

The Constitution Unit

**Constitutional reform and the new
Labour government**

CIPFA/Times Lecture
by Robert Hazell

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Delivering Constitutional Reform

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I should like at the start to thank CIPFA both for sponsoring and arranging this lecture and for publishing today the collected Briefings of the Constitution Unit. The Unit was an unusual and in some respects unprecedented venture, so I should like to start with some brief remarks about it. The Unit was established in 1995 as a two year project to work on the proposals of the political parties for constitutional reform. It was an independent initiative, and we adopted a non partisan approach, with representatives of all three main political parties on our advisory committee. The work was generously funded by six charitable trusts, with a total budget of £650,000. This enabled the unit during its short life to publish seven major reports and twelve briefings: it is these twelve briefings which CIPFA has now brought together in a single collected volume.

What was different about the Constitution Unit?

The Unit was different from most academic research projects and think tanks in a number of respects. First, our work had a sharply practical focus: we took the known commitments of the political parties and worked out how best to implement them. We did not ourselves advocate constitutional reform in general or any individual reforms. Second, all our work was the product of collective effort: and perhaps I could pay tribute here to the qualities of my team. I was exceptionally lucky to have a really brilliant team, and the high quality of the Unit's work is entirely due to their commitment and their ability. Three out of the four principal members of the team came from the Civil Service; and this enabled us to bring to bear to the task the questioning mind and sharp eye for the practicalities of the professional civil servant. We also made extensive use of retired civil servants, who sat on our advisory committee, chaired our three consultative groups on devolution and commented on successive drafts of our reports. The practical focus of our work was further sharpened by exposing it to other practitioners such as parliamentary clerks, who advised us on parliamentary procedure; parliamentary counsel, who helped us with legislative drafting; returning officers, who advised on the conduct of referendums; etc.

So much for the input. What distinguished the outputs was that each report was summarised in a four page briefing, with the half dozen key findings listed in bullet points on the front page, so that our conclusions should be readily accessible to busy politicians and policy makers in Whitehall. Those were our two key targets: it was their thinking and planning that we were seeking to influence, and during the short life of the Unit we did not have much time to engage in wider public education.

Preparing for government

Our work with politicians was my first exposure to the exigencies of life in opposition. Many of my former Whitehall colleagues said to me, "Isn't Labour taking care of all that?". I have to say that on the whole they were not: in some cases for lack of inclination, but for those who had the inclination, there were desperately few resources. The Labour Party research department barely existed; because all the resources had been stripped out to support the media managers in Millbank Tower; and for serious minded politicians like Jack Straw, who certainly understood the need to prepare for government, there was desperately little time because of all the other competing demands being made upon him. These included the duty to oppose, which was particularly time consuming in the face of the hyperactivity of Michael Howard who had no less than seventeen bills in the last parliamentary session; and the relentless pressures of the media, who with more and more outlets demand more and more of politicians' time. It is not surprising in the face of such pressures that most opposition politicians can focus only on tonight's speech or tomorrow's television interview, and I would hazard that preparing for government took up less than 5% of most opposition front benchers' time.

Funding of opposition parties

These observations about the resourcing of the opposition lead me into a brief digression on the funding of political parties. It is not generally known how unusual the UK is in relying heavily on private donations from companies and trade unions to support our major political parties. State aid is the norm in Europe, on a sliding scale depending on a party's share of the vote; and in Canada and the USA through tax relief on contributions. The Nolan Committee has been waiting for a reference on regulating contributions to political parties in the UK, and if a tighter regulatory regime did lead to a drying up of traditional sources then the question would be raised of whether we should introduce wider state aid. Our very limited scheme of state aid known as the Short money is small in amount (£1.5m for the Labour Party in 1996-97, and just over £300,000 for the Liberal Democrats) and limited to their parliamentary work. Ann Taylor has suggested that some civil servants might in future be seconded to work for the opposition. This is a promising suggestion, but I fear that their numbers will be so few that it may be little more than a token gesture. If we do get into more serious funding of political parties, my only plea is that the money should not be given direct to the parties, because they will only spend it on more spin doctors and poster advertising; but it should instead be used to fund political research foundations of the kind found in Germany. There the Konrad Adenauer and Friedrich Ebert Stiftungen have made a real contribution to improving the quality of the policies developed by the opposition parties. In its small way, and on a limited part of the agenda, the Constitution Unit offers a possible model of what might be achieved.

Influence of the Constitution Unit

Before I leave the work of the Unit, you may want me to attempt some assessment of the impact the Unit managed to have. It is always difficult to make this kind of judgement, particularly about one's own work, but I suppose one approach would be to ask what is now fashionably called the counterfactual question, and assess where

Labour and Whitehall would be if the Unit had not existed. One thing which I think might be missing is the emphasis on parliamentary procedure. We identified changes to parliamentary procedure as critical to the delivery of a major programme of constitutional reform in our very first report, which shares the same title as this lecture; and in that report we proposed three specific changes, taking the committee stage of constitutional bills off the floor, timetabling all bills, and allowing selective carry over, all of which feature in the Government's memorandum to the new Select Committee on Modernising the House of Commons. I am particularly pleased that the new Select Committee has been set up because another of our recommendations was that these proposals should not be tackled in isolation, because taken alone they all favour the executive, but rather should be introduced as part of a wider package of much needed parliamentary reform. That is clearly the agenda and the approach put before the new Select Committee, which has been asked to produce its first report before the summer recess.

On devolution it is still too early to judge what impact we may have had. I suspect we may have had some influence over Labour's change of policy last summer on the referendums, which was announced two days after publication of our reports on Scotland and Wales: our Welsh report in particular had suggested the use of a pre-legislative referendum, in the light of the emphatic rejection of the last Labour government devolution proposals in Wales by four to one in the referendum of 1979. In relation to Scotland, the counterfactual question has to be, would the new government in the rush to legislate in its first year simply have attempted to dust down and update the Scotland Act 1978? We suggested a radically different approach, based upon the Government of Ireland Act 1920 which established the Stormont Parliament, which defines the powers reserved to Westminster rather than the powers devolved: and we wait to see in the White Paper to be published next week which model will have been followed. The other issues which we raised were to question sharply whether there would be a continuing role for the Secretary of State; and to point out that many of the legislative powers to be devolved are in fields like agriculture, the environment, industrial policy, training and employment, which are now fields where legislative responsibility has also passed upwards to the EU. This is one of the major changes since the devolution debate in the 1970s, and our reports explored in some detail how the sharing of legislative power in these fields between the different levels of government in Brussels, Westminster and Edinburgh could best be handled. Finally, as part of our work on regional government in England, we commissioned studies of how regional government has developed in the other major countries of western Europe, all of which have developed a regional tier in the post war years. Those studies suggested that a rolling programme of devolution was feasible, but that if we were looking at the same pattern as in France or Spain we should be thinking in a timescale of some ten to twenty years.

On Lords reform we started with a much blanker sheet of paper, at least in terms of Labour's policy: because there was little beyond the commitment to remove the hereditary peers. Our work revealed that even in the rump chamber of life peers the Tories would still be much the largest single party, because of Mrs. Thatcher's and Mr. Major's appointments; and if Labour seeks to redress this imbalance, by appointing large numbers of new life peers, it will throw the whole appointments process into sharp relief. We suggested that the appointments process should be made more open

and transparent, with the possibility of public nominations, an Appointments Commission, and Nolan type procedures to define the nature of the role and the kind of skills and experience being sort. This would also help to flush out a fundamental ambiguity in the present system, which is whether the grant of peerage is meant to be a job or an honour.

Our other main contribution on Lords' reform was to bring out the unsatisfactory nature of a second chamber which was entirely dependent on Prime Ministerial patronage; and to remind people that in the past the main obstacle to Lords' reform has not been the Lords themselves, but the House of Commons. The last time a Labour Government attempted to reform the House of Lords, in Harold Wilson's first government in the 1960s, Dick Crossman's bill did not get beyond the House of Commons, where it was talked out in a filibuster led by Michael Foot and Enoch Powell. They were both staunch House of Commons men; and thanks to their advocacy the other MPs, who normally never spare a thought for the other place, gradually awoke to the realisation of what it might be like to face a second chamber which was more legitimate and more effective - and found it rather threatening. This is why a government which wants to move beyond the transitional phase of an all-nominated House of Lords must think hard about the machinery for developing proposals for stage two. The vehicle agreed before the election between Labour and the Liberal Democrats of establishing a Joint Committee of both Houses may prove to be politically shrewd, because it involves the House of Commons from the start in the process. To succeed the government will need to give the exercise clear political direction and terms of reference. The terms of reference which we suggested in our report were that the enquiry should be invited to determine:

- the functions appropriate to the second chamber
- the powers appropriate to those functions
- the role of the second chamber in relation to the House of Commons and other tiers of government
- the basis on which to select members of the second chamber

It is extraordinary that at the moment all debate about the House of Lords' tends to begin and end with its composition. In any proper review of a reformed House of Lords the membership must come last. First we must decide on its role and functions; the powers necessary to fulfil those functions; and only then can we decide what sort of people we need to carry out that role, and exercise those powers.

Unit's failures

It is only right before I leave this assessment of what the Unit managed to achieve that I should attempt a brief summary of those areas where the Unit failed to have influence. I'm interpreting this in the narrow sense of areas where the new government has not heeded our advice. The main one is that, so far at least, constitutional reform does not appear to be treated as a coherent whole. The central machinery to coordinate the programme, which we shall look at in a moment, is a secretariat rather than a proactive unit; and the government has embarked on a piecemeal approach, with no general explanation in advance of the wider context, or how the different items of constitutional reform are interrelated.

These interrelationships are both substantive and procedural. To give you just one example from House of Lords' reform, the role of the second chamber must be complementary to the House of Commons; and if it is to be elected, it must be elected upon a different franchise. But if we are to have a referendum on the electoral system for the House of Commons, the franchise for the first chamber may change. Any enquiry into the future role of a fully reformed House of Lords must therefore be planned and set up on a timescale which will enable it to mesh in with any future decisions about the franchise for the House of Commons. I could give half a dozen other examples of ways in which different items are interrelated; but there does not appear at this stage to have been much advance planning or sequencing in the constitutional reform legislative programme, nor adequate central machinery to bring out these kind of considerations. The policy lead has been left with the individual departments.

The other area where our advice has not been heeded was our Sir Humphrey type warning that a new government would be unlikely to find time for more than one or two constitutional bills per session. Now admittedly we were talking about how much could be handled by an unreformed house of Commons - I mean unreformed in terms of its legislative procedures - and normal twelve-month sessions, but nevertheless it is startling how much of the constitutional reform programme the new government is planning to introduce in this very first session.

Queen's Speech

That brings me to the Queen's Speech, and Table 1 shows the number of constitutional items which appeared in it.

Table 1: Constitutional items in Queen's Speech

- Referendums in Scotland and Wales
- Scottish Parliament
- Welsh Assembly
- Incorporation of ECHR
- Implement Treaty amendments from Amsterdam IGC
- Regional development agencies in England
- Referendum on strategic authority for London
- Freedom of information: White Paper and draft bill
- Select Committee on Modernising the House of Commons

In all there will be seven constitutional bills, including the referendums bill - the first item - which is going through parliament at the moment. The next two items, the main devolution legislation to be introduced in the autumn, were first year commitments; and the fifth item, the IGC bill to make the necessary treaty amendments following the conclusion of last months IGC in Amsterdam, is an international obligation. But the other items - incorporation of the European Convention, the establishment of regional development agencies in England as a possible first step towards regional government, and the development of proposals for a strategic authority for London are not items which need necessarily have been brought forward in the first year. Nor was freedom of information; although the policy there is a lot easier to develop, and we are now

promised a White Paper later this year and a draft bill early in the new year. As a necessary precursor to getting all this constitutional legislation through, the Select Committee on Modernising the House of Commons has been invited to issue an initial report on improving the legislative process before the summer recess.

Ministerial lead

Let us turn now to the ministerial and departmental lead on these different items. Table 2 shows the wide range of Whitehall departments which have a piece of the constitutional action.

Table 2: Ministerial Lead

- Devolution: Scottish Office and Welsh Office
- ECHR: Home Office
- IGC Bill: Foreign Office
- Regional Development Agencies: DETR
- London strategic authority: DETR
- Freedom of information: Cabinet Office (OPS)
- Modernising Parliament: Leader of the House
- Electoral reform: Home Office
- Lords reform: ?

Unlike in the 1970s, when devolution was led by the Cabinet Office, the lead is now coming from the Scottish Office and Welsh Office respectively. In other cases the policy lead also rests with the department responsible for the subject or non-subject before the election. So human rights falls to the Home Office, as does electoral reform, because the Home Office is the department responsible for electoral law. The IGC bill falls to the Foreign Office, as did the Maastricht bill following the last IGC in 1992. Regional government falls to John Prescott, who is the new Secretary of State for the Environment, Transport and the Regions: assisted by Dick Caborn on regional development agencies, and by Nick Raynsford as the minister responsible for London. Freedom of information will be developed by David Clark, the Chancellor of the Duchy of Lancaster; and the Open Government team in the Cabinet Office have been redesignated the Freedom of Information Unit. Ann Taylor leads the reforms to modernise the House of Commons. Interestingly, no minister has yet been designated as being in charge of the policy on Lords reform. This underlines the point I made about the potential risk of lack of coherence. If the work on any of these other items raises a point about Lords reform, as the first two items potentially do, there is no minister or department whom they can consult.

Cabinet Committees

Now let us look at the machinery established to coordinate this programme, because it is certainly not fair to suggest that there is none. Indeed the Cabinet committees and the amount of Ministerial time devoted to them are a great tribute to how much the new government has invested in the constitutional reform programme. Donald Dewar said last week: "We have been trying to do in several weeks what took several years in the 1970s". It is an extraordinary achievement by him and all his ministerial colleagues

and officials to have succeeded in bringing out the devolution White Papers within three months of coming into office. Table 3 shows how it was done.

Table 3: Cabinet Committees

- Constitutional Reform Policy (CRP): Prime Minister plus 12
- Devolution to Scotland and Wales and English regions (DSWR): Lord Chancellor plus 18
- Incorporation of ECHR (CRP (EC)): Lord Chancellor plus 16
- Freedom of information (CRP (FOI)): Lord Chancellor plus ?
- London (GL (L)): Deputy Prime Minister plus 11
- Cabinet Office: new Constitution Secretariat (10)

Three new Cabinet committees were announced when the new government promulgated its cabinet committee structure. There is an over-arching committee on constitutional reform, chaired by the Prime Minister, which has met only rarely; but the Cabinet Committee on Devolution has been in almost permanent session since the new government began, and has just finalised drafts of the White Papers on Scotland and Wales which are to be published next week. That committee is chaired by the Lord Chancellor, who is emerging as the minister who has been put in overall charge of the constitutional programme: because he also chairs the Cabinet Sub-Committee on incorporation of the ECHR; and on 4 July he disclosed that he chairs a further cabinet sub-committee to develop the policy on freedom of information. The Cabinet Sub-Committee on London existed under the previous government, but an important part of its new role is to develop the plans for the strategic authority for London and in this capacity it reports to CRP. Supporting this new cabinet committee structure is a new Constitution Secretariat established in the Cabinet Office, which now has some ten principals involved in it.

The pace of reform

Constitutional reformers certainly cannot complain that the government is not getting on with it. Seven constitutional bills this session constitutes a cracking pace. I wonder rather whether the pace is not too fast; and we may have seen small signs of that in the way the legislative programme for this first session was assembled. By sticking to the previous government's chosen date of 14 May for the Queen's Speech the incoming government effectively had the inside of a week to decide its contents: a process which in the normal governmental cycle takes some four months. Confusion, not conspiracy, lay behind the alternating headlines in that first week of whether freedom of information was going to be in or out; it had never been a first year commitment anyway. And ministerial overload, not Whitehall sabotage, was behind the news last week that the Freedom of Information White Paper will not now appear until the autumn. There is nothing sinister about this, and I am sure we will have a better White Paper as a result. What was silly was the timetable ministers initially set themselves, when they don't need to try to do so much all at once.

More serious perhaps was another omission not remarked upon at the time of the Queen's Speech but which has been noticed since, and that is the absence of a bill to introduce PR for the European Parliament elections in June 1999. Following the talks

with the Liberal Democrats Labour had agreed upon a regional list system for the European elections; and there has been pressure for many years to bring our electoral system more into line with those of our European partners - we are the only country in Europe not to use a proportional system for electing our Euro MPs. Robin Cook said in an interview last month, "We made it plain before the election that we would want the next European elections to be fought under a PR method of voting. But we are desperately short of time to put it into place. The whole system would have to be placed on the Statute Book, the seats established by the Boundary Commission and candidates selected by 1998, and we already have a full agenda for legislation" (*New Statesman*, 13 June). I think one could be forgiven for saying that these things could have been thought about a month earlier when that agenda for legislation was being decided. This was clearly an item with known deadlines leading up to the date of the European elections in 1999; unlike a number of the other items included in the Queen's Speech which were essentially timeless and could have been introduced in any session.

That applies to the legislation on London, where the government has locked itself in to an extremely tight timetable by deciding to hold the referendum at the same time as the next London borough elections in May 1998. In order to meet that target it has promised a Green Paper on London this month, a three month period of consultation over the summer and a White Paper in the autumn. Those of you who know the problems of the government of London will understand that this may prove to be a short time in which to decide difficult issues such as the role of the elected mayor, the electoral system for the mayor and for the assembly, the powers and functions of the new strategic authority, its sources of finance, its relationship with all the other London-wide bodies and with the London boroughs. Similar comments might apply to the legislation on regional development agencies. This will seek to implement the separate policy streams which were developed in opposition by Jack Straw as the spokesman on regional government and John Prescott whose main interest was in regional economic development. The issues paper published last month by Dick Caborn, Minister for the Regions asked for responses by the beginning of September. Here again the government has allowed itself very little time to resolve the tension between a top down and a bottom up approach; and to devise a satisfactory accountability mechanism within the region.

The difficulty is exacerbated by some muddled thinking about the nature of accountability. The issues paper states: "In the short term, the RDAs will be formally appointed by ministers and accountable through ministers to parliament". It goes on to say: "Ministers want RDAs in addition to be fully responsive to the needs of their region and able to be called to account locally". Note those words "called to account". John Stewart and others have usefully distinguished two separate elements in accountability, of giving an account and being called to account. A public body can give an account to ministers and to client groups and the general public within the regions: we are increasingly used to giving an account to different groups of stakeholders. But it can be held to account by only one body, the body which appoints it and which in the last resort has power to dismiss it. If RDAs are to be appointed by ministers that will be their main line of accountability, as national quangos; and it is wishful thinking to suggest that they can also be called to account locally. They can at best give an account, as other central government agencies operating in the regions already do.

My greatest concern over the pace of the new government's programme relates to Wales. In the 1970s the debate in Wales was completely overshadowed by that in Scotland, because the Scotland Act and the Wales Act 1978 passed through parliament together, and the referendums were held on the same day of March 1st 1979. The national media coverage, which is what most Welsh households receive, focused primarily on Scotland, so that there was very little separate debate in Wales. I am concerned here that history may be about to repeat itself. Because Wales has not gone through a process like that engendered in Scotland by the Scottish constitutional convention, there has been almost no public discussion about the powers and functions of a Welsh Assembly; and this lack of debate shows up in the opinion polls, where in Wales the don't knows hold the balance, ranging from 20-25%; while in Scotland the proportion of don't knows has for a long time been down to between 2% and 5%. The Lords have made matters worse, by their amendment to the referendums bill requiring both referendums to be held on the same day; an amendment which is not principled, but purely a spoiling tactic. To have a separate debate Wales certainly needs the referendum on a separate day; but if I could wave a magic wand for Wales I would have a much bigger separation than a couple of weeks between the referendum days - and indeed between the two bills, to allow Wales to have a genuine national debate, a debate which so far has been too confined to the different factions within the Wales Labour Party.

Public understanding

This leads on to a wider point about the pace at which the government is going, which is that I fear that it may leave many of the public behind. There was a total silence about constitutional reform during the six week election campaign; a silence which has largely continued into government, although it began to break this weekend. No doubt the reason is that ministers have been so busy in cabinet committees and in getting to terms with their departments that they have had no time. And no doubt there is continuing feedback from the focus groups that constitutional reform does not play well in middle England. It may also be that with the policy lead lying with individual departments there is no spokesman who can speak for the totality of the constitutional reform agenda. But the Lord Chancellor is clearly emerging as the minister in overall charge of the constitutional reform programme who chairs the key cabinet committees; and when he surfaced on Saturday in *The Times*, the editor ran his article under the headline 'My pivotal role in the constitutional revolution' (*The Times* 12 July).

Lord Irvine may have to do more than submit the occasional piece to *The Times*, and play a much more public role. These are very big changes in our system of government which are being proposed: changes which will fundamentally alter the relationship between the different parts of the United Kingdom, between parliament and the judges, between government and the citizens. They form a major part of the new government's legislative programme; but the government silence about them is deafening. The English could be forgiven for thinking that devolution is some special deal for the Scots and the Welsh, because no one has troubled to tell us otherwise. This matters because for devolution to work it requires goodwill on both sides. That goodwill exists: when asked in opinion polls commissioned by the Joseph Rowntree Reform Trust what they thought about devolution for Scotland, the English have

tended to say if the Scots want it let them have it. But this continuing support cannot be taken for granted once the terms of the devolution settlement emerge. There needs to be much more explanation of why the government is engaging in such major constitutional reforms, and what it will mean for all of us; not just those of us who live in Scotland and Wales.

Guiding principles

What might government ministers say if they were to embark on a campaign of mobilising popular support for their reforms? I do not pretend this is wholly straightforward. In the early days of the Unit we did some work trying to articulate the underlying principles which should guide any programme of constitutional reform; but we decided not to publish because we thought it would give a misleading impression of what the Unit was about. But it also brought home to us some of the inherent difficulties in such an exercise, largely because our unwritten constitution itself is silent about underlying principles, so any interpretation is inevitably contentious. But my task is greatly simplified by another government minister who broke the silence over the weekend, and that was Gordon Brown giving the keynote address to the Charter 88/Economist Constitutional Convention here in Westminster on Saturday. His speech was the most eloquent account I have heard from any minister explaining the reasons why the government is embarking on such a major programme of constitutional reform. It was thoughtful, wide ranging, compelling listening, and it laid out the arguments for developing a new constitutional settlement between the state, the individual and the community. Unfortunately no text was distributed so sadly I cannot quote from it, but I hope that others will: in particular his colleagues the Prime Minister and the Lord Chancellor. If they could expound the same rationale for modernising our constitution and deliver it to mass audiences through radio and TV I think the constitutional debate could be transformed. What has been most missing in the government's silence has been not what it plans to do but a convincing statement of why; and that firm philosophical foundation is what Gordon Brown has now supplied.

He laid out all the arguments, starting with the themes in the manifesto: the need to renew our democracy, to restore trust in government, and to increase citizen participation by rebuilding the links between the state, citizen and the community. He then went on to show how it could be done: through greater openness at all levels of government, tighter accountability, more effective checks and balances, and a major programme of devolution and decentralisation. He ended with a new vision of popular sovereignty which is worth pausing on: because it is rather extraordinary, as we enter the twenty first century, that it is still open to debate whether the fundamental guiding principle of the British constitution is the sovereignty of parliament or popular sovereignty. It is worth briefly recording the reason why; which is essentially the same reason why we do not have a written constitution. It takes a seismic event to force a country to write a new constitution: a revolution, defeat in war or complete collapse of the civil power, as happened in South Africa. The reason why we have never got round to it is our extraordinarily peaceful history over the last one thousand years and the fact that our only revolution, the one led by Cromwell, came a century too early: a century before the development of the doctrines of the rights of man and the separation of powers which informed two of the first written constitutions in the United States

and then in France at the end of the eighteenth century. Those constitutions were clearly based on the sovereignty of the people. Our constitution can make a similar claim since the introduction of universal suffrage, completed with votes for women in 1928; but it co-exists uneasily with the prior doctrine of the sovereignty of the Crown in Parliament. Dicey struggled to reconcile the two, and constitutional textbooks and politicians have been struggling ever since. I don't want to get drawn into this, but it is worth just noting that the doctrine of parliamentary sovereignty is an English doctrine which was never recognised in Scotland before the amalgamation of the two parliaments in 1707. Some constitutional lawyers - mostly English - have insisted that the new parliament of Great Britain introduced the principle to Scotland, but in the Scottish case of McCormick against the Lord Advocate in 1953 the Scottish judge Lord Justice Cooper ruled that it had not. The issue remains a live one in Scotland: the Campaign for a Scottish Assembly's *Claim of Right* issued in 1988 was founded on the claim that sovereignty belonged to the Scottish people; a claim re-asserted by the Scottish Constitutional Convention.

Guiding principles for devolution

This is an important backdrop to the White Papers to be published next week on devolution in Scotland and Wales. I do not believe that within our parliamentary system as it is at present, with the doctrine of the sovereignty of Parliament (and here I betray my Englishness) there can be any effective legal form of entrenchment.

What Westminster gives Westminster can take away, as the Unionist politicians in Northern Ireland discovered in 1972 when the Stormont parliament was abolished.

But this need not prevent us striving to achieve *de facto* entrenchment, through a balanced settlement which is built to last because it is seen to be reasonably fair, and because subsequently it is seen to work. If it doesn't work for the Scots it won't last anyway. But it must also work reasonably well for the rest of us. There is nothing wrong with asymmetrical, non-uniform devolution in which the Scots enjoy greater devolution of power than other parts of the kingdom - something I shall develop in a moment - so long as the other terms of the Scottish settlement are seen to be fair.

What are the elements of fairness to look out for in next week's White Papers? There are three basic respects in which Scotland and Wales and Northern Ireland are currently privileged compared with other parts of the UK. First, they have separate Secretaries of State, who can argue their case in Cabinet; second, and thanks in part to that special pleading they enjoy very generous levels of public expenditure, even when allowance is made for their special needs; and third, Scotland and Wales, but not Northern Ireland, enjoy over-representation at Westminster. This last does not give rise to, but adds spice to, the West Lothian Question. As everyone here knows it is not really a question at all, because it never expects an answer, but it is really used to make two political points. The first is to suggest that within a unitary state legislative devolution is impossible. That, as I hope to show shortly, is nonsense. The second point is about fairness between the nations of the UK, and in this respect the West Lothian Question deserves to be taken seriously. It will not be a fair or balanced settlement between Scotland and the rest of the UK if post-devolution Scotland continues to be privileged in these three respects. They are privileges which have been allowed to develop largely to keep the Scots quiet about devolution. If they continue

post-devolution the rest of us can be forgiven for thinking that the Scots are being allowed to have their cake and eat it.

Of course they need not be removed immediately; but they must be addressed in the White Papers, and plans made over time for their removal. The Secretary of State must wither away once the new Parliament is established; there is not room for two politicians claiming to be the political leader of Scotland. The level of public expenditure in Scotland cannot be determined forever by the Barnett formula, based as it is on a needs assessment now 20 years out of date; and when Scotland was much poorer relative to the UK than she is now. And the number of Scottish MPs, at 72 when their population share should give them 59, cannot be justified now and is even less justifiable post-devolution. As Iain McLean of Nuffield College, Oxford has convincingly shown it was not deliberate policy but historical accident and declining population which has led to the over-representation. Labour can appear to be magnanimous in offering a reduction when actually basic fairness demands it, but here too the adjustment can be gradual and certainly need not be immediate. If there is to be a referendum on the electoral system for the House of Commons and if the electorate votes for change, the adjustment can be factored into that much wider set of boundary changes.

A balanced and lasting settlement

Enough about fairness. In what other ways can we ensure the settlement is balanced and lasting? My first point will be comforting to those currently grappling with trying to get the devolution settlement right; but alarming to those in government who can't wait to put devolution behind them. Devolution is a process and not an event. You probably won't, but you don't have to get it right first time; what you need is to build into the legislation sufficient flexibility to allow for adjustments at the margin, like the expansion joints the engineers build into a bridge. Our reports on Scotland and Wales contained specific proposals to authorise each parliament to trespass by consent on the territory of the other, to confer further executive powers by Order in Council, and similar devices. Here the sovereignty of Parliament can help: every Act of the Westminster Parliament will have to say whether it extends to Scotland or not. The same was true of Northern Ireland in the days of Stormont. Government lawyers would negotiate with the Stormont government about the application of UK statutes in Northern Ireland, and in so doing engaged in a continuous process of accommodation and adjustment at the margin.

But it won't all be low profile marginal adjustment. There will be high level confrontations as well, with the Scots wanting to do things differently, or demanding further powers, in a manner which the UK government finds deeply unwelcome. Here I don't think some people have fully realised that in establishing a Scottish Parliament the government is unleashing a political dynamic which it will not be able fully to control - not even through its control of the Scottish Labour party, which has been and continues to be formidable, but which will inevitably weaken post-devolution. The Scottish Parliament will have a legitimacy and dynamic of its own. Remember what happened in the early days of Stormont, when Craig, the first Prime Minister of Northern Ireland, introduced legislation to reverse the voting system from STV, the system chosen by Westminster, back to first past the post. The British government

said they would advise the King to withhold Royal Assent. Craig threatened to dissolve the Stormont parliament and go to the country on the issue; whereupon the British government backed down in the face of Craig's democratic mandate.

In particular the Scottish parliament will provide a stronger platform for the SNP and the siren calls of separatism. At Westminster their voices are drowned amongst the much larger noise. We should not be surprised to hear the Scottish parliament railing against this or that decision by London: in the Australian states and Canadian provinces generations of redneck politicians have based whole political careers, very successfully, on attacking Ottawa and Canberra. Devolution will not quell the demands for separatism; and we need to be imaginative in devising ways in which Scotland continues to have a stake in the Union. It is potentially a slippery slope, which needs underpinning. One possible way of giving Scotland and the other devolved assemblies a direct stake in the institutions of central government would be to redesign the House of Lords so that it represents the nations and regions; which is the classic role of the second chamber in a federal system. This need not await an elected House of Lords: it could be appointed, as is the Canadian Senate; or indirectly elected, as is the German Bundesrat.

Need for statesmanship from government

My third guiding principle for devolution is that it requires generosity and trust on both sides. This is necessary for devolution to work in practice; but it will be greatly helped if the new settlement is created in a generous spirit, which is then carried into daily practice. Here there is a heavy responsibility on the new government, in two respects. The first is to explain, again and again, what they are planning to do and why. Generosity and trust needs to be felt not just by governments but by the people - in particular by the English, who form 85 per cent of the people in the UK. The government's failure to explain is worrying, and could prove undermining in the longer term. I don't fear an immediate backlash - the English aren't like that - but rather a sullen lack of understanding, a smouldering resentment like that we have seen develop in relation to Europe. Let me quote briefly from a former New Zealand Minister who recorded some lessons about the reform process there:

- There must be a good information base to work from so that the need for reform is evident for all to see
- The approach to reform must be comprehensive and even handed so that specific areas of reform can be viewed in a general context
- There needs to be continual explanation both within and outside government about what is being done and why. (Hon DF Qigley, *The How not the Why*, 1995)

He was talking about economic reforms; but exactly the same applies to constitutional reform. Here the need for continual explanation is even greater because we are so constitutionally illiterate: we have lost our capacity for constitutional discourse, as Ferdinand Mount put it in his brilliant polemic *The British Constitution Now* (1992). This is partly thanks to the confusions caused by our unwritten constitution; partly thanks to the relentless dumbing down by politicians and the media. The constitutional reform programme badly needs a bit of Mr Blair's mission for education, education, education.

The second respect in which the government needs to show generosity and to build trust is because of its landslide majority - a landslide majority, let us not forget, delivered on 44% of the popular vote. It is unlikely to face any effective opposition in the House of Commons or the House of Lords. The only constraint will be its own self-restraint. Here too there is a small cause for concern, in the conduct of the forthcoming referendums. Because in this country we have little experience of referendums, and no standing legislation to govern them, we established last year in conjunction with the Electoral Reform Society an independent Commission on the Conduct of Referendums, with all-party representation and chaired by Sir Patrick Nairne. One of the Commission's recommendations was that "Every household should receive a publicly funded leaflet giving general information on the holding of the referendum and statements of the 'Yes' and 'No' cases relating to the referendum question".

This point was raised on Second Reading in the Lords of the Scotland and Wales (Referendums) Bill, but the Minister in reply indicated that the government was likely to distribute only a summary of its White Paper. I do not think that the government sees anything wrong in this; but if you think about it, it is a bit like the government saying that the usual arrangements for free distribution of electoral addresses will apply - but only for candidates of the Conservative party. Referendums are different from elections in one crucial respect, namely that it is awkward if the government is both player and umpire, and they require their own set of ground rules if the results are to be accepted as legitimate and fair.

Asymmetrical devolution

My final point about devolution in the UK is that it will need to be asymmetrical, non-uniform, and delivered in a rolling programme. Federalism is not the solution. There is no public demand for it; it could not work if England is one of the component parts, because England so dominates the whole; and in a little-noticed move it was abandoned last year even by the Liberal Democrats, who have been its main proponents. In their Great Reform Bill approved at last year's party conference the Lib Dems agreed to a rolling programme of devolution whereby regional assemblies would only be established in England upon demand, following a regional referendum to be initiated by 5 per cent of the electors or a majority of the local authorities. It follows that some regions could decide not to have an assembly: and if (as is quite likely) some do, the pattern would then be asymmetrical.

The Conservatives have also accepted the feasibility of asymmetrical devolution. For 50 years they lived with it, during the years of the Stormont parliament; and in the *Framework for the Future* documents issued by the Major government they clearly contemplated the revival of a parliament in Northern Ireland with legislative powers. So we arrive at the startling conclusion that there is now all-party consensus on asymmetrical devolution. Stretching the point a bit, perhaps; but we shall see how William Hague and Michael Ancram accommodate to the growing reality of a Scottish parliament. I should be surprised if they seek to maintain the line that legislative devolution is impossible within a unitary state.

If they do they will be profoundly mistaken: not so much about devolution, but about the unitary state. We are not and never have been a unitary state in the way that a country like France is. This is another respect in which we are constitutionally illiterate, and ignorant of our own history. The literature on nation states has recently developed a new division into three broad families: federations, unitary states and union states (Michael Keating: *Nations against the State*, 1996). In this categorisation we belong to the third family. We are a union state; we should know that - our union flag symbolises the different nations; what we forget is that the nations came into the union on different terms. The most elaborate bargain was that with Scotland, which under the Treaty of Union of 1707 was guaranteed her established church, her system of law, her education system and system of local government. Wales was largely assimilated administratively to England after the union of 1536, but differential provision has since been made in Gladstone and Lloyd George's time in matters of religion and in our own time in matters of language. Ireland was formally united with England surprisingly late, in 1800, but kept the old laws of the Dublin parliament; henceforth Irish law was, like that of Scotland, made by the Parliament at Westminster.

We are not alone in being a union state; and we can learn a lot from other multinational union states, like Canada and Spain, which allow varying degrees of asymmetry. Michael Keating, who is well placed to observe this from his twin bases in the universities of Strathclyde and Western Ontario, has described the union state as a pact or contract, which since the parties have generally acceded on different terms, is often asymmetrical in origin. But this territorial variation needs to be adapted and renegotiated in each generation, in order to meet contemporary needs and continue to legitimise the state and its authority. Although we are about to go through a major renegotiation, in the devolution legislation, that process of adaptation between the centre and the territories will continue post-devolution; it is on-going, never finished business, which in Germany they recognise and call 'cooperative federalism'.

The UK is already asymmetrical in a number of respects: in the different degrees of administrative devolution between Scotland, Wales and Northern Ireland; in the over-representation of certain territories in the Westminster Parliament; in differing civil rights, very marked between Northern Ireland and the mainland - the Northern Irish can even be subject to exclusion orders which prevent them from travelling to Britain; and in differing senses of national identity, which you would expect in a union state. But somehow it is easier to overlook or to live with existing anomalies; only when new ways are proposed of adapting or renegotiating our asymmetrical pact does the cry go up that the constitution is under threat. We can learn and take courage from other asymmetrical union states in Europe - Spain, Italy, Belgium, Portugal - and from Canada. Canada is also a federation, but it helps to prove my earlier point that federalism is not the answer. Classical federalism is based on a uniform division of powers and has not managed to give expression to the special status sought by Quebec. Despite their federation, Canadian constitutional experts and politicians are just as interested in finding ways of accommodating asymmetry as we are.

We can also learn about some of the difficulties involved in trying to hold the nation state together as a whole, while allowing greater devolution to some parts than to others. I mention only one here, which is the risk of leap frog. In Spain following the death of Franco the high autonomy regions were originally meant to be only the

Basque country and Catalonia. They were then joined by Galicia and Andalucia; and then by Valencia, the Canary Islands and Navarre; with other regions pressing behind. To preserve the special status of the Basque country and Catalonia these two have been given further powers; which in turn has led the other high autonomy regions to ask for the same. In Canada there is a similar ratchet at work. Concessions to Quebec are followed by demands by other provinces for the same treatment. These have usually been conceded, though arguably this represents a power game amongst groups of provincial politicians rather than a public demand for more autonomy on the part of their electorates.

I am not sure what the answer is here. Labour's rolling programme of devolution is likely to stimulate demands from at least some of the English regions for a piece of the action granted to Scotland and Wales; Wales will demand legislative powers on a par with Scotland; will Scotland then demand more to stay one step ahead of Wales? One factor which may rein in the process is our high expectations of equity. In doctors surgeries, hospitals or in schools we expect the same standards of service throughout the kingdom. This goes deep in our political culture, is reinforced by our national media, and further reinforced by performance measurement and national league tables. In this respect our expectations are those of a unitary state. Soon we will have our first statewide charter of civil and political rights, once we have incorporated the European Convention on Human Rights. It may be that we will also need to develop a baseline statement of social and economic rights, to give expression to our deeply felt expectations of equity; and that statement may or may not succeed in defining one set of boundaries beyond which devolution cannot go.

Constitutional reform and Europe

Finally, a brief word about Europe. The EU is also constitutionally in a mess, which the IGC in Amsterdam did nothing to resolve. I won't go into that, but I want to mention just one connecting theme, and to take one step further my point about the union. Some Euro-enthusiasts believe that the only satisfactory long term long term solution for the EU is federalism: federalism on the German model, with the Council of Ministers becoming the second chamber of the European Parliament. But in Europe as in the UK federalism is not the answer, because the EU is also a union, based upon a pact or treaty between different nations. Uniformity and a federal solution become more difficult to impose the more the EU enlarges. Asymmetry is rampant, albeit with designer Euro-labels: Europe a la carte, multi-speed Europe, variable geometry are all expressions of allowing flexible, asymmetrical development.

In the past our doctrine of parliamentary sovereignty has been a major impediment to engaging in any serious debate about sharing powers with Europe. I know we have a lot to live down in terms of attitude as well. But once we have redeemed ourselves, and shown that we can operate constructively, I hope that we might have a real contribution to make to the European constitutional debate. France and Germany are conceptually at a disadvantage in this debate, since as a unitary state and a federation respectively they both expect uniformity in constitutional arrangements. If we can succeed in our own constitutional reforms, in loosening up our own union, and allow greater flexibility for the different territories, while preserving a free market and defining a common set of rights and values for all our citizens, we may find we have

something to offer. We would offer a model of a flexible union, where our natural allies would be the other union states, Italy, Spain and Belgium, and for once we could help contribute to the agenda rather than taking the lead from the Franco-German axis. Constitutional reform at home could be the start of constitutional reforms in Europe.

And so I must conclude. I have tried to cover an impossibly wide range, and in so doing I am afraid I have done scant justice to the very detailed nature of all the Unit's work. Some topics I have not covered at all; and those I have, I have only dipped below the surface. But I hope that I have given some impression of what constitutional reform is about; the inter-relationships which need to be addressed if it is to be successfully delivered; and lastly, how intensely political it is. I've never understood why politicians regard constitutional reform as such a turn-off, when in reality it is about power, and the sharing and control of power, which is the very stuff of politics. But if I have convinced you of that, and engaged your interest, then I have achieved my purpose; and in CIPFA's collected edition of the Unit's briefings you will find, if not everything you need to know, then much, much more than I have managed to say tonight.