The Constitution: Rolling out the New Settlement

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THE year 2000 saw the third anniversary of the present Labour government. On the constitutional front, the major developments during the year were the continuing implementation of reforms enacted during the government's first two years in office, and the enactment of legislation on political parties and freedom of information. The biggest single event was the coming into force of the Human Rights Act on 2 October 2000. That will herald an enormous shift in the balance between executive, parliament and the courts. But equally important in terms of shifting power was the rolling-out of devolution, as the devolved executives and assemblies got into their stride.

Devolution is not a stable settlement

This article opens with some reflections on the devolution settlement, an account of which is in another contribution to this issue. What became increasingly clear during the year was how dynamic the process is. Devolution has not reached a steady state. In Northern Ireland, in Wales, even in Scotland, there is serious questioning about the adequacy of the settlement, while in the English regions everything is still to play for.

The settlement in Northern Ireland is particularly precarious. In the Executive and the Assembly, the war of attrition continued throughout the year between the unionist and nationalist blocs, with far more energy devoted to symbolic issues like flags or the renaming of the Royal Ulster Constabulary than to matters of substance like the programme for government or the budget. The roller-coaster negotiations which eventually led to the first formation of the Executive in December 1999, its suspension ten weeks later in February, and then its second coming in May 2000, are recorded in another article. The new institutions continue to be extremely fragile. There are no rules of collective responsibility binding ministers in the new Executive, which is an involuntary coalition boycotted by the two ministers from the Democratic Unionist Party (DUP). Its support on the unionist benches in the Assembly hangs by a thread, and could vanish if only a few more Ulster Unionist Party (UUP) members decided to join forces with their anti-Belfast Agreement colleagues.

David Trimble's worries do not stop there, because the year saw a growing attrition of support for his position within the party member-

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ship as a whole. His internal party support has fallen from 72% of the Ulster Unionist Council after the Belfast Agreement in 1998, to 58% at the Council meeting in November 1999 and an uncomfortable 53% in May 2000, improving only marginally (54%) at a further meeting in late October. It reached rock bottom in September 2000 following a by-election in South Antrim—the UUP's second safest seat—when its candidate, David Burnside, was defeated by the DUP (Paisleyite) candidate Rev. William McCrea. This brings home how serious has been the erosion of support since the Belfast Agreement for the moderate unionists and nationalists (broadly speaking, represented by the UUP and the SDLP), and the rise of their more aggressive challengers in the DUP and the other anti-Agreement unionists as well as Sinn Fein.

Continuing battles over policing, flags and the decommissioning of weapons, against a background of worsening paramilitary violence, could yet lead to the reimposition of direct rule. But even without the troubles, it may be that the involuntary coalition which lies at the heart of the consociational model enshrined in the Belfast agreement is so unworkable that the Northern Ireland Executive has been set up to fail. That is the view of at least one expert commentator: 'Devolution can only work with power sharing if there is a supply of understanding, goodwill, and self-restraint amongst parties in the province that is unprecedented . . . they are being asked to make something work that on its face is unworkable.'[1]

But Northern Ireland is not the only place where the devolution settlement looks unstable. In Wales, fundamental questions are also being asked about the institutional design. Few Members of the National Assembly believe that it has sufficient powers to make a difference. The questioning goes right through to the top. During 2000, first Ron Davies, the Assembly's progenitor, then Lord Elis-Thomas, its Presiding Officer, and lastly Rhodri Morgan, as the new First Secretary, have all expressed doubts about the design and functioning of the new body. Lord Elis-Thomas has been the most outspoken, arguing in a major speech: 'It is not based on any clear legislative principle . . . We are not at the beginning of a new constitution for Wales. We are at the beginning of the end of the old constitution . . . We have the least that could be established at the time. We shouldn't say that a political fix is a national constitution. It is time we looked for more.'[2]

Ron Davies has always said that devolution is a process, not an event. Since stepping down as leader of the Wales Labour Party, he has become more open about his wish for the Assembly to acquire legislative powers. The first year of devolution in Wales saw it turn itself into a constitutional convention: the convention which, as Rhodri Morgan has observed, the Scots had before devolution but the Welsh missed out on. The next step in the process is Rhodri Morgan's review of the workings of the Assembly starting in autumn 2000, in cooperation with the other political parties. One issue will be Lord Elis-Thomas' call for

a much clearer separation of powers between the Executive and his own Office of the Presiding Officer, which is not formally separate but has become the defender of the Assembly in its role of checking and scrutinising the actions of the Executive. But this will have to be achieved within the confines of the Government of Wales Act. Rhodri Morgan made clear when announcing the review that 'We act within that Act and I am not eager to discuss whether we should amend it.'[3]. Any wider review of the statutory framework must await the Assembly's second term, when Morgan has promised an independent commission to enquire into the adequacy of its powers, as part of his coalition partnership agreement with the Liberal Democrats.

The UK government will expect the current model of executive devolution to be properly tested and demonstrably found wanting before Wales comes back for more. The real test for Wales will come when the Assembly has developed a set of policies which require primary legislation from Westminster. The whole scheme of executive devolution is predicated on Westminster continuing to legislate for Wales, and on Whitehall taking account of Welsh interests each year when preparing the legislative programme and giving the Welsh legislative time at Westminster. This was identified as the crucial stumbling block in the whole scheme in speeches about the first year of the Assembly given in summer 2000 by two senior figures: the Presiding Officer, Lord Elis-Thomas, and Labour's Lord Prys Davies.[4] Only when the Assembly finds that it is not accorded sufficient legislative time, or is not allowed sufficient headroom in Westminster legislation to develop its own distinctive policies, will Wales be able to mount a strong campaign that it needs to be given legislative powers.

The model that Wales will appeal to is Scotland. The Scottish Parliament has substantial legislative powers, and the first year legislative programme completed in 2000 shows the new Parliament beginning to exercise them to the full. But even in Scotland, calls have been made for extra powers. The Scottish opinion polls in spring and summer 2000 show most Scots disappointed in the performance of their Parliament, some of them concluding that it needs extra powers to make a real difference to their lives. It remains to be seen whether, in the second year of devolution, the demand for extra powers picks up any groundswell of support in the Scottish Parliament and whether it starts to be linked (as it clearly is in Wales) to specific issues where the devolution settlement does not deliver sufficient power. If it is simply an expression of general frustration, then the grant of extra powers may not be the answer; the difficulties may lie more in the internal workings of the Executive or the Parliament than in the extent of their formal powers.

The English question

England remains the gaping hole in the devolution settlement. It is the space where everything is still to play for. During 2000, three reports

were published which all concluded that the current organisational landscape at regional level in England is unbalanced and unlikely to prove stable.[5] In constitutional terms the English Question is best divided into two separate questions about English representation in our new quasi-federal system: should there be an English Parliament to match the Scottish Parliament and the Welsh and Northern Ireland Assemblies? Or should England be divided into eight or so regions, each with its own assembly, which in population terms would come much closer to the size of the devolved assemblies?

An English Parliament does not seem a realistic option. Those who demand one are in effect demanding a full-blown federation, in which the four historic nations would form the component parts. But England would be too dominant. There is no successful federation in the world where one of the parts is greater than around one-third of the whole. Nor would it meet the demands for representation coming from the English regions: to them, an English Parliament looks like another form of London dominance. The Campaign for an English Parliament is a political gesture, making a political point as much as it is pressing for the establishment of a new political institution. The point is that with devolution the Scots, the Welsh and the Northern Irish will have a louder political voice, while the English risk losing out. But the answer for the English may lie in adapting Westminster and Whitehall, in ways discussed below, and not in a separate English Parliament.

The second option, regional assemblies, constitutes one of Labour's two unfulfilled pledges from its 1997 manifesto. This promised legislation to allow the people of England, region by region, to decide in a referendum whether they want directly elected regional government. Following the approval of the democracy and citizenship policy statement at the party conference in September 2000, similar pledges are likely in Labour's next manifesto. However, they mask the fact that Labour remains deeply divided (at central and local government level) about the design of regional government in England.

There is little evidence of serious public demand, but in the regions pressure is beginning to mount. 2000 saw the launch of the Campaign for the English Regions, formed by the vanguard regional bodies of the North East, North West, the West Midlands and Yorkshire. The North East is making the running, and, in direct imitation of Scotland, three of the regions have established Constitutional Conventions. So far, none has got beyond sloganising: there is nothing like the detailed planning about powers, functions and composition which went into the work of the Scottish Constitutional Convention. If they are serious they will need to engage with the detail. They will also need to meet the challenge which is now emerging in the form of directly-elected Mayors. They are not necessarily incompatible, but there is an interesting tension between the two models. For at regional level there may not be room for two political leaders claiming to be the voice of the region, one as leader of

the Regional Assembly and the other as the Mayor of the largest city.[6] Which model wins through may depend upon who occupies the political space first.

At present, the elected mayors look likely to get there first. The enabling provisions are in the Local Government Act 2000, the government wants to see more, and other cities could opt for elected mayors from May 2001 onwards. Regional Assemblies are a long way further back. Elected mayors, as the leaders of the biggest local authority in the region, may prove to be one more voice that discovers little interest in moving on to a Regional Assembly once they realise that it would be another source of power over which they would have less control. Elected mayors may prefer, with encouragement from government, to become the leaders of networks of regional and subregional governance in which they would be amongst the biggest players.

Intergovernmental relations

In the political sphere of intergovernmental relations, 1 September 2000 saw the first plenary meeting of the Joint Ministerial Committee on Devolution (JMC), convened largely at the request of the devolved governments. Held in Edinburgh, it was attended by the Prime Minister and all the First Ministers and their deputies, and is intended to set a precedent for an annual evaluation of the devolution process. The Memorandum of Understanding emphasises that the JMC is at the summit of the political machinery for intergovernmental relations and sets out its terms of reference as follows: to consider reserved matters which impinge on devolved areas, and vice versa; to consider common issues of concern across all devolved areas; to keep the arrangements for liaison under review; and to consider disputes between the administrations.

The six meetings of the JMC in 2000 have dealt with health, the knowledge economy and poverty and provided Tony Blair and Gordon Brown with a platform from which to promote their own agenda. Disputes between the devolved administrations, it seems, have not figured highly. Indeed, after the first plenary meeting it was reported that throughout the year differences of view had been handled 'amicably'.[7] Testament perhaps to the emphasis that has been placed on the continuation of intergovernmental relations on a less formal scale, between officials and bilaterally between ministers, the September meeting 'stressed the importance of early sharing of information between administrations and consultation on policy options'.[8]

The British-Irish Council and British-Irish Intergovernmental Conference, established under the Belfast Agreement, held inaugural meetings in December 1999. The suspension of the devolved institutions in Northern Ireland prevented further meetings of the British-Irish Council for most of the year. A meeting was scheduled for 31 October 2000 but was cancelled due to the sudden death of Donald Dewar. However, the

inclusive nature of the devolution settlement does not extend across the spectrum as the two Democratic Unionist members of the Northern Ireland Executive continue to boycott the institutions set up under the Belfast Agreement. It is political divisions such as this that will test the informal structures of intergovernmental relations in the UK in the future. The Welsh and Scottish administrations' loyalties to London, and the attention paid by the First Ministers to establishing the devolved administrations, have so far ensured a relatively smooth process. The advent of a nationalist majority in any of the devolved assemblies would no doubt cause greater tensions across the Union, tensions which may only be resolved in the courts.

The House of Commons and devolution

With devolved governments established in Scotland, Wales and Northern Ireland, there have been growing questions about how Westminster needs to adapt. Thus far, the changes made have been minimal, despite the fact that large areas of policy-making have been exported to the new institutions. Minor procedural changes have been made, for example to Question times, whilst other issues, such as the role of the territorial committees for the devolved areas, have been put on hold.[9] However, one issue which grew in prominence during the year was how English matters should most appropriately be dealt with in the UK Parliament post-devolution.

This issue was famously raised by Scottish Labour MP, Tam Dalyell, during the 1970s devolution debates. His 'West Lothian' question concerned the equity of Scottish MPs being able to vote on legislation relating purely to England and Wales when English and Welsh MPs had lost the right to vote on equivalent Scottish matters. This is a constitutional question, but in a party-dominated Parliament it also becomes a political one. Labour tends to win disproportionate numbers of seats in both Scotland and Wales, to the extent that the Conservative Party won no Westminster seats in either part of the country in 1997. The inclusion of Scottish MPs in Westminster votes will therefore tend to favour Labour governments. The 1997 government enjoyed a large majority amongst seats in England, but a future Labour government could potentially need to rely on Scottish votes in order to get its legislation through.

For these reasons the matter has been brought to prominence particularly by the Conservative Party. In July 2000, the Commission to Strengthen Parliament, set up by Conservative leader William Hague under the chairmanship of Lord Norton of Louth, published a wide-ranging report.[10] Amongst its recommendations was a new procedure whereby the Commons Speaker should be able to certify bills as applying to one area of the UK only, with such bills then being dealt with primarily by members representing the relevant area. Crucially, the committee stage would be taken by a committee of members from

the territory, representing the political balance there, and by convention members from outside the area would not take part in the third reading debate or vote. Such arrangements, which could make matters difficult for a Labour government with a small majority, have been adopted as Conservative Party policy under the banner of 'English votes on English laws'. Unsurprisingly, they have received little interest from the Labour benches, where many members protest that Conservatives voted on Scottish bills throughout the 1980s and 1990s whilst at no time holding a majority in Scotland. However, Labour backbencher Frank Field proposed a 10-minute rule bill in June 2000 which would have barred Scottish or Northern Irish MPs completely from speaking or voting except on matters where power is reserved at Westminster for the whole UK. The bill was defeated.

One minor concession made by government to the need to deal with English matters was agreement on a new Standing Committee on [English] Regional Affairs. This would to some extent balance the Scottish, Welsh and Northern Irish Grand Committees, which enable MPs from a territory to come together and debate territorial matters. The new committee was carefully designed, with a core membership reflecting the balance of the parties in the whole house rather than just in England. The government is clearly wary of setting up any English structures which might prove difficult for a subsequent Labour government. However, when one comes, the existing arrangements look set to become increasingly controversial.

The House of Lords

Following the removal of the hereditary peers from the House of Lords in 1999, the next stage in the reform process was due to be proposed by a Royal Commission, established in January 1999. Chaired by Lord Wakeham, this published its report on 20 January.[11] It included 132 recommendations relating to the powers, functions and composition of the chamber. The Royal Commission had been asked in particular to consider how a reformed upper house might fit within the new constitutional framework, including devolution and the Human Rights Act, whilst maintaining the pre-eminence of the House of Commons.

Upon publication, most of the attention focused on the Royal Commission's proposals for the composition of the new chamber, which would have around 550 members. Commission members had failed to agree on a composition model, proposing three options with 65, 87 or 195 elected members (12%, 16% or 35%of the total), with the remainder appointed. The main concession made to devolution was that the elected members would represent the nations and regions (serving 12 to 15 year terms, with one-third elected at each general election or European Parliament election). Appointed members would be chosen by a statutory Appointments Commission, which would be required to ensure that party balance in the chamber mirrored votes cast at the last

general election, that 20% of members were not aligned to any of the main parties, and that the chamber's membership was balanced in gender, ethnic and regional terms.

The Royal Commission proposed little change to the current judicial and religious representation. Proposals that the Law Lords should be removed from the chamber, thus creating a clearer separation of powers between parliament and judiciary, were rejected. Instead, it was suggested that the Law Lords would 'publish a statement of principles which they intend to observe when participating in debates and votes in the second chamber and when considering their eligibility to sit on related cases'. The Church of England would continue to be represented, but with a reduction in number of Bishops from 26 to 16, and 10 seats reserved for other faiths.

The chamber's powers over legislation would be unchanged, with a maximum delay of approximately a year for ordinary and a month for financial legislation. Its veto over delegated legislation would end, being reduced to a brief power of delay. No special powers would be given to the upper house over constitutional matters, as applies in many other states.[12] Instead, it would take on a new constitutional focus through establishment of three committees—on the constitution, on human rights and on devolution—in addition to its current work of detailed legislative scrutiny, committee enquiries and European work. Aside from the minority of elected members, the Commission made no firm proposals about how the chamber would link to devolution or the new devolved institutions.

The Commission's report was generally cautious and gradualist, not rising to the challenge of the new constitutional settlement, or fundamentally appraising the role of a second chamber in modern Britain. This was unsurprising, given the short time within which it was expected to report and the fact that devolution and human rights reform had not yet come into force when it began its work. The report was not well received by the press generally. The Liberal Democrats condemned the proposals immediately, calling for a fully elected house. Labour and the Conservatives gave more measured and non-committal responses. The government expressed its desire to use the proposals as a starting point to reach cross-party agreement over future reform.

Although there was little progress towards those aspects of the report which required legislation, there were some piecemeal changes during 2000 to implement the Commission's proposals. For example, in June the Law Lords responded to the suggestion of a statement of principles, although the statement they produced contained little more than a cursory restatement of the status quo. In July the House of Lords agreed to establish a Constitutional Committee, as recommended to 'examine the constitutional implications of all public bills and keep under review the operation of the constitution'.

In May, an Appointments Commission was established for selecting

crossbench peers and vetting other appointments (taking over in the latter role from the old Political Honours Scrutiny Committee). This had been promised in the White Paper on House of Lords reform in December 1998. It fell far short of that proposed by the Wakeham Commission, as it has no statutory basis and responsibility for choosing only a minority of peers. Under the new arrangements, the Prime Minister continues to control how many appointees each party gets, how many crossbench peers there are and the overall size of the house. (A Private Member's bill moved by Lord Kingsland (Cons.) during 2000 would have put the Commission on a statutory basis and required a minimum proportion of crossbench peers to be maintained, but this fell at the end of the session, after passing in the Lords.) In September, the Commission caused a stir by advertising for the first time for members of the upper house and it also has a website inviting people to put themselves forward for appointment. It received some 2,000 applications and is expected to make around ten appointments per year.

Many political appointments were made during the year, with Labour seeking to further equalise the numbers between its members and the Conservatives. By the end of 2000 the total size of the chamber had swollen to 690. The two main parties were almost equally represented, with 232 Conservatives and 201 Labour members, but the balance of power was decisively held by 62 Liberal Democrats and 195 others (most of them crossbenchers). A number of controversies surrounded the main round of appointments, in March. The Liberal Democrats were given only nine new seats, and claimed that Labour had reneged on a previous agreement to boost their numbers, and was making new appointments dependent on 'good behaviour' by Liberal Democrat peers in voting for government legislation. Particular attention also attached to the controversial appointment of the Conservative Party Treasurer, Michael Ashcroft. The year's appointments brought Tony Blair's total since becoming Prime Minister in 1997 to 206, compared to the 216 appointed by Margaret Thatcher in her eleven years. These various concerns resulted in most newspaper editorials calling for rapid moves to an elected upper house, with public opinion polls showing growing support for such an option.

This was the first year in which the new, partly reformed, chamber could demonstrate how it was different from the old hereditary-dominated House. There were early signs that the reform, with the resultant balancing of party numbers, is leading to a new confidence on the part of peers. The government suffered considerable difficulties with several pieces of legislation, but peers generally chose their rebellions carefully in order to gain public approval. Thus in January the chamber effectively rejected the Criminal Justice (Mode of Trial) Bill, which sought to reduce defendants' right to trial by jury. This House of Lords bill was rapidly reintroduced by the government as a House of Commons bill so that the Parliament Acts might be used if necessary to push it

through without the Lords' consent. However, the No. 2 bill was rejected by the upper house in September and the government announced in the Queen's Speech in December that it would be reintroduced. Likewise, the government was forced to drop part of the Local Government Bill which would have given more freedom to teachers about the teaching of homosexuality in schools. The Sexual Offences (Amendment) Bill, which equalised the age of consent for homosexual and heterosexual sex, was passed under the Parliament Act procedures when the Lords rejected the it for the second year running. In February, a long-standing convention was broken when the Lords rejected government regulations covering the London mayoral elections, the first time that secondary legislation has been rejected by the chamber since 1968. The trouble ahead had been indicated by the Conservative opposition leader, Lord Strathclyde, in a speech in November 1999 when he suggested that the conventions of the chamber regarding the government's right to get its legislation passed might break down now that its membership has changed and the chamber is, in the words of the Labour Leader of the House, Baroness Jay, 'more legitimate'.

If the government becomes sufficiently exasperated with the behaviour of the semi-reformed house, it may be more inclined to press ahead with further reform. However, it is currently difficult to see how the cross-party consensus on which the government seeks to proceed can be achieved. When the Royal Commission's proposals were debated in the House of Commons in June, Conservative spokesman, Sir George Young, stated that his party was 'likely to end up favouring a higher percentage of elected members' than the Commission proposed. However, the Leader of the House, Margaret Beckett, indicated the government's acceptance of the Commission's main principles, including the suggestion of a largely appointed chamber with a small elected element. The Liberal Democrats meanwhile remained committed to a wholly elected replacement for the House of Lords. These differences will almost certainly be reflected in the parties' general election manifestos. Nonetheless, it has been agreed that a joint committee of both houses of Parliament should be established to 'examine the parliamentary aspects of [the Royal Commission's] proposals'. The committee has been expressly required not to revisit the questions of composition and powers considered by the Commission but merely to consider how its proposals may be put into effect.

Freedom of information

2000 was the year when the long-awaited Freedom of Information Bill finally became an Act. It was introduced in the Commons in December 1999, and had its second reading in the Lords in April 2000. But because of the congested legislative programme it did not start its committee stage in the Lords until October and gained royal assent right at the end of November. During its passage, the Bill suffered

backbench revolts in the Lords and Commons, and the government made concessions to narrow the exemption provisions and increase the powers of the Information Commissioner.

In Wales the new First Secretary, Rhodri Morgan, started to publish minutes of the Welsh Cabinet from May 2000 and issued a consultation paper on a new Freedom of Information Code of Practice in Wales. In Scotland the Executive published a consultation paper on Freedom of Information legislation in November 1999 and a summary of the responses in May. The next step is publication of a draft bill, due at the end of 2000, which will go out to a further round of public consultation and scrutiny by the Justice and Home Affairs Committee of the Scottish Parliament.

Human Rights

The Human Rights Act came into full force on 2 October 2000. During the lead-in period for the Act, the government completed an exhaustive risk-assessment exercise, identifying areas vulnerable to challenge under the European Convention on Human Rights (ECHR). A complex matrix, applied in all departments, was used to assess the significance of an area or activity, its vulnerability to challenge and the risk of challenge. Important changes resulting from this exercise included the new requirement for magistrates to give reasons for decisions, changes in the arrangements for part-time and temporary judicial appointments, and the introduction of a statutory code governing surveillance activities under the Regulation of Investigatory Powers Act. Other areas, given a clean bill of health or where it was believed a successful defence could be mounted in court, were the subject of guidance issued by two high-powered lawyers groups within the government ('Points for Prosecutors' and the third edition of the 'The Judge Over Your Shoulder'). These groups were also to consider the implications of successful challenges and the fast-tracking of appeals for critical cases.

A £4.5 million training programme for judges, magistrates and heads of tribunals was completed in the summer. The courts showed increasing willingness to apply Convention rights before the Human Rights Act came into force. But the anticipated flood of challenges after 2 October was slow to materialise. The Government estimated that in England and Wales the Human Rights Act would double the number of applications for judicial review to around 600 a year and add between 2,300 to 2,800 extra sitting days in cases already before the higher courts at an annual cost of £60m (including £39m for legal aid). In Scotland the additional cost in 2000 was put at £10.6m.

New legislation continued to be vetted for consistency with the Convention. In an important development, from January 2000 the government extended the Section 19 process under the Human Rights Act to the vast body of secondary legislation and statutory instruments brought before Parliament. In March, the first use was made of this

section to signify that the government did not consider amendments made by the House of Lords to the Local Government Bill retaining the 'Section 28' ban on the promotion of homosexuality in schools, to be compatible with the Convention

In July, terms of reference for the Joint Parliamentary Committee on Human Rights were announced, authorising it to conduct inquiries into general human rights issues in the UK as well as to examine the Convention aspects of draft legislation and any remedial orders, amending legislation judged incompatible, laid before Parliament. An earlier government pledge to have the committee in place before the Human Rights Act came into force was not met because of disagreements over its composition and chairmanship.

In Scotland, where the ECHR had been given force since July 1999 by the devolution legislation, Convention rights were raised in over 600 cases. Barely 3% of these challenges succeeded. However, they included a number of cases in which long delays in bringing prosecutions where a person has been released on bail were considered to breach the fair-trial-within-a-reasonable-time requirements.[13] In another landmark case, it was held that there had been a breach of the right to silence and the right against self-incrimination under Article 6 through the use of evidence obtained under a section of the Road Traffic Act 1988 which makes it an offence for the owner of a vehicle to fail to give information to the police, if required to do so, about the identity of the driver.[14] The appeal, which had wide implications for the whole of the UK, was one of the first 'devolution issues' to go before the Judicial Committee of the Privy Council. The Scottish Executive responded to the courts' November 1999 rejection of the arrangements for appointing temporary sheriffs (i.e. judges) by ending the existing practice and taking steps to establish a Judicial Appointments Commission. It also considered separating the policy and prosecution functions of the Lord Advocate and setting up a Scottish Human Rights Commission. Similar steps were not contemplated in London.

Through the course of the year, work continued on the drafting of a Charter of Fundamental Rights for the institutions of the European Union. Questions were raised about whether the Charter should be purely declaratory or have real legal effect, should include economic and social rights and new rights not found in the ECHR, and was a potential stepping stone towards a written constitution for a federal Europe. The UK government maintained that the Charter should be no more than a compilation of existing rights accepted within the European Union in a non-legally binding text. The draft Charter considered at the informal EU summit in Biarritz was a compendium of some 50 existing and new rights. While it would only be proclaimed as a political declaration and not incorporated into the Treaty of Nice, its existence was expected to have some influence on judgements of the European Court of Justice. Further moves to try to incorporate it as a Chapter or

Protocol in the Treaty of European Union were anticipated, but it is too early to say more about the possible effects of this, if any, on the British constitution.

Elections and parties

The year marked a midpoint in the process of reforming the UK's electoral and party system. It lacked the drama of previous years, which saw the report from the Jenkins Commission in 1998 and the proportional representation (PR) elections in Scotland and Wales in May and for the European Parliament in June 1999. Yet there was plenty of activity and debate, setting the stage for important new initiatives in the next couple of years.

The most significant individual event was the May elections for the new Greater London Authority: the Mayor and Assembly. The election for the Mayor was held under the Supplementary Vote (SV) method, with the Additional Member system (AMS) used for the 25 members of the Assembly. The intention of using SV—under which voters were given two preferences, with second preferences coming into play if no candidate won more than 50% of first preference votes—was to ensure that the winner commanded majority support. Although Ken Livingstone gained only 39% of first preference votes, he gained sufficient second preference votes to give him an overall tally of 58%, against 42% for the Conservative, Steve Norris. The SV system itself was seen to work well, with 83% of voters making use of their second preferences. Those casting ballots also seemed relatively sure of the basics of SV and AMS with only 1% of ballot papers being spoilt, broadly in line with first-past-the-post elections.[15] The major disappointment was turnout: only 34% cast a vote in the mayoral election and 31% for the Assembly. This compared with turnout of 58% for the Scottish Parliament and 46% for the Welsh Assembly the previous year, and 35% in the last London borough elections in 1998.

The growing concern about falling turnout at elections to all tiers of government produced a number of initiatives during the year. The Representation of the People Bill gained royal assent in March. The Act is intended to widen the franchise, through a continuously updated—or 'rolling'—register of voters, as well as to lower the cost to individuals of voting through innovations such as postal voting and, potentially, electronic voting, both of which should also extend turnout. Experiments to assess the effectiveness of such innovations were carried out as part of the local council elections in May. The 32 trials included electronic, postal and weekend voting: the results showed that only all-postal ballots had a consistently positive effect on turnout compared with 1999 contests.[16]

If changing the mechanics of voting was seen as one means of boosting turnout, redesigning the electoral system and introducing new structures of decision-making were seen as others. The Local Govern-

ment Act 2000 has given the green light for pioneering councils to test the popularity of directly elected mayoral/cabinet models with their electorates. Where these models are introduced, it is very likely that they will adopt a PR electoral system. All local councils in Scotland face the prospect of a new proportional, electoral system following the June report of the Renewing Local Democracy Working Group. The committee recommended that local councillors be elected by the Single Transferable Vote (STV) system in 3 to 5 seat constituencies. It is hardly surprising that the proposal to change the 'rules of the game' has aroused fierce debate among local councils; finding an amicable solution will be a key test of the Labour-Liberal Democrat coalition. Even if it does agree on the recommendations, the timetable for introducing STV for the next scheduled local elections, in May 2002, is extremely tight. It may be that the price paid by reformers is implementation delayed until the following elections.

Of course, the big electoral reform fish remains Westminster. The year saw a protracted discussion within the Labour Party about the merits of PR, in particular the 'AV Plus' version recommended by the Jenkins Commission. The matter was still not resolved at the party conference, where the agreed 'Democracy and Citizenship' paper watered down Labour's commitment to a PR referendum by failing to set any timescale within which voters would be consulted. The paper also referred to 'serious concerns' among the party over the Jenkins proposals. The impression that the tide within Labour was shifting to the simple AV system, shorn of the top-up element that would provide at least some proportionality, was reinforced by Peter Mandelson's public support for AV in a thoughtful speech in June[17] (although, to be fair, Mandelson has long been a supporter of the AV system[18]).

The future of PR at Westminster centres on the debate within the Labour Party, and the year 2000 appears to have weakened the hand of those supportive of Lord Jenkins' proposals. Looking ahead into 2001, the main area of interest is the establishment of the Electoral Commission (covered in another article in this issue), in particular how it defines its role and copes with a possible spring general election.

The future

As the parties prepare for the next election, what are their manifestos likely to say on constitutional issues? Labour convened its National Policy Forum in Exeter in July to agree documents for the September conference. The policy document on Democracy and Citizenship contains a weakened commitment to electoral reform. The pledge to a referendum still remains, but with no timetable; and the alternative option could be the Alternative Vote (AV) rather than the more proportional AV-plus recommended by the Jenkins Commission. The party agreed that the referendum on the subject should only take place once the new voting systems for the Scottish, Welsh and London Assemblies

and the European Parliament could be assessed. But it is not clear what more can be gleaned from these contests, given the low turnout for the European and London elections and the fact that detailed analysis of the Scottish and Welsh contests has already been published by the Constitution Unit and the Centre for Research into Electoral and Social Trends.

On Lords reform, the party conference accepted the principles set down by the Wakeham Commission, including a proportion of elected members 'not less than that contained in the options outlined in the Royal Commission's report' (12%, 16% or 35%). The other option was to commit the party to a majority elected upper house. On regional government in England, there is a commitment to move to directly elected regional government 'where and when there is a clear demand for it', with a statement that the party recognises 'the legitimate aspirations of the English regions and believes that the creation of elected regional assemblies is the essential next step in our programme of renewing the constitution and empowering our citizens'. A new government would publish a Green or White Paper on regional governance; but this should not result in adding a new tier, and so would require a move to a predominantly unitary system of local government.

The Liberal Democrats have the most detailed policies for constitutional reform, in a July policy paper, 'Reforming Governance in the UK'. The working group, chaired by Robert Maclennan, proposes replacing the Lords with an elected Senate, cutting the Commons to around 450, cutting the number of ministers, and allowing junior ministers to be appointed from outside Parliament. There would be referendums on regional assemblies in England, on the basis of a minimum set of core powers, with the possibility of further devolution of powers and boundary changes to allow smaller regions after a subsequent referendum. A Finance Commission would be charged with devising a new revenue distribution formula to the nations and regions. There would be a referendum on the Jenkins recommendation on the voting system as 'a first step towards our ultimate goal of STV'.

The Conservatives' draft manifesto, 'Believing in Britain', was launched in September. Its centre-piece was a pledge to introduce legislation to protect British sovereignty against further encroachments by the EU in fields such as defence, direct taxation, education and health. On devolution the party seeks to work to ensure devolution succeeds in Scotland and Wales, whilst pledging to scrap Regional Development Agencies in England. The party leader, William Hague, confirmed his proposal that Westminster should be reformed so that 'only English MPs should be able to take part in the decisive stages of legislation on questions that affect only England'. The Party would have a long-term aim of reducing the size of the House of Commons, partly in response to devolution, and also pledged to cut the number of ministers. These proposals reflected those made in the Norton report on 'Strengthening Parliament'.

The UK constitution is going through a period of dramatic change. Electoral reform, structures of regional government, the composition and role of the House of Lords, all remain unresolved issues. The second full year of devolution and the first full year of the Human Rights Act promise much in the way of continuing development. Much also rests on the outcome of the forthcoming general election. Will the dominance of the Labour government at the centre continue? Will the devolved administrations begin to assert their position in the Union? Will the courts become embroiled in political and constitutional battles? These are the issues we hope to report upon in a year's time.

1 A.J. Ward, 'Devolution: Labour's Strange Constitutional "Design" ' in J. Jowell and D. Oliver (eds), *The Changing Constitution*,Oxford UP, 4e, 2000, p. 134.
2 *Wales: A New Constitution*, Welsh Governance Centre, Cardiff University, 2000.
3 *Assembly Record*, 12.7.00.
4 Lord Elis-Thomas, *National Assembly: A Year in Power?*, Institute of Welsh Politics, Aberystwyth, 2000; Lord Prys Davies, *The National Assembly: A Year of Laying the Foundations*, Law Society lecture at Llanelli National Eisteddfod, 2000; both are cited extensively in the Institute of Welsh Affairs quarterly monitoring report, *Devolution Looks Ahead: May to August 2000*, Constitution Unit website www.ucl.ac.uk/constitution-unit/.
5 Local Government Association, *Regional Variations: Report of the LGA's Hearing on the Region*s, LGA, 2000; A. Harding, *Is There a 'Missing Middle' in English Governance?*, New Local Government Network, 2000; J. Mawson, *Whitehall, Devolution and the English Regions*, Aston Business School, 2000.
6 Although in countries such as France and Spain they have high profile mayors coexisting with a regional tier of government.
7 *The Times*, 2.9.00.
8 Press Notice issued by 10 Downing Street following the 1 September meeting.
9 For fuller discussion of the issues in this section see M. Russell and R. Hazell, 'Devolution and Westminster: Tentative Steps Towards a More Federal Parliament' in R. Hazell (ed.), *The State and the Nations*, Imprint Academic 2000.
10 Conservative Party, *Strengthening Parliament*, July 2000.
11 Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm. 4534, Stationery Office, 2000.
12 See M. Russell, 'Responsibilities of the Upper House: Constitutional and Human Rights Safeguards', *Journal of Legislative Studies*, forthcoming.
13 *H.M. Advocate* v. *Little*, 1999 GWD 28–1320; *Docherty* v. *H.M. Advocate*, 2000 GWD 8–275; *R* v. *H.M. Advocate*, 2000 GWD 8–276.
14 *Brown* v. *Stott*, 2000 GWD 6–237.
15 *News Release*, Department of the Environment, Transport and the Regions, 15.5.00.
16 See *Elections: The 21st Century Model*, Local Government Association Research Paper, 2000.
17 Speech to Make Votes Count, 28.6.00.
18 See P. Mandelson and R. Liddle, *The Blair Revolution: Can Labour Deliver?*, Faber and Faber, 1996.