

# CONSTITUTIONAL CHANGE IN THE UNITED KINGDOM



F. N. FORMAN

# **Constitutional Change in the United Kingdom**

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# Preface

This is a comprehensive account of constitutional change in the United Kingdom. Because such change has often taken place over a very long period of time, the book does not focus exclusively on what has happened since Labour came to power in May 1997, but reaches back, where appropriate, to explain the historical background to the significant reforms pursued by successive Blair Administrations. It also uses a broad definition of what is involved in constitutional change for the very good reason that in the United Kingdom, to a greater extent than elsewhere, almost all significant political reforms can have constitutional consequences.

New Labour came to power in May 1997 on the basis of a Manifesto in which it declared:

our system of government is centralised, inefficient and bureaucratic. Our citizens cannot assert their basic rights in our own courts. . . . There is unquestionably a national crisis of confidence in our political system to which Labour will respond in a measured and sensible way.

Four or five years later we are in a better position to judge the significance of these words and the extent to which the Labour Government has met the expectations which it raised.

Certainly the scope of constitutional reform under Labour has been wide-ranging; but in the eyes of some people it has been essentially cautious, pragmatic and occasionally incoherent

in its implementation. This has left campaigners for constitutional reform, such as those in Charter 88, in the Liberal Democrats and in the academic community, disappointed with Tony Blair's apparent unwillingness to exploit huge Labour majorities in two successive Parliaments in order to transform the constitutional context within which our system of government operates. In particular, there has been disappointment in these quarters at the lack of substantial progress towards radical reform of the House of Commons, full British participation in Economic and Monetary Union in Europe, and the introduction of proportional representation as the basis for elections to the Westminster Parliament. Yet it remains possible that these outstanding goals will be achieved during the remainder of Labour's period in office and the author of this work is in no doubt that future historians will acknowledge the enduring significance of the constitutional reforms introduced by successive Blair Administrations.

The attentive reader will quickly appreciate that there are several important themes running through the agenda of constitutional change in this country, although the Lord Chancellor, Lord Irvine of Lairg, was content to say that 'principled pragmatism' is the unifying thread which has run through the whole of Labour's programme. In the author's opinion, one theme has undoubtedly been the political determination of Ministers to honour

the legacy of the late John Smith, who was a genuine believer in the value of comprehensive constitutional reform, mainly by implementing a devolution strategy which so far has contained the political threat to the Labour Party from buoyant nationalism in Scotland and Wales.

A second theme has been the need to restore hygiene and respectability to our political system, something which was identified by Tony Blair and his senior colleagues in Opposition as an urgent priority for a New Labour Government after years of Tory sleaze. This has been largely a matter of making a virtue of necessity by tightening up the rules of what had become a manifestly sleazy political game, moving from a culture of official secrecy towards freedom of information, adjusting the methods of democratic decision making in an attempt to make elections cleaner and more attractive to the general public, and searching for many new ways for politicians to relate to the people they represent in what is nowadays a notably spontaneous and unpredictable political culture.

Traditionally, such a 'soft' discussion would probably not have been included in a book of this kind – certainly not one written by a constitutional lawyer or a political scientist. Yet there is compelling evidence that a combination of changing social attitudes and dynamic technological advances has affected not only our ways of conducting politics but also the rules of the political game and hence the constitutional arrangements within which those active in the policy community have to operate.

A third theme has been 'modernisation', which is the elastic term used by Tony Blair and his New Labour colleagues to present, explain and justify all manner of reforms, whether governmental, institutional or legal. Thus there have been ambitious attempts to modernise both central and local government by changing the pattern of goals and incentives for civil servants and local councillors alike. It is a nice irony, however, that in spite of the decentralisation implicit in the Government's policy of devolution, the policy of modernisation has entailed the further concentration of power within central Government and in the structures of government overall at the expense of the more

traditional power centres in Whitehall Departments and regional or local authorities.

Modernisation is a term which has been applied by successive Blair Administrations to the presentational adjustments that have been made to the functioning of the Monarchy, the compositional adjustments to the membership of the House of Lords and the procedural adjustments to the working of the House of Commons designed to make the Lower House more professional and effective in processing Government business.

In the legal sphere, which has been the expanding bailiwick of the Lord Chancellor, there has been much use of the 'm' word to describe the Government's reforms. Yet it would be more accurate to say that the traditional institutions and practices of the law have been transformed by Lord Irvine's reforming zeal, aided and abetted by learned reports from Lord Woolf, Lord Justice Auld and Sir Andrew Leggatt. Indeed, it is already clear that this area of the Government's reform agenda is likely to have far-reaching consequences, especially if it leads to genuine democratisation of the judiciary and the whole legal profession over a period of time.

A fourth theme has been the steady, almost remorseless, Europeanisation of our constitutional arrangements which has manifested itself in some obvious and some less obvious ways. For example, since our entry into the European Communities in 1973, we have been drawn ever more deeply into adopting European legal norms, such as the doctrines of positive rights, purposive legal interpretation, proportionality in jurisprudence and direct effect in Community law. Since the 1998 Human Rights Act came into force in October 2000, we have laid ourselves open to the possibility that British courts, inspired by what might once have been described as alien legal doctrines, will increasingly feel able to look Parliament in the eye and so begin to cast doubt upon the much vaunted principle of Parliamentary supremacy.

As a significant sub-plot in the European play, we have seen the steady growth of regulation at arm's length by quasi-judicial (sometimes supra-national) authorities rather than by elected Ministers accountable to national Parliaments; we have seen

a growing tendency to pool national sovereignties and so create a justiciable body of superior constitutional law via cumulative international agreements enshrined in further European treaties; and we have witnessed a gathering crisis of democratic legitimacy in all our representative institutions which has encouraged more frequent recourse to referenda to resolve big constitutional issues in which the interests of national Parliaments are at stake.

These have been among the really important themes of constitutional change since Labour came to power in May 1997 and indeed over a longer period as well. They have brought into play the law of unintended consequences which has been exemplified in several interesting ways. For example, the drive for Celtic devolution has thrown a spotlight on various awkward aspects of the English question, such as the need (but not yet an overwhelming demand) for new governmental structures in England at the regional and municipal levels; and on various equally awkward aspects of the Union question, such as the need for a financial rebalancing between the four constituent 'nations' of the United Kingdom, regardless of what structural changes may or may not be made to the pattern of local government in England.

Another example of unintended consequences might well be the fact that those who want further reform of the Upper House have discovered that their goal makes little sense – and is probably unsustainable in the long run – unless they also tackle the more fundamental need for parallel reform of the Lower House and maybe the Monarchy as well for good measure. This realisation serves to emphasise the reality that in a political system without the fixed points and political anchors of a codified constitution, it is effectively impossible to make a single discrete change in our constitutional arrangements. Sooner or later this generation of constitutional reformers will need to present a coherent and synoptic view of everything which they have been trying to do. Otherwise their ambitious reforms will not be sufficiently understood or appreciated by the people whom they seek to serve.

Looking to the future, there are at least three large constitutional uncertainties which could

challenge many of our current assumptions. The first is whether or not the Government, Parliament and people of this country will finally resolve to abolish the pound and adopt the euro, thus rendering much more likely the eventual submersion of the United Kingdom into the political depths of the European Union. The second is whether or not the same triumvirate of forces will ever resolve to abandon first-past-the-post elections to the Westminster Parliament and adopt instead some version of proportional representation. The third is a categorical question: whether the United Kingdom is likely to remain the most satisfactory political and constitutional structure within which to strive for the timeless goals of peace, prosperity and public welfare; or whether we shall need to think more globally and act more locally in the twenty-first century.

Whatever the answers to these questions may be, I must now record my debts of gratitude to all those who have assisted me in different ways with the production of this book. I begin by thanking Professor Robert Hazell of the Constitution Unit at University College London, whose suggestion it was that I should write this book and who kindly brought his editorial skills to bear upon the text, and his Assistant, Lucinda Maer, for her help in editing much of the text. I must also thank Mark Kavanagh and Heidi Bagtazo, Craig Fowlie, Jenny Lovel and Iain Hunt of Routledge, and Rosamund Howe, the copy editor, for all their help and support throughout the two years and more that were involved in the writing and publication of this book.

A number of friends whose judgement I respect have been kind enough to read and comment upon parts of the text: Dr Nicholas Baldwin, Professor Vernon Bogdanor, Oonagh Gay, Christopher Jary, Professor George Jones, Peter Riddell, Dr Frank Vibert, Dr Tony Wright MP and Sir George Young Bt MP. Others have kindly supplied me with useful material: Dr Tony Barker, Caroline Bell, Rebecca Blackwood, Richard Cornes, Jeremy Croft, Katherine Fisher, Avis Furness, Gabrielle Garton Grimwood, Dylan Griffiths, Timothy Holmes, Mary Morgan, Dr Roger Mortimore, Kirsty Nichol, Meg Russell, Bryan Wells and Professor Bob Worcester. Any value which there may be in this volume owes

a great deal to all these people. Any errors of fact or dubious opinions are my own responsibility.

The book has been described as 'a monograph' – a mixture of monograph and textbook. Although this is an inelegant description, it captures something of the hybrid quality of the subject and indeed of the author's claims to be able to write about it. My main hope is that the reader

will find the narrative and the argument clear and convincing and will be encouraged to embark upon further exploration of what I have found to be a dynamic and fascinating subject.

London  
December 2001

F.N. Forman

# Contents

PREFACE	xv
<b>PART I THE LEGACY OF HISTORY</b>	<b>1</b>
<b>1 Historical background</b>	<b>3</b>
From the century of revolution	4
Via a long era of consolidation	6
Through a century of democratisation	8
A period of consensus, then confrontation	15
With New Labour into a new Britain	23
General reflections	25
Questions for discussion	26
Notes	26
Further reading	27
<b>PART II ISSUES OF IDENTITY AND TERRITORY</b>	<b>29</b>
<b>2 Nationalism and devolution</b>	<b>31</b>
The historical influence of nationalism	32
Differing political responses at Westminster	34
Options for the various nationalities	35
General reflections	38



Questions for discussion	40
Notes	40
Further reading	41
<b>3 The Irish question</b>	<b>43</b>
The pursuit of a nationalist dream	44
Three enduring Irish problems	46
The long struggle for Home Rule	50
Partition and devolution to Stormont	59
Direct rule from Westminster	64
Internationalising the peace process	67
Power sharing and the Belfast Agreement	69
General reflections	73
Questions for discussion	74
Notes	74
Further reading	75
<b>4 The issue of Scotland</b>	<b>77</b>
A nation all along	78
Devolution on the political agenda	84
Devolution as an Opposition cause	86
Delivering devolution in Scotland	88
Distinctive characteristics of Scottish devolution	89
General reflections	92
Questions for discussion	93
Notes	93
Further reading	94
<b>5 The meaning of Wales</b>	<b>95</b>
Always more than a cultural identity	96
Integration with England and its discontents	99
The faltering revival of Welsh nationalism	103
Devolution: not an event but a process	108
Distinctive characteristics of Welsh devolution	110
General reflections	112
Questions for discussion	113

Notes	113
Further reading	114
<b>6 The English question</b>	<b>115</b>
The ancient sense of England	116
A need for new governmental structures	120
English votes on English laws	123
Orthodox regionalism on request	125
The London model of governance	129
General reflections	133
Questions for discussion	135
Notes	135
Further reading	136
<b>PART III MODERNISING GOVERNMENT</b>	<b>137</b>
<b>7 Modernising central Government</b>	<b>139</b>
Modernising policy and administration	141
Two critiques of modernisation	147
Creating improved and inclusive public services	149
Embedding human rights in all public functions	153
Inter-governmental relations in the United Kingdom	156
Keeping the fiscal strings attached	159
General reflections	161
Questions for discussion	162
Notes	162
Further reading	163
<b>8 Modernising local government</b>	<b>165</b>
The mosaic of English local government	166
Reforming local authority practices	167
New models of local governance	172
The emasculating effects of modernisation	175
General reflections	178
Questions for discussion	179
Notes	180
Further reading	181

<b>PART IV OTHER FORMS OF INSTITUTIONAL MODERNISATION</b>	<b>183</b>
<b>9 Redefining the Monarchy and the Crown</b>	<b>185</b>
Ensuring the efficacy of constitutional Monarchy	187
Maintaining media and public respect for the Royal Family	189
Demystifying and redefining the concept of the Crown	193
Problems for Parliament with the Royal Prerogative	196
The meaning and effect of Crown immunities	198
General reflections	202
Questions for discussion	203
Notes	203
Further reading	205
<b>10 Reforming the House of Lords</b>	<b>207</b>
Settling old scores against hereditary peers	208
The interim Second Chamber	211
The Wakeham Report – <i>A House for the Future</i>	213
Debate on Lords reform in the Lords	216
Debate on Lords reform in the Commons	219
Stage Two of reform and beyond	221
General reflections	222
Questions for discussion	223
Notes	223
Further reading	225
<b>11 Modernising the House of Commons</b>	<b>227</b>
Earlier attempts at Commons reform	228
Labour's agenda for modernisation	229
The view from different angles	234
Lessons from other Parliaments	239
General reflections	242
Questions for discussion	244
Notes	245
Further reading	246
<b>12 Transforming the legal system</b>	<b>247</b>
Modernising judicial and court procedures	248

Democratising the judiciary and legal profession	252
Improving legal services and access to justice	254
Incorporating human rights into statute law	257
European and other influences upon public law	262
General reflections	265
Questions for discussion	267
Notes	267
Further reading	269
 <b>PART V NEW RULES, METHODS AND POLITICAL RELATIONSHIPS</b>	 <b>271</b>
<b>13 Changing the rules of the political game</b>	<b>273</b>
Public concern about political behaviour	274
The first Nolan Committee report	276
Interim assessment by the Neill Committee	280
Regulating and funding political activity	283
The Political Parties, Elections and Referendums Act 2000	285
From a culture of official secrecy	288
Towards freedom of information	291
General reflections	295
Questions for discussion	296
Notes	296
Further reading	299
 <b>14 Adjusting the methods of democratic decision making</b>	 <b>301</b>
Modernising electoral arrangements	302
The Electoral Commission and its tasks	303
The uncertain path to electoral reform	306
Proportional representation in practice	307
The Jenkins Commission and the future	309
The role and regulation of referenda	313
Issues raised by the use of referenda	316
General reflections	318
Questions for discussion	319
Notes	319
Further reading	321

<b>15 The people, society and the state</b>	<b>323</b>
The people as subjects and citizens	324
Ambivalent participation in an eroded society	328
The media and other voices of the people	331
Direct action and direct democracy	333
The changing character of the state	335
General reflections	338
Questions for discussion	339
Notes	339
Further reading	341
 <b>PART VI A REFORMED UNITED KINGDOM WITH A EUROPEAN FUTURE</b>	 <b>343</b>
<b>16 The European Union and other challenges</b>	<b>345</b>
Coming to terms with the European Union	346
Subsidiarity and sub-national politics	354
The current challenges of globalisation	356
Common pressures and convergent responses	359
General reflections	361
Questions for discussion	362
Notes	362
Further reading	364
 <b>17 Cumulative change and dynamic outlook</b>	 <b>365</b>
Creating new constitutional arrangements	366
With a significant degree of entrenchment	372
Prospects of further change to come	374
Conclusion	384
Questions for discussion	386
Notes	386
Further reading	388
 APPENDIX 1 Political and official support for the Prime Minister and Deputy Prime Minister at 10 Downing Street and in the Cabinet Office	 391
 APPENDIX 2 Changes in Departmental structures and Ministerial responsibilities in June 2001	 395

APPENDIX 3	Modernisation of the House of Commons: main points of a Memorandum submitted by Robin Cook to the Modernisation Select Committee of the House of Commons on 12th December 2001	397
APPENDIX 4	Proposed citizenship pledge for people becoming British citizens	400
INDEX		401

# **Part I**

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## **THE LEGACY OF HISTORY**

1 Historical background

3





# **Historical background**

From the century of revolution	4
Via a long era of consolidation	6
Through a century of democratisation	8
A period of consensus, then confrontation	15
With New Labour into a new Britain	23
General reflections	25
Questions for discussion	26
Notes	26
Further reading	27