

**CODIFYING – OR NOT CODIFYING – THE UNITED  
KINGDOM CONSTITUTION:**

**THE EXISTING CONSTITUTION**

**Centre for Political & Constitutional Studies  
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## **Centre for Political and Constitutional Studies**

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## **Authorship**

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## **Previous publications in this series**

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## Summary

This paper has been produced as part of a programme of impartial research support provided by the Centre for Political and Constitutional Studies, King's College London, to the House of Commons Political and Constitutional Reform Committee. The Committee is investigating the possibility of codifying – or not codifying – the UK constitution. This paper examines the existing constitution and the implications for this subject. It follows on from a literature review produced by the Centre for the Committee in 2011.<sup>1</sup> During the course of 2012 and 2013 the Centre will produce accounts of the various sources of the present UK constitution; of selected constitution-building processes internationally and within the UK; and a consideration of what the substance of a codified UK constitution, if established, might be. In this paper certain key trends, uncertainties and controversies associated with the UK constitution are identified:

### *Trends*

In recent decades the UK constitution has been subject to change on an unprecedented scale. Developments have included:

- Entry in 1973 into what is now the European Union (EU);
- From the late-1990s, devolution to Northern Ireland, Scotland and Wales<sup>2</sup>;
- The *Human Rights Act 1998*;
- The removal of most hereditary peers from the House of Lords (1999);
- The *Freedom of Information Act 2000*
- The establishment of a Supreme Court through the *Constitutional Reform Act 2005*;
- The *Fixed-term Parliaments Act 2011*; and
- Statutory referendums applying to power-pooling at EU-level (2011).

### *Uncertainties*

The UK constitution has various indeterminate features. They include:

- Its precise content and its meaning, with particular doubt surrounding such components as constitutional conventions;
- The extent to which a government, deploying a majority in the House of Commons, can undermine core constitutional principles such as representative democracy and the rule of law;
- How far the UK should be seen as having moved towards a federal or quasi-federal structure, and away from being a unitary or 'union' state;
- The precise definition of the UK state or central executive; and
- The exact procedures involved in executing constitutional change, which can vary substantially according to the particular modification being contemplated.

### *Controversies*

Disagreement surrounds various features of the UK constitution, such as:

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<sup>1</sup> *Codifying – or Not Codifying – the United Kingdom Constitution: A Literature Review* (Centre for Political and Constitutional Reform, King's College London, 2011).

<sup>2</sup> As well as, arguably, Greater London.

- The desirability and viability of the doctrine of parliamentary sovereignty;
- The appropriate constitutional role for the courts;
- The desirability of UK membership of the EU;
- The status of the European Convention on Human Rights and the future of the Human Rights Act;
- The continuation of the Union;
- The asymmetrical nature of devolution and the institutional identity of England;
- The arguably excessive strength of the UK central executive, including its possession of Royal Prerogative powers; and whether the UK Parliament is able effectively to hold the executive to account;
- Democratic issues, such as the voting system for UK parliamentary elections and the presently unelected House of Lords; and
- Evidence also exists of a long-term fall in public confidence in arrangements for UK governance; as well as a decline in levels of cooperation between different components of the UK constitution, such as the judiciary and politicians; and Parliament and the executive.

#### *Codifying – or not*

A final controversy exists, surrounding the uncodified nature of the UK constitution. The view that is taken of the desirability or otherwise of codification partly depends on whether the trends discussed above are regarded as leading naturally towards this ultimate outcome; and on whether the uncertainties and controversies also described are regarded as problems – and if they are problems, whether codification might help resolve them.

Key arguments against codification include that it might lessen the supposedly valuable flexibility associated with UK arrangements; that it would entail placing the judiciary in an inappropriate position of political decision-making; and that the potential benefits do not outweigh the difficulties and dangers that a codification exercise, entailing a break with established constitutional practices, might bring. Supporters of codification might argue that it could provide greater clarity about the UK constitution; more protection for basic principles of democracy and the rule of law; genuine public ownership of the political system, that is: popular sovereignty; and that it could help resolve existing constitutional tensions.

The debate about codifying or not codifying the UK constitution cannot be held entirely in isolation from a consideration of what precisely a codified constitution, if established, might be. For instance, there are various different legal models potentially on offer, with more or less rigid amendment procedures and more or less extensive constitutional review by the judiciary provided for. Other important decisions would have to be made. For instance, would codification involve the formal entrenchment of the rights of sub-UK tiers of governance such as local and devolved government? How it would provide for the place of the UK within the EU, assuming EU membership would continue? What specific individual rights might be provided for? Properly resolving such issues would in turn require the establishment of a carefully designed codification process, that may well

have to be exceptionally broad and inclusive if it were to provide the necessary level of democratic legitimacy.

### **Questions arising**

At this stage of our work, the following questions are pertinent to the issues of the desirability or otherwise of introducing a codified UK constitution and the possible impact of establishing such an entity:

- 1) How significant is the lack of a codified UK constitution?
  
- 2) What are the main a) advantages and b) disadvantages for the UK of an uncodified constitution?
  
- 3) Are current arrangements for the amendment of the UK constitution satisfactory?
  
- 4) Is the current role for the judiciary in upholding basic constitutional principles and rights satisfactory?
  
- 5) What difference would codification of the UK constitution be likely to make? Are there any particular difficulties it might resolve? Are there any problems it might create?
  
- 6) What are the prospects for the introduction of a codified UK constitution? What sort of circumstances might be conducive to such a development and how likely are they to come about?

Further questions will be proposed at a later stage in relation to the process that might be used to codify the UK constitution, were a decision taken to do so, and the issues of substance it might engage with.

# THE EXISTING CONSTITUTION

## Introduction

The purpose of this paper is to consider the nature of the existing United Kingdom (UK) constitution, from the perspective of the debate about codifying – or not codifying – it. Three concerns are central. First is the *desirability or otherwise* of codification. Second is the *process* that might be required to effect codification, were a decision taken to do so. Third is an assessment of the *issues of substance* with which such a process would have to engage, if embarked upon.

The paper discusses what are the key characteristics of the UK constitution as an uncodified entity. It then positively defines important features of the UK constitution; and its different sources. Finally there is a discussion of ongoing political, social and constitutional developments in the UK and their implications.

Throughout, the existing constitution is critically scrutinised; and the difference that codification might make is considered. When the projected impact of codification is assessed, it is necessary to take into account both the potential for incorporating existing arrangements into a new codified entity; and for using a codification process to effect overt change. The extent to which the two approaches can genuinely be distinguished from each-other is also examined.

This report draws on sources including works produced in the legal, political science and historical disciplines; official inquiries and papers; international codified texts; and proposals for a UK constitutional text that have been produced to date. It utilises the *Cabinet Manual*,<sup>3</sup> published in October 2011, since this document was initially intended to stimulate debate in the area under consideration in this paper.

## Part One: The uncodified constitution and its implications

### *Definition and causes of the uncodified constitution*

The UK constitution is often defined using negatives. For instance, A. V. Dicey referred to ‘the non-existence in England [sic] of any written or enacted constitutional statute or charter’<sup>4</sup>. A section in the first chapter of *The Law and the Constitution* by Sir Ivor Jennings is entitled ‘NO WRITTEN CONSTITUTION’<sup>5</sup>; and the *Cabinet Manual* states:

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<sup>3</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government*, 1<sup>st</sup> edition October 2011 (Cabinet Office, London, 2011).

<sup>4</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, Indianapolis, 1982), reprint of eight edition, first published 1915, first reprint published 1885, p.38.

<sup>5</sup> Sir W. Ivor Jennings, *The Law and the Constitution* (University of London Press, London, 1959), p.7.

‘The UK does not have a codified constitution’<sup>6</sup>. These definitions have various implications but their direct meaning is that there is no single or interlinked set of official documents specifically labeled the ‘constitution’ of the UK. In lacking a codified constitution the UK exists among a small group of democracies internationally, alongside Israel and New Zealand.<sup>7</sup> Attempts to explain this peculiarity often focus on the idea that codified constitutions emerge from national crises such as revolution, or independence from foreign occupation.<sup>8</sup> It is sometimes noted that circumstances in the history of the UK and its different national components that might have turned out to be ‘constitutional moments’ of this sort, such as the turmoil of the seventeenth century, predated the theoretical developments necessary for the establishment of a codified constitution as now understood.<sup>9</sup>

It is nonetheless possible to identify in the history of the UK and its nations instruments which share some characteristics with a codified constitution, even if they preceded this concept.<sup>10</sup> They include *Magna Carta* (1215); the *Declaration of Arbroath* (1320); the *Bill of Rights* and *Scottish Claim of Right* (both 1689), and the *Treaty of Union* (1706, enacted by both the English and Scottish parliaments), as well as the acts affecting union with Ireland.<sup>11</sup> The *Instrument of Government*, introduced by Oliver Cromwell in 1653, is accepted by some as being a ‘written constitution’, albeit one in force for only a short period of time.<sup>12</sup> On this evidence, codification might not be regarded as entirely alien to the UK constitutional tradition. The UK has, moreover, been involved in the creation of various codified constitutions worldwide, in former colonies and following UK participation in military action ending in changes of regime.<sup>13</sup>

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<sup>6</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government, 1<sup>st</sup> edition October 2011* (Cabinet Office, London, 2011), p.2.

<sup>7</sup> See eg: Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), p.8. New Zealand has included its main constitutional provisions in its *Constitution Act 1986*, which is however largely a regular piece of legislation. Rodney Brazier, ‘Enacting a Constitution’, *Statute Law Review*, Volume 13, Number 2, Autumn 1992, p.104.

<sup>8</sup> See eg: Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009), pp.11-12; Sir W. Ivor Jennings, *The Law and the Constitution* (University of London Press, London, 1959), p.7.

<sup>9</sup> See eg: Rodney Brazier, *Constitutional Reform: Reshaping the British political system* (Oxford University Press, Oxford, 2008), pp.158-9.

<sup>10</sup> Frank Vibert, *Constitutional Reform in the United Kingdom – An Incremental Agenda* (Institute of Economic Affairs, London, 1990), p.21.

<sup>11</sup> See eg: Ministry of Justice, *The Governance of Britain*, CM 7170 (Stationery Office, London, 2007), p.12; Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework* (Stationery Office, London, 2009), Cm 7577, p.12. For discussion of some of these documents as possibly establishing rules fundamental to the UK constitution, see eg: Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart, Oxford, 2006). For a more sceptical view, see: Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), pp.13-15.

<sup>12</sup> Sir W. Ivor Jennings, *The Law and the Constitution* (University of London Press, London, 1959), p.7. See also Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), pp.15-16; K.C. Wheare, *Modern Constitutions* (Oxford University Press, London, 1966), p.9.

<sup>13</sup> A number of constitutions internationally were created by acts of the UK Parliament, such as the Australian Constitution. Anthony Bradley, ‘The sovereignty of Parliament – form or substance?’ in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), p.50.

However, in some accounts of UK constitutional history another narrative predominates. It is held that a powerful tradition of the supremacy of Parliament – or the doctrine of parliamentary sovereignty (as it came to be labeled, particularly from the late nineteenth century, prompted by the writing of the constitutional lawyer A. V. Dicey<sup>14</sup>) prevailed in place of a written statement of fundamental values.<sup>15</sup> Finally a further version of UK constitutional development, that of ‘common law constitutionalism’ exists, in which judicial decisions, involving the application of unwritten fundamental principles, formed the basis for the UK constitution, including even the authority of Parliament.<sup>16</sup>

### *Characteristics of the uncodified constitution*

What are the most important qualities associated with the uncodified nature of the UK constitution? First, rather than being contained in a specific text, the constitution is instead to be found spread across a range of sources. In the words of the *Cabinet Manual* of 2011: ‘It consists of various institutions, statutes, judicial decisions, principles and practices that are commonly understood as “constitutional”’.<sup>17</sup> Another government publication which appeared four years earlier, the *Governance of Britain* green paper, provided a slightly different account of the sources of the UK constitution, but presented the same general image of diffuseness. It noted that the:

vast majority of countries have codified, written and embedded constitutions. The UK has not. Instead, the British constitution has four principal sources – statute law, common law, conventions and works of authority, such as those of Walter Bagehot and A.V. Dicey.<sup>18</sup>

Second and following on from the previous feature, it is not possible to establish with certainty and wide agreement what precisely are all the contents of the constitution. In a discussion of the idea of defining constitutional legislation, the Royal Commission on the Reform of the House of Lords noted in 2000 that in the absence of a ‘written constitution there is no way of distinguishing between “constitutional” enactments and others’.<sup>19</sup> Defining the non-legislative portion of the constitution – such as conventions - would be more problematic still, since there is disagreement not only about whether particular practices and rules should be seen as constitutional but what their precise form is – and whether they exist at all.<sup>20</sup>

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<sup>14</sup> See: A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, Indianapolis, 1982), reprint of eight edition, first published 1915, first edition published 1885.

<sup>15</sup> For the fullest version of this thesis see: Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, Oxford, 1999).

<sup>16</sup> See eg: T. R. S. Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, Oxford University Press, 2001); D. Edlin, *Judges and Unjust Laws, Common Law Constitutionalism and the Foundation of Judicial Review* (University of Michigan Press, Ann Arbor, 2008); Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2005).

<sup>17</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government, 1<sup>st</sup> edition October 2011* (Cabinet Office, London, 2011), p.2.

<sup>18</sup> Ministry of Justice, *The Governance of Britain*, CM 7170 (Stationery Office, London, 2007), p.17.

<sup>19</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Stationery Office, London, 2000), Cm 4534, p.50.

<sup>20</sup> See eg: Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009), pp.222-8.

Third, as stated in the *Cabinet Manual*, the UK constitution has ‘evolved over time’<sup>21</sup>. An uncodified constitution has no clear moment of foundation in which a single process established its underlying nature. For this reason – and while codified constitutions can change also – more than most constitutions internationally, UK arrangements can be assessed as an historical conglomeration.<sup>22</sup> Some developments have been slow. For instance, the emergence of the office of Prime Minister as an officially acknowledged feature of UK governance took from the early eighteenth to the early twentieth centuries; and the premiership retains to the present a notably informal nature, founded more in convention than statute.<sup>23</sup> Other shifts have taken place swiftly. While the development of the office of Prime Minister largely involved the gradual appearance and change of different conventions, the Constitution Committee has described how ‘Statutory intervention takes place to achieve a step change’.<sup>24</sup> Examples of statutory ‘step change’ could include the *European Communities Act 1972*, which gave effect to UK membership of what is now the European Union; and the devolution legislation introduced since the late 1990s. But whether gradual or sudden, constitutional change in the UK has been piecemeal, neither part of a foundation exercise, nor within the clear framework of an established text.

What are the precise mechanics of constitutional change in the UK, and how do they differ from those of codified constitutions? Generally codified constitutions establish specific procedures for amending their contents which may involve more demanding requirements than those applying to the passing of regular law. For instance, legislative super-majorities or referendums may be involved.<sup>25</sup> Under the uncodified UK constitution, there is no specific amendment procedure or procedures. The means by which the constitution can be altered varies significantly according to the nature of the particular change being executed. Often effecting such change is easier than might be expected under a codified constitution.<sup>26</sup> In a comparative study of 36 international democracies published in 1999, Arend Lijphart ranked countries from 1.0 – 4.0 according to their constitutional flexibility or rigidity, with 1.0 being the most flexible. The UK was rated at 1.0, alongside the other two countries on the list with uncodified constitutions, Israel and New Zealand; and Iceland.<sup>27</sup>

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<sup>21</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government*, 1<sup>st</sup> edition October 2011 (Cabinet Office, London, 2011), p.2.

<sup>22</sup> For an account of this approach to the UK constitution, see: J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press, Cambridge, 2007), esp. pp.7-45.

<sup>23</sup> See: Andrew Blick and George Jones, *Premiership: the development, nature and power of the office of the British Prime Minister* (Imprint Academic, Exeter, 2010), pp. 110-18; and Andrew Blick and George Jones, ‘The Institution of Prime Minister’, Number 10 website, 2012.

<sup>24</sup> House of Lords Select Committee on the Constitution, *Changing the Constitution: The Process of Constitutional Change* (London, Stationery Office, 2002), HL 69, para. 26.

<sup>25</sup> See eg: Chapter VIII, Section 128 of the Australian Constitution; Article 39 of the German ‘Basic Law’.

<sup>26</sup> Lord Scarman, *Why Britain needs a Written Constitution*, *The Fourth Sovereignty Lecture* (Charter 88 Trust, London, 1992), p.4. For analysis of constitutional change internationally, see: Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart, Oxford, 2011).

<sup>27</sup> Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale, University Press, London, 1999), p.220.

Constitutional change in the UK can be brought about through acts of the UK Parliament, which despite the advent of devolution retains responsibility for most constitutional matters<sup>28</sup> (though devolved governance can also make an impact in this area, for instance through changes to local government). The overall legislative agenda of the UK Parliament is dominated by the executive, providing it with the initiative in this area, subject to the legal and other constraints discussed below. What are the internal procedures applying to the production of such legislation in Westminster? If they are published in draft form, bills may be considered by specially convened or existing parliamentary committees. The committees with an ongoing constitutional remit include the House of Commons Political and Constitutional Reform Committee; the Joint Committee on Human Rights (JCHR); and the House of Lords Select Committee on the Constitution (these committees may also investigate non-legislative constitutional developments such as the production of the *Cabinet Manual*). The closest equivalent to a general constitutional amendment procedure in the Commons is a convention – by definition not directly legally effective – that bills of ‘first class constitutional importance’ are considered by a committee of the whole House of Commons. But the definition of ‘first class constitutional importance’, like that of many conventions, is not precise and in practice the executive determines when this procedure is used.<sup>29</sup> Conventions may apply to specific forms of legislation of a constitutional nature, for instance regulating how the UK Parliament may legislate for the devolved areas. The Constitution Committee has recently called for the introduction of a ‘clear and consistent process’ for legislation effecting constitutional change.<sup>30</sup> In some instances, constitutional change can be effected through subordinate legislation provided for by parent acts, such as transfers of powers under devolution statutes.<sup>31</sup> Such instruments are subject to less extensive parliamentary oversight than primary legislation.

For primary legislation to pass through Parliament and obtain Royal Assent requires – under normal procedure – the consent of both the House of Commons and House of Lords. Some see the Lords as having acquired a special role in protecting constitutional principles from being undermined by the majority group in the Commons, that might otherwise be performed by a codified constitution.<sup>32</sup> But if the Lords resists the legislative will of the Commons, ultimately it can in most cases be bypassed under the Parliament acts. The clear purpose of the *Parliament Act 1911* was to facilitate the effecting of constitutional change in the face of a resistant Lords. Though deployed sparingly (seven times to date since 1911) it has been put to constitutional use, including

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<sup>28</sup> See eg: Scotland Act 1998, Schedule five Part one, ‘The Constitution’.

<sup>29</sup> Mathew Flinders, *Democratic Drift, Majoritarian Modification and Democratic Anomie in the United Kingdom* (Oxford University Press, Oxford, 2010) pp.219-22; Robert Hazell, *Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills, 1997-2005* (London, Constitution Unit, 2006).

<sup>30</sup> House of Lords Select Committee on the Constitution, *The Process of Constitutional Change* (London, Stationery Office, London, 2011) HL 177, p.11.

<sup>31</sup> Robert Hazell, ‘Devolution as a legislative partnership’ in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Imprint Academic, Exeter, 2005), p.296. See eg: Sections 30 and 63 of the *Scotland Act 1998*.

<sup>32</sup> Dawn Oliver, ‘Reforming the United Kingdom Parliament’ in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), p.170.

for the passing of the *Parliament Act 1949*, which amended the 1911 Act itself, reducing the delaying power of the Lords from three to two Sessions.<sup>33</sup> In this sense, the UK has legal provision to make constitutional change a *less* rather than *more* rigorous process.

Yet the 1911 Act included an exception to this procedure: legislation extending the life of a Parliament beyond five years, over which the Lords retained the veto it had possessed over all legislation before the Act was passed.<sup>34</sup> In effect the 1911 Act created a heightened constitutional amendment procedure in the one particular area in which the previous power of the Lords was preserved. A government can also *choose* to make a constitutional change measure subject to the Lords veto by introducing the bill providing for it in the Lords rather than the Commons (the Lords also has a final veto on statutory instruments). Requiring the approval of the Lords without the option of circumventing it could be seen as a legislative supermajority procedure in that majorities must be achieved in both Houses. But in each individual division over constitutional legislation, as over any other matter, provided quorums are met, a majority of one is sufficient. It may be that the *Fixed-term Parliaments Act 2011* has encouraged a modification of this principle, with its provision for immediate early general elections depending upon support from two thirds or more of all MPs (including vacant seats).<sup>35</sup> While this rule does not alter the legislative process as such, it can be seen as a constitutional safeguard involving a parliamentary supermajority in one chamber.

Beyond the House of Lords veto in certain areas, there is a further apparent legal regulation applying to the production by Parliament of legislation that could be regarded as implementing constitutional change. In some instances if Parliament sought to amend or repeal earlier primary legislation it would have to be explicit that it was doing so, or a court might well not regard it as having intended to effect such change (for further consideration of this qualification to the principle of 'implied repeal', see the section on parliamentary sovereignty below). This requirement could be seen as imposed by Parliament on itself, or as involving the discretion of the judiciary. It is generally accepted as applying to the European Communities Act and Human Rights Act. More radically, in the *Thoburn* case of 2002, Lord Justice Laws called for the recognition of 'a hierarchy of Acts of Parliament', comprising both 'ordinary' and 'constitutional' statutes. He held that the latter statutes were, unlike the former, not subject to implied repeal. Lord Justice Laws defined a constitutional statute as one which 'conditions the legal relationship between citizen and State in some general, overarching manner' or 'enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights'. The two criteria for a constitutional statute were 'of necessity closely related'. He gave as examples of this constitutional category *Magna Carta*, the *Bill of Rights 1689*, the 'Act of Union', various electoral reform acts, the *Scotland Act 1998* and the *Government of Wales Act 1998*.<sup>36</sup> However, his remarks did not relate directly to the

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<sup>33</sup> See: House of Lords Select Committee on the Constitution, *Constitutional aspects of the challenge to the Hunting Act 2004* (London, Stationery Office, 2006), HL 141.

<sup>34</sup> Section 2 (1).

<sup>35</sup> Section two 'Early parliamentary general elections'.

<sup>36</sup> Anthony Bradley, 'The sovereignty of Parliament – form or substance?' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), pp.51-2;

judgement being made and are controversial.<sup>37</sup> Nonetheless if this concept came to be established it would entail the emergence of a class of entrenched constitutional acts. If Parliament wished to repeal them, it would have to follow the procedure of expressly stating that it was doing so.

Increasingly since the 1970s another extra-parliamentary player has been introduced into the production of constitutional legislation: the electorate. Voters may express their views directly through referendums – but only if Parliament provides for them. For instance, entry into the European Economic Community in 1973 was eventually subject to retrospective approval in a 1975 referendum; while devolution was introduced after approval through referendums in the areas concerned in the late 1990s.<sup>38</sup> In these instances, Parliament was not obliged *in law* to abide by the results of these votes (though political pressures should of course not be overlooked). However, Parliament bound itself to accept a ‘yes’ vote in the referendum on the extension of Welsh devolution in 2011<sup>39</sup>; and the *European Union Act 2011* includes provisions requiring the holding of referendums which can veto a variety of extensions of sovereignty pooling at EU level.<sup>40</sup> The latter law stands out not only because referendum outcomes are intended to bind Parliament but because it applies to a whole class of possible future actions rather than a planned vote on a single specified issue. In this sense it resembles more closely a codified constitutional amendment clause. However, Parliament could – at least in more orthodox constitutional interpretations – repeal the European Union Act (or any other legislation providing for referendums) at any point without following a special procedure. The UK government is also bound by law – giving expression to an international treaty, the *Belfast Agreement* of 1998 – to introduce into Parliament legislation giving effect to the secession of Northern Ireland, if supported by its population in a referendum<sup>41</sup> (though parliamentary approval of this legislation would be required). It is also now generally accepted that a referendum in Scotland could enable it to leave the UK, though the precise details remain in doubt. Yet while referendums have gained a role in the constitutional alteration process, substantial changes, such as the Human Rights Act; the *Constitutional Reform Act 2005* (which amongst other measures created the UK Supreme Court); and the Fixed-term Parliaments Act continue to be introduced without the use of referendums (though the third of these acts was subject to an absolute veto by the Lords, had it allotted to deploy it).

Constitutional change does not necessarily involve acts of Parliament being passed at all.<sup>42</sup> The Constitution Committee remarked in 2002 that ‘Constitutional change is not

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[2002] EWHC 195 Admin, paras 62-3; Sir John Laws, ‘Constitutional Guarantees’, *Statute Law Review*, Vol. 29, Issue 1, pp.1-10.

<sup>37</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press, Cambridge, 2010), pp.312-18.

<sup>38</sup> Other attempts to introduce devolution in the 1970s and 2000s failed the referendum test.

<sup>39</sup> *Government of Wales Act 2006*, Section 103.

<sup>40</sup> *European Union Act 2011*, Part One and Schedule One.

<sup>41</sup> *Northern Ireland Act 1998*, Section One and Schedule One. Provision regulating the possible secession of Northern Ireland can be traced to the *Ireland Act 1949*, which required the approval of the Northern Ireland Parliament, rather than a referendum.

<sup>42</sup> Lord Scarman, *Why Britain needs a Written Constitution, The Fourth Sovereignty Lecture* (Charter 88

simply a matter of legislation...The Government may generate policy on constitutional issues which does not require primary legislation in order to carry it into effect.' Changes, the Committee went on, could be brought about using 'prerogative powers or delegated legislation or change to the internal procedures of a legislative body'. They could 'also occur less formally through the development of practice and procedure'. The Committee noted that 'One of the sources of the constitution takes the form of conventions: rules of behaviour that are followed in order to make the constitution work, but which are not enforceable in the courts or by either House of Parliament'.<sup>43</sup>

As the reference by the Committee to the government being the generator of change suggests, many of the means by which constitutional modification may be effected afford considerable discretion to the executive. As discussed above, it dominates the legislative process. Moreover, codes such as the *Cabinet Manual*, of considerable constitutional significance in its own right and arguably a means of effecting change, can be issued by the government under the Royal Prerogative, with no formal role for Parliament or any other external institution at all. When producing the manual in draft, the government avowedly used a consultation process applicable to general policy development, rather than any heightened procedure.<sup>44</sup> In addition to being driven by the executive, constitutional alteration in the UK may come about without being specifically willed by any player at any precise point. The development during the twentieth century of the convention that the Prime Minister must be a member of the House of Commons, as opposed to the Lords, fits into this category.

While generally there are less substantial barriers to constitutional change in the UK (at least from the perspective of the UK government) than might be expected under a codified constitution, there are some features of the UK constitution that it might be exceptionally difficult or perhaps impossible to alter. For instance, some accounts of the doctrine of parliamentary sovereignty argue that it is *continuing*, meaning that Parliament cannot abrogate its own sovereignty.<sup>45</sup> (Others, however, regard it as 'self-embracing', and possible for Parliament itself to alter or perhaps even dispense with.<sup>46</sup>) Another doctrine held by some to be immune from fundamental renunciation is that of the rule of law. For instance, it might be held that judges have a right or duty not to apply legislation that removed their ability to exercise judicial review (though this view conflicts with adherence to the doctrine of parliamentary sovereignty).<sup>47</sup>

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Trust, London, 1992), p.4.

<sup>43</sup> House of Lords Select Committee on the Constitution, *Changing the Constitution: The Process of Constitutional Change* (London, Stationery Office, 2002) HL 69, para. 26.

<sup>44</sup> Andrew Blick and Peter Hennessy, *The Hidden Wiring Emerges: the Cabinet Manual and the working of the British constitution* (ippr, London, 2011).

<sup>45</sup> H. W. R. Wade, 'The Basis of Legal Sovereignty', *Cambridge Law Journal* (1955), pp.172-197.

<sup>46</sup> For an account of the continuing and self-embracing theories see: H. L. A. Hart, *The Concept of Law*, Second Edition (Clarendon Press, Oxford, 1997), pp.149-50.

<sup>47</sup> For discussion of these issues see eg: Jeffrey Jowell, 'Parliamentary Sovereignty under the New Constitutional Hypothesis', *Public Law* (2006), Autumn, pp.562-80; Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009); Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press, Cambridge, 2010). See also:

A fourth characteristic of the uncodified constitution exists. Just as there is no single and/or explicit procedure for constitutional amendment, nor is there a specific legal mechanism for upholding the constitution. In the words of A.V. Dicey in his *Introduction to the Study of the Law of the Constitution*, first published in 1885:

There does not exist in any part of the British Empire any person or body of persons, executive legislative or judicial, which can pronounce void any enactment on the ground of such enactment being opposed to the constitution...<sup>48</sup>

While the reference to the Empire is anachronistic the basic principle described by Dicey continues to apply to the UK. There remains a particular taboo (subject to the limited protection from implied repeal discussed in this paper) about the idea of the judiciary being able to disapply or declare void acts of Parliament. In 2008 the JCHR considered the prospects for a UK Bill of Rights. In a discussion of an appropriate role for the courts in upholding rights, it concluded:

We are not in favour of a Bill of Rights which confers a power on the courts to strike down legislation. We consider this to be fundamentally at odds with this country's tradition of parliamentary democracy.<sup>49</sup>

Under a codified constitution, it might be that the courts – or one central court – would be able specifically to assess the constitutionality of official actions and legislation – including possibly acts of Parliament – if necessary disapplying or voiding them for non-compliance. For instance, Article 7 of Richard Gordon Q.C.'s proposed UK constitution ('the Gordon constitution') states:

Laws, whenever made, are to be interpreted and applied consistently with this Constitution and if they cannot be so interpreted and applied must be declared to be unconstitutional by the Supreme Court.<sup>50</sup>

The present lack of such provision helps explain the position of the UK within another of the international comparisons made by Lijphart, dealing with the strength of judicial review. On a scale of 1.0 (no judicial review) to 4.0 (strong judicial review), the UK was rated 1.0. Countries receiving the same ranking included, once again, Israel and New Zealand.<sup>51</sup> However, amongst codified constitutions, approaches to constitutional review by the judiciary vary. There is a theoretical distinction between the idea of disapplying legislation, which leaves it on the statute book, and declaring it void, which involves it being held legally never to have existed. The extent to which constitutional review is confined to a single central court, or carried out by on a more dispersed basis, differs.

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<sup>48</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, Indianapolis, 1982), reprint of eight edition, first published 1915, first edition published 1885, p.39.

<sup>49</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?* HL 165 – I/HL 150 – I (Stationery Office, London, 2008), p.51.

<sup>50</sup> Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), p.47.

<sup>51</sup> Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale, University Press, London, 1999), p.226.

Abstract review of constitutional compliance may be possible; or it may only be permitted in cases between specific parties.<sup>52</sup> A codified constitution might seek through exhortation to discourage constitutional litigation;<sup>53</sup> or judicial constitutional review of primary legislation and treaties may be forbidden altogether.<sup>54</sup> Mechanisms also exist internationally to ensure that legislation is assessed for its constitutional compliance *prior* to its enactment, rather than relying upon judicial action after it has been introduced.<sup>55</sup>

### *The debate: an outline*

While the UK constitution is often defined as uncodified, this position is not always accepted as desirable. In recent years there has been a rise in interest in the possibility of establishing a codified constitution for the UK. The Liberal Democrat Party has been a longstanding supporter of a codified constitution<sup>56</sup>; and the Labour Party has begun to show more interest in the idea. Late on in the tenure of Gordon Brown as Prime Minister a process that might lead to the introduction of a codified constitution was initiated, but no progress was made in advance of the 2010 General Election.<sup>57</sup> Labour included in its most recent General Election manifesto a pledge to establish ‘an All Party Commission to chart a course to a Written Constitution’.<sup>58</sup> But the debate should not be seen primarily as partisan. For instance, one of the most prominent advocates of a codified constitution was the senior Conservative politician Lord Hailsham, who supported this outcome in a 1976 lecture.<sup>59</sup>

A number of possible arguments both in favour of and against the uncodified nature of the UK constitution exist. The Royal Commission on the Reform of the House of Lords set out a key part of the case for the present nature of the UK constitution when stating that:

The British constitution...has shown itself over centuries to be extraordinarily dynamic and flexible, with the capacity to evolve in the light of changes in circumstances and in society. There are many who would argue that it is this very flexibility which has allowed the United Kingdom to avoid the kind of upheavals

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<sup>52</sup> Aalt Willem Heringa and Philipp Kiiver, *Constitutions Compared: An Introduction to Comparative Constitutional Law* (Intersentia, Antwerp, 2007), pp.96-7.

<sup>53</sup> See: Constitution of the Republic of South Africa, ss 41 (h) (vi).

<sup>54</sup> Netherlands Constitution, Article 120.

<sup>55</sup> See eg: the role of the Council of State in considering government bills as provided by Article 39 of the French constitution.

<sup>56</sup> See eg: Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83.

<sup>57</sup> House of Commons Political and Constitutional Reform Committee, *Lessons from the Process of Government formation after the 2010 General Election* (Stationery Office, London, 2011), HC 528, ev. 81.

<sup>58</sup> Labour Party, *A future fair for all: The Labour Party Manifesto 2010* (Labour Party, London, 2010), 9:3.

<sup>59</sup> Lord Hailsham, *Elective Dictatorship: The Richard Dimbleby Lecture, 1976* (British Broadcasting Corporation, London, 1976). See also: Frank Vibert, *Constitutional Reform in the United Kingdom – An Incremental Agenda* (Institute of Economic Affairs, London, 1990). For a discussion of party political issues associated with constitutional codification, see: Rodney Brazier, ‘How Near is a Written Constitution’, *Northern Ireland Legal Quarterly*, Vol 52, No.1, Spring 2001, pp.1-19.

which have forced other countries to return to the constitutional drawing board.<sup>60</sup>

The lack of stringent amendment procedures, a general feature of the UK constitution, can be seen as positive in that it ensures that democratic processes in the present are not constrained by decisions taken in the past.<sup>61</sup> Existing UK constitutional arrangements might be seen as desirable on the grounds they ensure that power resides in the hands of politicians, rather than the judiciary. Under a system of constitutional review, the latter group might be drawn into making and impacting upon political decisions;<sup>62</sup> and their appointments might come to be made on a partisan basis. There is a school of thought that an enhanced constitutional role for the courts is democratically inappropriate; and may not even be effective (though those who argue this case may hold that there has already been a rise in judicial authority from within the existing UK constitution).<sup>63</sup> In so far as it might bring about such an outcome, codification could be seen as undesirable. The lack of clarity surrounding features of the uncodified UK constitution has been portrayed as a sometimes helpful means of discouraging clashes between institutions and avoiding disagreements about what precisely the arrangements should be. A codification process and the constitution it produced, then, might lead to problematic disagreements. Furthermore it is argued that in the absence of a pressing need for codification, the case for such an exercise might not be sufficiently strong.<sup>64</sup>

Codified constitutions do not necessarily effectively describe how a system works in practice.<sup>65</sup> The text may only cover a narrow range of actual practice. It may be overlain by conventions which substantially alter the reality of how the constitution operates; or operate to a considerable extent on a basis of judicial interpretation of its words. Codified constitutions may simply not be followed from the outset, for instance appearing to entrench democratic values but failing to stop them being abused. Indeed they may be introduced for propaganda purposes by regimes which have no intention of adhering to them.<sup>66</sup> They may be supplanted by dictatorial regimes regardless of their supposedly being entrenched. The UK could be held already to enjoy strong observance of democratic principles, such as individual rights, without possessing a codified

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<sup>60</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Stationery Office, London, 2000), Cm 4534, p.50. For support for the flexibility idea, see further: Robert Hazell, 'Devolution as a legislative partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Imprint Academic, Exeter, 2005), p.296.

<sup>61</sup> For a democratic critique of features of the US codified constitution, see: Robert A. Dahl, *How Democratic Is the American Constitution?* (Yale University Press, New Haven, 2001).

<sup>62</sup> For analysis of strong judicial review under codified constitutions, see (for Germany): Christine Landfried, 'The Impact of the German Federal Constitutional Court on Politics and Policy Output', *Government and Opposition* (1995), 20, pp.522-41; and (for the U.S) Matthew J. Franck, *Against the imperial judiciary: The Supreme Court vs. the sovereignty of the people* (University Press of Kansas, Kansas, 1996). For a general analysis see: Alec Stone Sweet, 'The politics of constitutional review in France and Europe', *International Journal of Constitutional Law* (2007), Vol. 5, Issue One, pp.69-92.

<sup>63</sup> Adam Tomkins, *Our Republican Constitution* (Hart, Oxford, 2005), p.25; J. A. G. Griffith, *The Politics of the Judiciary*, Fifth Edition (Fontana, London, 1997).

<sup>64</sup> N. W. Barber, 'Against a written constitution', *Public Law* (2008), Spring, pp.11-18.

<sup>65</sup> Adam Tomkins, *Public Law* (Oxford University Press, Oxford, 2003), p.8.

<sup>66</sup> See the Soviet Union constitutions of 1936 and 1977. Dawn Oliver, 'Written constitutions: principles and problems' in *Parliamentary Affairs*, Vol. 45, No. 2, 1992, p.139.

constitution.<sup>67</sup> In this sense it might be argued that while codified constitutions are not wrong in themselves, the UK does not need one.

Various arguments can be made against the uncoded constitution, and by extension in favour of a codified constitution.<sup>68</sup> The mere exceptionality of UK arrangements could be seen as a defect, requiring bringing into line with international democratic standard practice. For some, the term constitution, rather than applying to the governmental arrangements of any given territory<sup>69</sup>, is descriptive of a norm to be aspired towards. On this interpretation there are various qualifications that must be met before an entity can be regarded as a true constitution, such as being expressed in a written text, deriving its authority from the people, and being prior to the various political institutions which it establishes.<sup>70</sup> Michael Foley describes how the UK constitution ‘is said to fall foul of Thomas Paine’s celebrated criteria of a constitution – namely, that it should be antecedent of government; that it should define the authority of government; and that where the distinction between the constitution and the government is not observed there is in effect no constitution’.<sup>71</sup> A codification exercise might correct these supposed defects. It can be held that the lack of a codified constitution means that there are not sufficiently effective limitations upon government; and that individual or human rights are not properly protected.<sup>72</sup> Moreover, it has been argued that under existing uncoded arrangements the UK executive – through its dominance of the Commons, the pre-eminent parliamentary Chamber – is rendered too strong in relation to the legislature and judiciary.<sup>73</sup>

Support for codification can be founded in the idea that it would have the desirable effect of creating greater clarity about what the constitution is, particularly to non-experts.<sup>74</sup> Codification might introduce a systematic means of constitutional amendment that could not easily be commandeered by a given government; and making it clear how the constitution can change. A more rational and possibly principled approach to

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<sup>67</sup> James Cornford, ‘On Writing a Constitution’, *Parliamentary Affairs*, Vol. 44, No.4, October 1991, p.570.

<sup>68</sup> See eg: Jeffrey Jowell and Dawn Oliver, ‘Editors’ Introduction’ in *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), p.5; Vernon Bogdanor and Stefan Vogenauer, ‘Enacting a British Constitution: Some Problems’, *Public Law* (2008), Spring, pp.38-57. But see also: O. Hood Phillips Q.C., *Reform of the Constitution* (Chatto & Windus, Charles Knight, London, 1970), p.156.

<sup>69</sup> For different meanings of the term constitution, see eg: Anthony King, *The British Constitution* (Oxford University Press, Oxford, 2007), p.3.

<sup>70</sup> Thomas Paine, *Rights of Man* (Penguin, London, 1984).

<sup>71</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press, Manchester, 1999), p.2.

<sup>72</sup> Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, p.4.

<sup>73</sup> Lord Hailsham, *Elective Dictatorship: The Richard Dimbleby Lecture, 1976* (British Broadcasting Corporation, London, 1976); Lord Scarman, Why Britain needs a Written Constitution, The Fourth Sovereignty Lecture (Charter 88 Trust, London, 1992), p.7.

<sup>74</sup> O. Hood Phillips Q.C., *Reform of the Constitution* (Chatto & Windus, Charles Knight, London, 1970), pp.149-50; Lord Scarman, Why Britain needs a Written Constitution, The Fourth Sovereignty Lecture (Charter 88 Trust, London, 1992); Rodney Brazier, ‘How Near is a Written Constitution’, *Northern Ireland Legal Quarterly*, Vol 52, No.1, Spring 2001, p.7.

constitutional modification might be brought about.<sup>75</sup> Individual rights and the position of different tiers of government could be protected from encroachment authorised by simple majorities in the House of Commons.<sup>76</sup> Finally, the process of constitution-building, it might be claimed, could itself be a valuable exercise. It would enable a considered approach to the totality of constitutional arrangements. Furthermore it would make possible a new start for the UK political system, if such an event is regarded as desirable; and an investigation and elucidation of the founding first principles.<sup>77</sup> There is tension between this final possible justification for codification and an important tradition in political thought in the UK, as espoused by Edmund Burke. In his 1790 work *Reflections on the Revolution in France* he claimed:

The very idea of the fabrication of a new government, is enough to fill us with disgust and horror. We...wish, to derive all we possess as an inheritance from our forefathers...All the reformations we have hitherto made, have proceeded upon the principle of reference to antiquity; and I hope...that all those which possibly may be made hereafter, will be carefully formed upon analogical precedent, authority and example.<sup>78</sup>

However, the development of another revolution of Burke's time, to which he was more sympathetic, the American, demonstrated the possibility of a movement leading to the establishment of a codified constitution which drew on sources of authority from within constitutional tradition. As J. C. Holt notes in his work, *Magna Carta*, 'for the Americans the chief value of the Charter lay in the fact that it was a concession, which had been granted or confirmed in the past; it was, as it had always been, a fault in the armour of authority...in America some of its principles came to be established as individual rights enforceable against authority in all its forms, whether legislative, executive or judicial, whether represented by Crown, governor or council, or later by state and federal government'.<sup>79</sup>

### *Public opinion*

Beyond the views of the experts, another matter to be taken into account is public opinion. The periodic 'State of the Nation' polling conducted on behalf of the Joseph Rowntree Reform Trust (JRRT) provides evidence of popular support for the idea of a codified constitution.<sup>80</sup> The following table shows the percentage of respondents that said they either strongly agreed or tended to agree with the statement: 'Britain needs a written constitution, providing clear legal rules within which government ministers and civil servants are forced to operate' over time. The total has tended to be in the high 60s or low

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<sup>75</sup> Frank Vibert, *Constitutional Reform in the United Kingdom – An Incremental Agenda* (Institute of Economic Affairs, London, 1990), p.21; Rodney Brazier, 'Enacting a Constitution', *Statute Law Review*, Volume 13, Number 2, Autumn 1992, p.122.

<sup>76</sup> James Cornford, 'On Writing a Constitution', *Parliamentary Affairs*, Vol. 44, No.4, October 1991, p.568.

<sup>77</sup> See: Graham Allen MP, 'The need for a written constitution' in Chris Bryant MP (ed.), *Towards a new constitutional settlement* (Smith Institute, London, 2007), pp.124-8.

<sup>78</sup> Edmund Burke, *Reflections on the Revolution in France* (Penguin, London, 2004, first published 1790), p.117.

<sup>79</sup> J. C. Holt, *Magna Carta* (Cambridge University Press, Cambridge, 1992, Second Edition), p.17.

<sup>80</sup> For details, see: <http://www.jrrt.org.uk/publications>

70s, apart from in 2004, when a different range of options seems to have boosted apparent support for a ‘written constitution’:

2000: 71%

2004: 80 %.<sup>81</sup>

2006: 68 %

2010: 73%

However, it might be held that these data do not provide a clear indication as to how the public would respond to a prolonged debate about the possibility of a codified constitution. For instance, were a referendum held on this issue, a ‘no’ campaign would offer arguments that would seek to counteract the possible popular appeal of greater regulation of ministers and officials, included in the wording of the question in this survey.

Furthermore, while respondents may like the general idea of a codified constitution when put to them, they may not regard it as a pressing issue, even when compared with other possible constitutional reforms. The 2008 Hansard Society *Audit of Political Engagement*<sup>82</sup> showed that respondents ranked ‘Britain’s unwritten constitution’ as the least pressing constitutional problem affecting the UK. When asked which two or three – if any – of a list of issues were ‘the most urgently in need of change’, they responded in the following way:

How the Human Rights Act works in practice	26%
How political parties are funded	24%
Powers that the government can exercise without the approval of Parliament	23%
Britain's membership of the European Union	23%
Scottish MPs being allowed to vote on English issues in the House of Commons	22%
The way members of the House of Lords are chosen	16%

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<sup>81</sup> A different range of options were available to respondents for the 2004 survey. The other surveys included both ‘neither’ and ‘don’t know’ as options; the 2004 survey only included ‘don’t know’, seemingly producing a lift in stated support for a ‘written constitution’.

<sup>82</sup> <http://hansardsociety.org.uk/blogs/publications/archive/2008/03/27/audit-of-political-engagement-5-march-2008.aspx>

How votes cast in a general election translate into seats in the House of Commons	14%
Not having a new Bill of Rights	14%
Not having a fixed date for general elections	12%
People aged between 16 and 18 not being able to vote at general elections	9%
Britain's unwritten Constitution	9%
None of these	4%
Don't know	16%

While nine per cent of people did identify the unwritten constitution as a pressing issue, seven per cent more than that registered as 'don't know'. It could be held that a constitutional codification process would enable the simultaneous consideration of a number of different constitutional issues, including those regarded as more important than the 'unwritten Constitution' on this list. However, even the highest rated issue, the working of the Human Rights Act, was identified by only 26 per cent as pressing.

When asked in the same survey the extent to which they were satisfied or dissatisfied with the same set of constitutional arrangements, the split for 'Britain's unwritten constitution' amongst respondents was:

Very satisfied	Fairly satisfied	Neither/nor	Fairly dissatisfied	Very dissatisfied	Don't know
4	15	40	12	6	25

The overall division between those who were satisfied and those who were dissatisfied was 19 per cent to 18 per cent. At the same time the majority, 65 per cent, were non-committal, registering as neutrals or don't knows. When asked about their knowledge and understanding of the same issues, 'The constitutional arrangements governing Britain' came bottom. The figures for knowing very well or fairly well were:

How votes cast in a general election translate into seats in the House of Commons	49
Whether only English MPs should vote on English issues in the House of Commons	48
Lowering the age at which people are eligible to vote in a UK general election from 18 to 16	48

How political parties are funded	39
How the date of a general election is chosen	38
How the Human Rights Act works in practice	34
The European Union	28
Whether Britain needs a new Bill of Rights	28
Proposed reforms of the membership of the House of Lords	26
The powers that government can currently exercise without Parliament's approval	22
The constitutional arrangements governing Britain	20

During late 2009 and early 2010, as part of the *Governance of Britain* programme introduced by Gordon Brown when he became Prime Minister in 2007, the Ministry of Justice held a number of 'deliberative events' intended to establish in more depth than regular opinion polling what were the views of members of the public on a variety of constitutional issues. They were held in England, Scotland and Wales but not Northern Ireland, where a separate bill of rights process was ongoing. Sampling was designed to represent the overall characteristics of the population, though it could not do so in a statistical sense. There were three stages of events. First they were held in five regions involving 457 participants in total (500 were invited, 100 for each). Then 225 participants returned to two reconvened events at Gateshead and Birmingham (240 were invited, 48 from each regional event). Finally there was a national event in London attended by 110 of those who had taken part in the reconvened event (120 were invited, 24 from each region). The events used plenary sessions, round table discussions and polling. Participants were provided with expert presentations with the objective of supplying a balanced account of the issues involved.<sup>83</sup> One of the issues addressed was 'the potential for a written constitution'.<sup>84</sup>

Participants saw the possible advantages of a 'written constitution' as being the provision of 'clarity and certainty to individuals about how constitutional arrangements worked'. Its establishment might 'invigorate democracy in the United Kingdom' and could 'instil a sense of pride in Britain's democracy', contributing to the existence of 'national identity'. A 'written constitution' could also 'provide an insight for migrants into how the British system of government is organised and what key principles are upheld'. It could, participants felt, 'provide a transparent, secure framework which would constrain future

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<sup>83</sup> Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (Ministry of Justice, London, 2010), pp.10-18.

<sup>84</sup> Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (Ministry of Justice, London, 2010), p.7.

governments from making substantial changes to existing rights and responsibilities'. The possible drawbacks identified by participants included that a 'written constitution' might expend time and financial resources on the 'unnecessary replication of existing legislation'. The issue of the potential 'inflexibility' of a 'written constitution' was raised. It was felt there was a danger that 'once formalised, it could not be changed in the light of social changes'. Concerns were expressed about the costs of litigation arising from a 'written constitution'. Overall polling on the 'written constitution' issue showed mixed views. Just over four in 10 participants agreed with 'the introduction of a written constitution', while just under four in 10 were opposed.<sup>85</sup>

## Part Two: Key features of the UK constitution

The value of considering the UK constitution from the perspective of its uncodified status is widely acknowledged. Though some dispute the significance of this characteristic<sup>86</sup>, the international exceptionality alone of the constitution being uncodified makes it difficult to ignore. But it is important to avoid creating false dichotomies with codified arrangements. For instance, it is only relatively recently that France – one of the homes of the codified constitution – began seriously to develop entrenchment and justiciability.<sup>87</sup> Moreover, there is a need positively to analyse the nature of the UK constitution and its components, a purpose with which the next two parts of this paper are concerned. Part Two, the present part, deals with certain key features of the constitution, considering normative values, operational rules and institutions. One reason for this approach is that the distinction between the first two categories is not always clear. For instance, constitutional conventions might be seen both as stipulations about how those who operate the constitution ought to behave, and rules (though not legally enacted) governing their behaviour. Another is that a codified constitution, were one introduced for the UK, would probably include provisions currently existing both as values and rules in the current uncodified entity; as well as defining institutions, which can be composed of a mixture of rules and values.<sup>88</sup> Through assessing the different components of the UK constitution, the difference that might be made by codification, and its possible value, can be understood.

### Representative democracy

The principle of representative democracy is widely accepted as fundamental to the contemporary UK constitution. Paragraph 1 of the *Cabinet Manual* opens with the words

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<sup>85</sup> Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (Ministry of Justice, London, 2010), pp.53-4.

<sup>86</sup> See eg: Anthony King, *The British Constitution* (Oxford University Press, Oxford, 2007), p.4; Adam Tomkins, *Public Law* (Oxford University Press, Oxford, 2003), p.7.

<sup>87</sup> See eg: Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009), pp.83-4.

<sup>88</sup> For an approach along these lines to the UK constitution, see Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and materials*, Seventh Edition (Cambridge University Press, Cambridge, 2011).

‘The UK is a Parliamentary democracy...’.<sup>89</sup> In 2001, the House of Lords Select Committee on the Constitution identified ‘Representative Government’ as one of its ‘five basic tenets of the United Kingdom Constitution’ (though it did not specify that it was ‘democratic’).<sup>90</sup> If the UK constitution were codified, it is plausible that it would contain a preamble or declaratory clause which in part set out this concept.<sup>91</sup> The preamble to the draft UK constitution first produced in 1991 by the Institute for Public Policy Research (‘the IPPR constitution’) included the statement:

that the informed consent and active participation of the people are fundamental to a democratic system of government, which must be based on free elections by universal adult suffrage and whose institutions must provide for the expression of national, regional and local loyalties and enhance the opportunities for self-government in all institutions, public and private<sup>92</sup>

But the preeminence of principles of representative democracy is a relatively new development.<sup>93</sup> The appearance of the features of the UK constitution which now facilitate democracy can be seen – retrospectively – as having some foundation in the struggles of the seventeenth century and gaining pace in the first half of the nineteenth century (in particular with the *Representation of the People Act 1832*), reaching maturity in the early twentieth century (particularly through the *Representation of the People* acts of 1918 and 1928). Over this period the UK constitution developed in certain ways which – whether or not it was always the intention at each specific point – ultimately allowed it to accommodate democratic values.

A series of reform acts expanded the electoral franchise for both the Commons and local government. The *Parliament Act 1911* legally circumscribed the legislative and financial powers of the unelected House of Lords, solidifying the primacy of the elected Commons; and reduced the maximum duration of a Parliament from seven to five years. These shifts were of the statutory ‘step change’ variety identified by the Constitution Committee, as noted in Part One above. Other developments were more subtle and lacking in direct legal force, but no less important. Various conventions grew up around the exercise of the Royal Prerogative.<sup>94</sup> In part they expressed the emergent principle that ‘the Sovereign does not become publicly involved in the party politics of government’.<sup>95</sup> The notion of Commons primacy over the Lords, which dates back a number of centuries,

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<sup>89</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government, 1<sup>st</sup> edition October 2011* (Cabinet Office, London, 2011), p.2.

<sup>90</sup> House of Lords Select Committee on the Constitution, *Reviewing the Constitution: Terms of Reference and Methods of Working* (London, Stationery Office, 2001), HL 11, para. 21.

<sup>91</sup> See eg: Spanish Constitution, preamble.

<sup>92</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), p.31.

<sup>93</sup> For the undemocratic sentiments of one influential constitutional observer in the late nineteenth century, see: Walter Bagehot, *The English Constitution* (Oxford’s World Classics, Oxford, 2001), first edition 1867, p.8.

<sup>94</sup> E.C.S. Wade, ‘Introduction’ to A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1964), clv.

<sup>95</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government, 1<sup>st</sup> edition October 2011* (Cabinet Office, London, 2011), p.3.

was also expressed through conventions. As already noted, during the twentieth century the convention appeared that the Prime Minister could be drawn only from the Commons, not the Lords. Conventions developed after the Second World War that restricted the Lords in its obstruction of government legislation, partly an outgrowth of the doctrine of the mandate, another feature – if controversial – of the rise of democracy.<sup>96</sup> The ascendancy of the Commons, combined with the expansion of the franchise, might be seen as transmuting the doctrine of parliamentary sovereignty into an instrument of democracy, since under the new parliamentary power-balance it was exercised to a larger extent at the behest of elected representatives.<sup>97</sup>

On the one hand, the development of the UK constitution into a representative democracy could be regarded as a demonstration of the effectiveness of its uncodified nature. Through flexibility, the argument could run, major change was achieved and sustained without excessive disruption and discontinuity. Other countries which have codified their constitutions at various points – such as Germany – have subsequently endured periods of dictatorship which the UK has not. On the other hand, it could be noted that the basic underpinnings of UK democracy – such as the franchise; Commons primacy; provision for parliamentary oversight of the executive; and the constitutional monarchy – do not enjoy the formal entrenchment and enforceability they might under a codified constitution, and which, some might believe, they merit. They exist either in statute, which (in all cases except the extension of the life of a Parliament) can be overturned by regular legislative procedure and is not clearly protected by specific judicial constitutional review; or other forms such as conventions, which are arguably more frail still, at least from a legal perspective. Moreover, perhaps because there has never been a complete overhaul of the constitution based on democratic principles that a codification exercise might provide, pre-democratic anomalies, such as an unelected second chamber, persist.

Attention can also be drawn to arguable systemic flaws associated with an uncodified constitution that has been adapted to permit democracy. The very legislative procedure created by the Parliament acts to ensure that the elected chamber prevailed could theoretically be used to undermine democracy. The existence of potential threats of this sort was acknowledged and guarded against by the provision in the *Parliament Act 1911*<sup>98</sup> that the Lords would retain its veto over legislation extending the life of a Parliament. But beyond this safety device, there are no clear limits on the uses to which the Parliament acts could be used to bypass the Lords in passing legislation impacting negatively upon the democratic nature of the UK constitution. Indeed the Commons could even attempt to remove the Lords veto over extensions to the life of a Parliament by using the parliament acts; and then extend the life of a Parliament, again using the Parliament acts. In these senses Commons primacy, which helps the uncodified UK

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<sup>96</sup> Lord Hailsham, *Elective Dictatorship: The Richard Dimbleby Lecture, 1976* (British Broadcasting Corporation, London, 1976), pp.9-10.

<sup>97</sup> Anthony Bradley, 'The sovereignty of Parliament – form or substance?' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), pp.66-7.

<sup>98</sup> Section 2 (1).

constitution give expression to democratic values, could also be used to undo them.<sup>99</sup> In the words of Lord Scarman ‘the democratisation of a part has threatened the constitutional settlement as a whole; indeed the concentration of power in the Commons has capsized the old system of checks and balances’.<sup>100</sup>

Scenarios in which the executive uses Commons primacy for a full assault on democracy could be seen as too extreme to be relevant. It might be held that the UK has never seriously faced them and that here is proof that its uncodified constitution has been effective. Moreover, to restrain the elected legislative chamber through amendment procedures or judicial review could be regarded as anti-democratic. On the other hand, it could be felt that there are a range of possible legislative changes that would not entail an unraveling of democracy, but have important implications for it and should be subject to constitutional amendment procedures, such as major alterations to rules about the size and number of constituencies, or re-organisations of local government. Moreover it could be seen as preferable from a principled perspective clearly to entrench components of democratic governance in a constitution, established by a codification process and including an amendment procedure both of which were themselves democratically satisfactory. It might be desirable for fundamental democratic values and rules to be included in a single, easily accessible text. Within this constitution, democratic principles could be protected by such means as a referendum requirement, the courts and veto by a (presumably at least mainly elected) second chamber.

As suggested above, a codified constitution might require that special parliamentary procedures had to be followed for it to be amended. If such a stipulation was included, it may be that, when the constitutionality of a particular legislative measure was contested, the principle that the courts do not rule on the ‘proceedings in Parliament’<sup>101</sup> would be modified. There would probably be a need to include an ‘emergency powers clause’ of some kind in a constitutional text, making it possible in defined extreme circumstances to issue legislation without following normal democratic procedures. At the same time it would be necessary to set limits on emergency powers, perhaps more specific than those presently provided for by the *Civil Contingencies Act 2004*.<sup>102</sup>

A constitutional codification exercise would be regarded in some quarters as an opportunity not only to entrench but to alter the democratic content of the UK constitution. Depending on the composition of the House of Lords by the time at which codification might take place, if it were still wholly – or possibly even partly – unelected, this arrangement might come under scrutiny.<sup>103</sup> The range of possible options for the

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<sup>99</sup> See: House of Lords Select Committee on the Constitution, *Constitutional aspects of the challenge to the Hunting Act 2004* (London, Stationery Office, 2006), HL 141.

<sup>100</sup> Lord Scarman, *Why Britain needs a Written Constitution*, The Fourth Sovereignty Lecture (Charter 88 Trust, London, 1992), p.6.

<sup>101</sup> Article IX, Bill of Rights.

<sup>102</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), pp.285-6.

<sup>103</sup> See eg: Lord Hailsham, *Elective Dictatorship: The Richard Dimbleby Lecture, 1976* (British Broadcasting Corporation, London, 1976), pp.14-15. Iain Mclean, *What’s Wrong with the British Constitution?* (Oxford University Press, Oxford, 2010), pp.223-50.

future of the House of Lords include retaining it in its present form, electing some or all of it using a variety of possible systems, converting it into a federal Parliament within a federal UK – if such an entity were established – or abolishing it altogether, moving to a unicameral UK. Alongside discussion of the future of the second chamber, there would probably be pressure for reform of the electoral system, both at UK and possibly local government level. In particular there would be calls for the introduction of a more proportional system, rather than the Alternative Vote, which was on offer as the alternative to First Past the Post in the 2011 referendum.<sup>104</sup>

Some would support the entrenchment and/or enhancement of democratic arrangements below UK level, such as local government (the different tiers of governance within the multi-national UK are considered below).<sup>105</sup> Another issue that would need to be addressed would be the potential for extending beyond the more traditional practices of representative democracy, utilising various public engagement mechanisms.<sup>106</sup> First of all, it might not be considered feasible for the introduction of a codified constitution to be carried out entirely by representative institutions. For instance the process might well involve the holding of one or more referendums<sup>107</sup>; or the use of deliberative bodies of citizens chosen by lot. Second, a codified constitution, were one introduced, might incorporate such devices as part of its amendment procedures.<sup>108</sup>

Under current constitutional arrangements the separation of the monarchy from party politics, a key component of democracy, is, as noted above, achieved through various conventions. Were a codified constitution introduced, the role of the monarchy might be set out in its text.<sup>109</sup> The idea might be largely to leave it unaltered.<sup>110</sup> But once again, codification could be seen as an opportunity to effect substantive change. For instance, there might be a desire to remove gender and religious discrimination from the rules of succession, a subject of topical interest on which the present government may be making some progress.<sup>111</sup> Article 34.1.2 of the IPPR constitution provides that ‘the succession shall be in order of primogeniture without regard to gender or religion’.<sup>112</sup> It describes the overall purpose of its proposed provision for the monarchy as follows:

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<sup>104</sup> Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, pp.8-9.

<sup>105</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), pp.216-22.

<sup>106</sup> See: Ministry of Justice, *A national framework for greater citizen engagement: a discussion paper* (Stationery Office, London, 2008).

<sup>107</sup> See: ‘The Commonwealth of Britain Bill’, Tony Benn and Andrew Hood, *Common Sense: A new constitution for Britain* (Hutchinson, London, 1993), Appendix one, Part XIII, 50.

<sup>108</sup> See eg: Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), pp.149-53.

<sup>109</sup> See eg: Spanish Constitution, Part II; Constitution of Denmark, parts I – III.

<sup>110</sup> O. Hood Phillips Q.C., *Reform of the Constitution* (Chatto & Windus, Charles Knight, London, 1970), pp.160-1.

<sup>111</sup> Political and Constitutional Reform Committee, *Rules of Royal Succession*, HC 1615 (Stationery Office, London, 2011).

<sup>112</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), p.53.

The effect is to preserve the Monarchy but with all its powers derived from the Constitution and with no remaining prerogative powers of political significance. The replacement of the Sovereign by an appointed or elected official, should it ever be thought desirable, could be achieved by a constitutional amendment...but without alteration to the structure of the Constitution as a whole.<sup>113</sup>

Some would advocate outright abolition of the monarchy through a codified constitution.<sup>114</sup>

Alterations to the role of the monarchy and in particular the succession, as well as composition of the House of Lords, may well engage the status of the Established Church within the UK constitution.<sup>115</sup> On the surface, the removal of religious discrimination from the succession may seem a straightforward and even popular move (in some quarters). But the monarch is at present the head of the Established Church. It is unclear how this role could be performed by someone not in communion with it. The Gordon constitution states in Article 95 that 'The Sovereign and his or her successors shall no longer be Head of the Church of England and that Church shall henceforth be disestablished'.<sup>116</sup> A shift of this sort might be regarded as justified partly on the democratic grounds that it accorded with patterns of religious belief and practice in the UK (or the lack thereof), in particular declining participation in Anglicanism. On the other hand it could prove complex, and arguably serve no pressing need. Associated with Disestablishment, there would also be some calls for a firm separation of the public and religious spheres, such as provided for in the US.<sup>117</sup> Article 1 of the Gordon constitution describes the UK as a 'secular state'.<sup>118</sup> However, a codified constitution can provide for an official religion.<sup>119</sup> Another option would be simply not to address this issue in the text.

### **The rule of law and individual rights**

The rule of law is widely acknowledged as a doctrine central to the UK constitution. Indeed Jeffrey Jowell, underlining its importance, describes it as providing the restraint on government that might elsewhere be supplied by a codified constitution.<sup>120</sup> It has been

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<sup>113</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), p.188.

<sup>114</sup> Tony Benn and Andrew Hood, *Common Sense: A new constitution for Britain* (Hutchinson, London, 1993), pp.102-5; Iain Mclean, *What's Wrong with the British Constitution?* (Oxford University Press, Oxford, 2010), pp.251-83.

<sup>115</sup> For the likelihood of the monarchy and Church of England becoming part of a codification exercise, see: Dawn Oliver, 'Towards a written constitution?' in Chris Bryant MP (ed.), *Towards a new constitutional settlement* (Smith Institute, London, 2007), pp.146-7.

<sup>116</sup> Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), p.83.

<sup>117</sup> U.S. Constitution, First Amendment.

<sup>118</sup> Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), p.45.

<sup>119</sup> See eg: Constitution of Norway, Article two.

<sup>120</sup> Jeffrey Jowell, 'The rule of law and its underlying values' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution*, Seventh Edition (Oxford University Press, Oxford, 2011), p.24.

suggested:

The essence of the rule of law is that of the sovereignty or supremacy of law over man. The rule of law insists that every person – irrespective of rank and status in society – be subject to the law. For the citizen, the rule of law is both prescriptive – dictating the conduct required by law – and protective of citizens – demanding that government acts according to the law.<sup>121</sup>

The precise meaning of the rule of law is not entirely agreed upon. Section 1 of the *Constitutional Reform Act 2005* states that:

This Act does not adversely affect—  
(a) the existing constitutional principle of the rule of law...

Yet even while acknowledging that it is an ‘existing constitutional principle’ the Act does not define what is meant by the rule of law; nor does any other UK statute. But the rule of law could reasonably be said to take in such provisions as accessibility to the law; the right to due process; and protection from arbitrary official acts.

The application of the rule of law to government is of particular interest from a constitutional perspective. If the doctrine is to function effectively there is a need for a judiciary which possesses some degree of independence from competitive democratic politics, to be able impartially to uphold the law, including in its application to public bodies and office holders. The UK has a strong tradition of judicial independence for which the *Constitutional Reform Act 2005* set out to provide statutory reinforcement, including through a ‘Guarantee of continued judicial independence’<sup>122</sup> and the establishment of a Judicial Appointments Commission<sup>123</sup> (the creation of the UK Supreme Court by Part three of the Act is discussed below). In this sense the present UK constitution could be seen as adhering to ‘separation of powers’ principles, though in other ways – particularly the fusion of executive and legislature discussed below – it does not.<sup>124</sup>

Central to the upholding the rule of law by the courts is the conduct of judicial review.<sup>125</sup> This practice enables courts to consider the actions of public officials and secondary – but not primary – legislation and potentially quash them on grounds including that they are beyond the scope of primary legal authority; or exercised in manner which is

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<sup>121</sup> Hilaire Barnett, *Constitutional and Administrative Law*, Ninth Edition (Routledge, London, 2011), p.48.

<sup>122</sup> Sections three and four.

<sup>123</sup> Part four.

<sup>124</sup> For a critical consideration of the ‘separation of powers’ concept and its applicability to modern constitutions, see: Mogens Hansen, ‘The mixed constitution versus the separation of powers: monarchical and aristocratic aspects of modern democracy’, *History of Political Thought*, Volume 31, Number 3, 2010, pp.509-531; Gavin Drewry, ‘The Executive: Towards accountable government and effective governance?’ in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), pp.187-212.

<sup>125</sup> See: Lord Scarman, Why Britain needs a Written Constitution, The Fourth Sovereignty Lecture (Charter 88 Trust, London, 1992), pp.4-5.

unreasonable or procedurally unfair.<sup>126</sup> Without the existence of these forms of judicial review, a check would be removed on arbitrary behaviour by public bodies.

The rule of law can be interpreted more widely still to include what would now be termed human rights. Before the *Human Rights Act 1998* individual rights were upheld to some extent by the courts through the common law (under which, for instance, civil and political rights might be assumed to exist unless expressly legislated against) and statutes dealing with particular issues. Under the Human Rights Act UK courts can review compliance of the actions of public bodies and legislation with the European Convention on Human Rights. They are required to interpret legislation so far as possible as compatible with the Convention.<sup>127</sup> In doing so they can possibly even read into legislation words that are not contained in the actual text they are considering. If this task is found to be impossible, courts can quash secondary legislation or administrative acts. They can declare primary legislation incompatible with Convention rights<sup>128</sup> but they cannot disapply or declare it void (judicial review of compliance with European law, which does permit the disapplication of acts of Parliament, is considered below).

Another important protection for individuals against arbitrary official action includes the provision of redress. The twentieth century saw a large expansion in the network of tribunals operating in different sectors across the UK; and a system of commissioners for administration has developed since the introduction of the Parliamentary Commissioner for Administration in 1967.

One difficulty that might be identified in upholding the rule of law within the uncodified UK constitution is that there is a potential tension between it and another UK constitutional doctrine, parliamentary sovereignty.<sup>129</sup> To some extent the two doctrines could be seen as complementing each-other. Subjecting all individuals within society to the law entails upholding the will of Parliament. But in the words of the late Lord (Tom) Bingham:

We live in a society dedicated to the rule of law; in which Parliament has power, subject to limited, self-imposed restraints, to legislate as it wishes; in which Parliament may therefore legislate in a way which infringes the rule of law; and in which the judges consistently with their constitutional duty to administer justice according to the laws and usages of the realm, cannot fail to give effect to such legislation if it is clearly and unambiguously expressed.<sup>130</sup>

If it is accepted – in accordance with the doctrine of parliamentary sovereignty – that the legislative power of Parliament is legally unlimited and all of its legislation must be applied by the courts, then it is not only possible for legislation to be implemented which

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<sup>126</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government*, 1<sup>st</sup> edition October 2011 (Cabinet Office, London, 2011), p.50.

<sup>127</sup> Section three, 'Interpretation of legislation'.

<sup>128</sup> Section four, 'Declaration of incompatibility'.

<sup>129</sup> See: Lord Scarman, *Why Britain needs a Written Constitution*, The Fourth Sovereignty Lecture (Charter 88 Trust, London, 1992), p.5.

<sup>130</sup> Tom Bingham, *The Rule of Law* (Penguin, London, 2010), p.168.

arguably infringes principles of the rule of law; but Parliament could unpick existing means of upholding the doctrine through abolishing or circumscribing judicial review.<sup>131</sup> Examples of the erosion of the rule of law include the use of detention without trial in Ireland at various points since the nineteenth century and in Great Britain in both world wars.<sup>132</sup> In this sense, the reconciliation of two core features of the UK constitution is dependent upon uncodified understandings.

Many features of the rule of law might reasonably be expected to be included in the text of a codified UK constitution, were such an entity established. For instance, there might be a reference to the rule of law in a preamble or early clause<sup>133</sup>; a declaratory statement about judicial independence<sup>134</sup>; and provision for the Judicial Appointments Commission; and the Supreme Court. The principles of judicial review in its more traditional form might be provided for in the text.<sup>135</sup> Rights such as access to justice might be referred to. Judicial review might considerably be enhanced. The judiciary might be required both to interpret primary legislation as far as possible to render it compliant with the constitution; or if it found this task impossible, disapply it or declare it void.<sup>136</sup> However, another model for a codified UK constitution involves restraining the judiciary.<sup>137</sup> The constitutional text might concern itself with the right of citizens to redress, with provision for some or all of the commissioners for administration, as well perhaps as ombudsmen with roles which covered the private sector, and core principles of the tribunal system. Alterations to the role of the Parliamentary Commissioner for Administration might be brought about, for instance with a broadening of the terms of reference of the office and the removal of the 'MP filter' which requires citizens to make complaints via their Member of Parliament.

### **A constitutional Bill of Rights?**

Individual rights are closely associated with the concept of the rule of law; and as noted above, presently such rights are provided for in domestic law by the Human Rights Act, the common law and various individual acts of Parliament. There is already a debate taking place about the possibility of a UK Bill of Rights.<sup>138</sup> It is likely that a codified constitution would include within it a statement of rights, or have a Bill of Rights attached to it.<sup>139</sup> Issues that arise when considering the idea of a Bill of Rights from the perspective of codifying or not codifying the UK constitution include how far it would be

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<sup>131</sup> See eg: Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009), pp.81-3.

<sup>132</sup> A. W. B. Simpson, *In the highest degree odious* (Clarendon Press, Oxford, 1992).

<sup>133</sup> See: Constitution of the Republic of South Africa, ss. 1 (c).

<sup>134</sup> See: 'Basic Law for the Federal Republic of Germany', Article 97.

<sup>135</sup> See: Constitution of the Republic of South Africa, ss 33.

<sup>136</sup> For a proposal for a codified UK constitution which emphasises the importance of judicial independence and other features of the rule of law, see: Lord Scarman, *Why Britain needs a Written Constitution, The Fourth Sovereignty Lecture* (Charter 88 Trust, London, 1992), p.2.

<sup>137</sup> See: 'The Commonwealth of Britain Bill', Tony Benn and Andrew Hood, *Common Sense: A new constitution for Britain* (Hutchinson, London, 1993), Appendix one; and p.119.

<sup>138</sup> See: Commission on a Bill of Rights: <http://www.justice.gov.uk/about/cbr/index.htm> .

<sup>139</sup> Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, pp.13-15. See also eg: Basic Law for the Federal Republic of Germany, I; Spanish Constitution, Part I.

justiciable. Might some of the rights, for instance, be legally more enforceable than others?<sup>140</sup> There is also the matter of entrenchment. If a codified constitution introduced amendment procedures more rigorous than those applying to regular legislation, they would presumably cover the Bill of Rights. But should at least some rights be protected even more, such as the rights under the ECHR that cannot be derogated from? In the German constitution, the fundamental rights are un-amendable.<sup>141</sup> Perhaps it would be possible only to add, not subtract, rights – although this mechanism could be seen as encouraging rights inflation. Finally, the issue of which rights to include would prove controversial. The Convention, as incorporated by the HRA, largely provides for civil and political rights (though some other kinds of rights can be accessed through it). Some would argue that economic and social rights – such as the right to healthcare, the right to housing, the right to education, the right to strike – should be included in a constitutional Bill of Rights.<sup>142</sup>

The HRA has been the subject of much public controversy, for instance on the grounds that it is exploited by criminals. However the JRRT ‘State of the Nation’ surveys<sup>143</sup> suggest a high – and even rising – level of support for the idea of a Bill of Rights. The following percentages are for those agreeing ‘strongly’ or ‘slightly’ with the view that ‘Britain needs a Bill of Rights to protect the liberty of the individual’. It rose from 71 per cent in 2000 to 80 per cent by 2010.

2000 71%

2006 77%

2010 80%

When respondents are prompted, there is substantial support for the inclusion of both civil and political, and economic and social rights within such an instrument, for instance in the most recent survey published in 2010. The top-rated right (88 per cent of respondents wanted it included), to a trial by jury, is not provided for by the ECHR, but might be included in a specific British Bill of Rights. The second-highest-rated right (87 per cent), was socio-economic, to treatment by the National Health Service within a reasonable time. Even a more controversial right, to have an abortion, received 66 per cent support; and the seemingly divisive socio-economic right, to strike, gained 76 per

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<sup>140</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), p.182; Dawn Oliver, ‘Written constitutions: principles and problems’ in *Parliamentary Affairs*, Vol. 45, No. 2, 1992, pp.143-6.

<sup>141</sup> Under Article 79 (3).

<sup>142</sup> For a rehearsal of some of these discussions see: Joint Committee on Human Rights, *A Bill of Rights for the UK?* HL 165 – I/HL 150 – I (Stationery Office, London, 2008), p.51; Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework* (Stationery Office, London, 2009), Cm 7577, p.12. For constitutions including social and economic rights, see: the Netherlands Constitution, Chapter 1; Constitution of the Republic of South Africa, Chapter 2. For opposition to constitutional socio-economic rights see eg: O. Hood Phillips Q.C., *Reform of the Constitution* (Chatto & Windus, Charles Knight, London, 1970), pp.149-50.

<sup>143</sup> For details, see: <http://www.jrrt.org.uk/publications>

cent. As with opinion on introducing a codified constitution, it is difficult to ascertain whether a constitutional Bill of Rights and the idea of encompassing such varied rights within it would sustain such levels of support during a full national debate on the subject.

Which of the following rights, if any, should be included in a Bill of Rights?

	%
Right to a fair trial before a jury	88
Right to hospital treatment on the NHS within a reasonable time	87
Right to know what information government departments hold about you	81
Right to privacy in your phone, mail and e-mail communications	79
Right to join a legal strike without losing your job	76
Right to obtain information from government bodies about their activities	75
Right of free assembly for peaceful meetings and demonstrations	72
Right of a woman to have an abortion	66
Right of British subjects to equal treatment on entering and leaving the UK, irrespective of colour or race	66
Right of those who are homeless to be housed	60
Don't know	4

The Ministry of Justice ‘deliberative events’ held in late 2009 and early 2010 on constitutional issues (described above) included consideration of a proposed ‘new Bill to protect and enhance the rights and responsibilities of citizens’.<sup>144</sup> Participants were concerned to learn of the lack of specific protections in the field of economic and social rights, which they had previously assumed existed. They tended to support the inclusion of these sorts of rights in a ‘Bill’ but were also wary that such rights might be abused by groups including criminals and illegal immigrants. Participants made a distinction between these rights and more traditional civil and political rights, which they were more comfortable with being universal. It was felt that some kind of bill of rights might, through ‘greater clarity and transparency’, encourage a ‘stronger appreciation of rights and responsibilities, empowering people’. But to provide this benefit it would need to be written in ‘common sense’ language. It should, they felt, be aimed initially at young people, because the attitudes of older people were more fixed.

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<sup>144</sup> Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (Ministry of Justice, London, 2010), p.7.

Participants felt that, while at present rights and responsibilities were relatively safe, a 'Bill' protecting them might provide protection from erosion over time. At the same time the extent to which such a 'Bill' was supported was partly dependent upon it allowing for sufficient flexibility on the part of government to respond to different circumstances. Participants were concerned that a 'Bill' might create a 'rights culture', meant as a negative term implying exploitation of the new system by certain groups. There were worries about the public resource implications involved in introducing a 'Bill' and the litigation that might subsequently be associated with it. Overall, participants tended to be 'positive' about the idea of introducing a 'Bill of Rights and Responsibilities' and that it should have some kind of legal rather than simply declaratory status. There was however a pattern of 'support [for a 'Bill'] dipping [though not drastically] after discussions about existing rights and responsibilities'. This drop-off may have been associated with 'participants' concerns about perceived ways in which rights could be misused and their relatively negative reactions to existing human rights legislation'.<sup>145</sup>

### **A multinational state and its tiers of governance**

The UK is composed of different nations that have joined together or been absorbed (and partially left) at various points in history. Within it England might be regarded as the dominant component in political, economic and cultural senses.<sup>146</sup> Some of the most influential constitutional thinkers – such as Bagehot, Dicey and Sidney Low<sup>147</sup> – referred to the 'English' constitution or 'England' in their work. A tendency has also existed to discuss the 'British' constitution – for instance, the possibility of a 'British Bill of Rights', in a 2007 document called *The Governance of Britain* – seemingly neglecting the existence of Northern Ireland.<sup>148</sup>

Though it may sometimes have been neglected, the multinational nature of the UK is crucial to an understanding of its constitutional arrangements, and the debate about their being codified or not. Some multinational states – such as Belgium and Spain – have sought to accommodate their diversity through moving towards federal systems of government, that is constitutions in which typically there is an entrenched division of authority between federal and state tiers of governance, both of which are subject to a constitution expressed in a text which a supreme court is charged with upholding. The UK has not taken this approach to the extent of Belgium and Spain – although, as will be discussed, it has increasingly incorporated federal features of late.<sup>149</sup> Traditionally the UK is often referred to as a 'unitary' state, in which constitutional authority is concentrated at the centre.<sup>150</sup> While other states regarded as unitary – such as France –

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<sup>145</sup> Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (Ministry of Justice, London, 2010), pp.36-47.

<sup>146</sup> James Cornford, 'On Writing a Constitution', *Parliamentary Affairs*, Vol. 44, No.4, October 1991, p.563.

<sup>147</sup> Eg: Sidney Low, *The Governance of England* (T. Fisher Unwin, London 1904).

<sup>148</sup> Ministry of Justice, *The Governance of Britain*, CM 7170 (Stationery Office, London, 2007), pp.60-1.

<sup>149</sup> Andrew Blick, *Devolution and Regional Administration: a federal UK in embryo?* (Federal Trust for Education and Research, London, 2009).

<sup>150</sup> Eg: Hilaire Barnett, *Constitutional and Administrative Law*, Ninth Edition (Routledge, London, 2011), p.11.

may set out their arrangements in a codified constitution, the unitary nature of the UK, if it is accepted that this description applies to the UK, is provided for within its uncodified constitution and in particular the status of the UK Parliament within it.

However, the idea of the UK as a unitary state can be qualified.<sup>151</sup> Elizabeth Wicks writes that:

recognition of the United Kingdom as a union state provides a much more accurate, if complex, picture of the state than to focus solely upon its unitary nature. While it is true that the United Kingdom is a unitary (as opposed to federal) state, it is an entity with far more complexity than is indicated by the unitary label.<sup>152</sup>

Constitutional arrangements vary substantially across different parts of the UK, particularly as between different nations. This diversity includes variations in the number and types of local authority covering a particular area; the electoral systems in use for different purposes; the operative legal system; and whether there is an Established Church, and if so what it is. A relatively recent and considerable augmentation of the multinational diversity of the UK constitution has come with the advent of and subsequent extensions to devolution. Often described as ‘asymmetrical’<sup>153</sup> in character, this shift has produced variations both between those parts of the UK that are and are not subject to this tier of democratically elected governance; and between different types of devolved arrangements. Those living in England outside Greater London – who make up a majority of the UK population – are not represented by devolved institutions. There have been consequent discussions of whether and how devolution should be extended to England.<sup>154</sup> Furthermore, the so-called ‘West Lothian Question’ has become salient. It involves the issue of whether it is appropriate for MPs from devolved areas to discuss and vote on matters in the UK Parliament which are dealt with at devolved level in their constituencies, therefore not impacting directly upon them; while MPs from England can play no corresponding part in discussion and decisions over the same policy fields within the devolved territories. A commission appointed by the Coalition government is currently considering this issue. At the same time, all the devolved areas are moving towards greater autonomy (except during those periods when devolved government for Northern Ireland has been suspended).<sup>155</sup> The poor reception given to the Coalition policy for introducing directly elected mayors to the largest English cities, subject to referendums<sup>156</sup>, could be seen as having closed off one means of offsetting this

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<sup>151</sup> See eg: Neil Walker, ‘Beyond the Unitary Conception of the United Kingdom Constitution?’, *Public Law* (2000), Autumn, pp.384-404; S. Rokkan and D. Urwin, *Economy, Territory, Identity: The politics of West European peripheries* (Sage, London, 1983).

<sup>152</sup> Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart, Oxford, 2006), p.169.

<sup>153</sup> See: Robert Hazell (ed.), *The State and the Nations: The First Year of Devolution in the United Kingdom* (Imprint Academic, Exeter, 2000), esp. pp.269-71.

<sup>154</sup> Robert Hazell (ed.), *The English Question* (Manchester University Press, Manchester, 2006).

<sup>155</sup> For a recent discussion of the implications of asymmetry, see: Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009), pp.99-110.

<sup>156</sup> Department for Communities and Local Government, *What can a mayor do for your city? A consultation* (Department for Communities and Local Government, London, 2011).

imbalance, if it is judged to need offsetting. A commission has also been established by the Coalition to consider the implications of devolution for the House of Commons.<sup>157</sup>

A second type of diversity produced by devolution is between the different types of devolved system. For those living in Greater London (if a classification of the Greater London Authority as devolved is accepted), Northern Ireland, Scotland and Wales there are various divergences including in the electoral system used, the division of powers between UK and devolved levels, and the way in which those powers are defined. They continue to develop along their own distinctive paths. Perhaps most exceptional of all, reflecting historic issues, is Northern Ireland. The introduction of devolution was part of a broader peace process, certain features of which make the position of Northern Ireland unique not only within the UK, but internationally. There is specific statutory provision, implementing the Belfast or 'Good Friday' Agreement of 1998, setting out how Northern Ireland can detach from the UK and join with the Republic of Ireland; an arrangement which – it has been argued – breaks new ground in prioritising the self-determination of the population above the sovereignty of either state.<sup>158</sup> However it has now been widely accepted that Scotland could in principle secede if its population voted for this option in a referendum; and a convention may be developing that would be hard to deny to Wales as well.

Any constitutional codification process, were one embarked upon, would have to take the multinational nature of the UK into account in its deliberations (though the Gordon constitution, the first full proposed UK constitutional text produced in the post-devolution era, is relatively unitary in its outlook<sup>159</sup>), and if it were to be effective would probably have to engage in some way the devolved tiers of governance. What difference might a codified constitution make? It might mean that devolution was formally entrenched; and that the UK came increasingly to resemble a federal state. Devolution is already politically entrenched. In each case the introduction of devolved governance was approved by a referendum in the area concerned, creating a strong political block on action from Westminster to revoke devolution without clear evidence of support in that particular area, presumably through a referendum. In this sense, the UK has begun on a practical level to take on some of the features of a federal state. This impression is compounded by the status of the Supreme Court under the *Constitutional Reform Act 2005*<sup>160</sup> as responsible for devolution issues, making it resemble to some extent a federal supreme court.

However, at present the strict legal position asserted by the government is, as described in the *Cabinet Manual*, that:

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<sup>157</sup> <http://www.parliament.uk/documents/commons-vote-office/5-DPM-Devolution.pdf>

<sup>158</sup> Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart, Oxford, 2006), p.182-5. See also: Colm Campbell, Fionnuala Ni Aolain and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland', *Modern Law Review* (2003) Vol. 66, Issue 3, May, pp317-45; Elizabeth Wicks, 'State Sovereignty: Towards a Refined Legal Conceptualisation', *Anglo-American Law Review* (2000).

<sup>159</sup> Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), pp.54-5.

<sup>160</sup> Section 40.

Parliament is sovereign and it has provided by Acts of Parliament – which, by their nature, may be repealed – for certain issues to be considered and determined at different levels: within the European Union (EU); by the Devolved Administrations; and by local government.<sup>161</sup>

The *Manual* states further that:

Parliament remains sovereign and retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power.<sup>162</sup>

The UK Parliament has already proved willing to suspend devolution in Northern Ireland, though possibly a special case that might have to be allowed for in some way in a codified constitution.

The debate about the doctrine of parliamentary sovereignty, the applicability of which to the UK has been challenged partly on the grounds that it is not part of Scottish constitutional doctrines<sup>163</sup>, is considered in more detail below. It is fair to say that devolution presents a major practical, if not legal, challenge to parliamentary sovereignty.<sup>164</sup> It also provides a model for the limitation of legislative authority that might be applied to the UK Parliament: devolved institutions are in theory subject to full judicial review, including the possibility of quashing the legislation that the assemblies/Scottish Parliament produce.<sup>165</sup> One of the legal limitations on the UK Parliament under a codified constitution might be that it was prevented unilaterally from overturning the various devolution arrangements as presently provided for in acts of Parliament. Furthermore the following provision might be entrenched and made justiciable:

the Government proceeds in accordance with the convention that Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The Devolved Administrations are responsible for seeking such agreement as may be required for this purpose on an approach from the UK government. In practice this agreement is signalled by a devolved legislature passing a Legislative Consent Motion.<sup>166</sup>

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<sup>161</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government*, 1<sup>st</sup> edition October 2011 (Cabinet Office, London, 2011), p.2.

<sup>162</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government*, 1<sup>st</sup> edition October 2011 (Cabinet Office, London, 2011), p.64.

<sup>163</sup> See: I. McLean and A. McMilan, 'Professor Dicey's Contradictions', *Public Law* (2007). But see also: J. Goodacre, *The Government of Scotland 1560-1625* (Oxford University Press, Oxford, 2004), p.86.

<sup>164</sup> Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009), p.112.

<sup>165</sup> Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Imprint Academic, Exeter, 2005).

<sup>166</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government*, 1<sup>st</sup> edition October 2011 (Cabinet Office, London, 2011), p.64.

With a codified constitution dividing authority between the UK Parliament and the devolved institutions, the UK would have moved closer formally rather than just practically to resembling a federal rather than unitary system. If the German model were followed, the federal dimension of the constitution might be made unamendable altogether.

But as well as entrenching and providing legal force to some of what already exists, it is possible that a codification process, if engaged in, would alter some of the substantive content of the multinational UK constitution. It is unlikely that the devolved areas would be generally receptive to the idea of a process that could lead to a significant *reduction* in their powers, but would perhaps be agreeable to the idea of a codification process that could lead to an *increase* in the autonomy of devolved institutions. For instance, the Welsh Assembly might be allotted fiscal powers. An issue that would need to be addressed would be the special position of Northern Ireland, and the extent to which it could be considered alongside other devolved areas. It may be that some within Wales and Scotland (where the separatist Scottish National Party currently holds power with a single-party parliamentary majority at devolved level) would press for a clear constitutional ‘exit clause’, arguing that it would bring them into line with Northern Ireland. They might well seek to include independence as an option within the codification process itself. At present, although it is seemingly generally accepted that Scotland could in principle be allowed to secede, there is a lack of clarity about how precisely this decision could be made and implemented. Indeed there are some doubts about the ability of the UK Parliament fundamentally to alter the Union with Scotland, a legal arrangement that arguably possesses some of the features of a codified constitution, though not fully qualifying as such.<sup>167</sup>

A codification process might well give consideration to the anomalous position of England within the Union. If it did some would advocate extending devolution to England beyond Greater London. If the whole of England had this tier of governance established under a codified constitution, then the UK would clearly resemble a federal or at least quasi-federal state.<sup>168</sup> Like other multinational countries such as Spain, it could combine a shift towards a federal model with varying degrees of autonomy between its different components.<sup>169</sup> Probably certain distinctions between the ‘states’ of the UK – such as the differing legal systems – would be retained.

Such a development is connected with other issues, including whether the second chamber of the UK Parliament should provide a role for the ‘states’ that composed the UK; and whether there should be a new arrangement for the redistribution of funding between them to replace the present ‘Barnett Formula’.<sup>170</sup> Within a federal constitution,

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<sup>167</sup> See eg: T. B. Smith, ‘The Union of 1707 as Fundamental Law’, (1957), *Public Law*, 99.

<sup>168</sup> See eg: ‘The Commonwealth of Britain Bill’, Tony Benn and Andrew Hood, *Common Sense: A new constitution for Britain* (Hutchinson, London, 1993), Appendix one, which avowedly creates a federal constitution.

<sup>169</sup> See eg: Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, p.25.

<sup>170</sup> See eg: Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, pp.27-8.

each sub-UK 'state' could have its own constitution, supplementing the central one. The latter might consequently be a less detailed framework, setting out basic standards such as arrangements for the functioning of central government and minimum human rights standards, to which states could add in their own constitutions if they wished, but not subtract from. To some extent, the existing acts providing for devolution resemble codified constitutions, in that they are prior to the institutions they establish, which are subject to their provisions. Indeed they contain within them devices that might be adapted to a UK codified constitution, such as provisions under the *Scotland Act 1998* for ensuring the Scottish Parliament legislates within its own legal remit, before bills are enacted.<sup>171</sup>

One option for extending devolution throughout England would be through the introduction of a number of devolved English regional assemblies. But this approach was attempted (some would say unenthusiastically) under the last Labour government and abandoned in the face of apparent lack of appetite within England, including a significant defeat in a referendum on a North East Assembly in November 2004.<sup>172</sup> Another way forward might be to introduce a single English Parliament. Arguments against this option include that few of the benefits of devolution would be enjoyed by a body representing over 80 per cent of the UK population. Furthermore it might be held that the inclusion of such a large unit within a federal constitution would be dangerously destabilising.<sup>173</sup> If it did not extend devolution to England, a codified constitution might specify a system whereby MPs could not vote on measures which covered matters that were devolved within their constituencies, popularly known as 'English votes for English laws'. However, this option also raises various practical issues, such as the complexities that might arise if a party had a majority amongst UK but not English MPs. Where a reformed second chamber, if established, would fit into this arrangement remains to be seen.

## Local government

Directly below the devolved tier of governance (or, for most of England, directly below central government) is local government. Local government is responsible for tasks vital to the daily lives of the people it serves. Though it possesses its own electoral mandate it is – in England – immediately and legally subordinate to central government (elsewhere it is a devolved matter), and possesses throughout the UK levels of financial and policy autonomy that are internationally exceptionally low. This disadvantaged position is identified by some as a major defect in the UK constitution.<sup>174</sup>

It is likely that some would see a codified constitution as a means of bolstering the status of local government.<sup>175</sup> A codified constitution might guarantee the basic position of

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<sup>171</sup> See Part one.

<sup>172</sup> By 78 per cent to 22 per cent on a 47.8 per cent turnout.

<sup>173</sup> Andrew Blick and George Jones, *A Federal Future for the UK: the Options* (Federal Trust for Education and Research, London, 2010).

<sup>174</sup> See: House of Commons Communities and Local Government Committee, *The Balance of Power: Central and Local Government* (Stationery Office, London, 2009), HC 33-I.

<sup>175</sup> Lord Scarman, *Why Britain needs a Written Constitution, The Fourth Sovereignty Lecture* (Charter 88 Trust, London, 1992), p.2; Liberal Democrat Working Group on Better Governance, *For the People, By the*

local government, leaving devolved institutions (where they existed) to manage the more detailed position, perhaps under their own constitutions.<sup>176</sup> Otherwise, there could be more detailed provision at UK constitutional level. At present, under the *Localism Act 2011*<sup>177</sup>, local authorities in England possess a ‘general power of competence’. Like the Human Rights Act, this provision does not repeal by implication earlier statute; yet it is itself seemingly protected from implied repeal by later statutory provision. Potentially, the Localism Act could be incorporated into a codified constitution, with possible modifications to entrench it further. Otherwise a different local government code of some kind could be incorporated into the constitutional text, that set out enhanced powers and financial autonomy explicitly.<sup>178</sup>

### **The doctrine of parliamentary sovereignty**

The doctrine of parliamentary sovereignty is central to debates about the nature of the UK constitution and the prospects for codifying or not codifying it. The special position of the UK Parliament is associated with important characteristics discussed elsewhere in this paper such as the UK being a unitary (or perhaps ‘union’) rather than federal state; and the tendency towards dualism rather than monism as regards the legal status of international agreements. While the phrase may create the impression of a powerful legislature, in practice parliamentary sovereignty is arguably wielded by the executive, drawing on its strength within the House of Commons. Parliamentary sovereignty creates the potential for encroachments upon another constitutional doctrine, the rule of law, perhaps of a serious nature; and the dominance of local government in England. The legal position of Parliament might be seen as the alternative to a codified constitution, as incompatible with such an entity and even a major – or perhaps insurmountable – barrier to its introduction.<sup>179</sup> Some argue that parliamentary sovereignty makes popular sovereignty, that might be expressed in a written constitution by the phrase ‘We, the people’<sup>180</sup>, impossible. They might note further that parliamentary sovereignty has never popularly been endorsed.<sup>181</sup> On the other hand parliamentary sovereignty could be seen as an indirect means of achieving popular sovereignty, via the elected Commons.<sup>182</sup>

The term ‘parliamentary sovereignty’ gained particular currency after it was used by Dicey in his work *Introduction to the Study of the Law of the Constitution*, published in

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*People* (Liberal Democrat Party, London, 2007), Policy Paper 83, pp.10-11.

<sup>176</sup> Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), pp.221-2.

<sup>177</sup> Part one, chapter one.

<sup>178</sup> See eg: House of Commons Political and Constitutional Reform Committee, ‘Draft Code for Central and Local Government’, 2012.

<sup>179</sup> H. W. R. Wade, ‘The Basis of Legal Sovereignty’, *Cambridge Law Journal* (1955), 172; Rodney Brazier, ‘Enacting a Constitution’, *Statute Law Review*, Volume 13, Number 2, Autumn 1992, pp.122-3; Dawn Oliver, ‘Towards a written constitution?’ in Chris Bryant MP (ed.), *Towards a new constitutional settlement* (Smith Institute, London, 2007), pp.146-50.

<sup>180</sup> The opening words of the preamble to the Constitution of the United States. Followed by others, eg: Constitution of the Republic of South Africa, ‘Preamble’.

<sup>181</sup> Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), pp.12-26.

<sup>182</sup> Dicey, *Introduction to the Study of the Law of the Constitution*, p.286.

its first edition in 1885. Dicey defined it as meaning that:

Parliament...has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.<sup>183</sup>

For Dicey there was a direct connection between the doctrine of parliamentary sovereignty and the uncodified constitution:

there is no law which Parliament cannot change...fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely by Parliament acting in its ordinary legislative character...there is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional...This absence of any distinction between constitutional and ordinary laws has a close connection with the non-existence in England of any written or enacted constitutional statute or charter.<sup>184</sup>

Dicey was also an advocate of the principle of implied repeal.<sup>185</sup> It means that if a court finds two acts of Parliament to be in conflict with one-another, the later Act must prevail over the earlier, even if it does not expressly repeal the earlier. This approach was developed to help give expression to the idea that Parliament cannot bind itself.<sup>186</sup>

Dicey's impact was immense in his own time; and his influence remains important. In its evidence submitted to the parliamentary Joint Committee on Conventions in 2006, the government quoted from Dicey's account of parliamentary sovereignty and stated:

It remains a true description. Even if Parliament should agree to make itself subordinate to some other jurisdiction, it remains open to it to resume its sovereignty at any time. It therefore remains the sovereign body of the constitution.<sup>187</sup>

However, this statement seemed to represent an attempt to reconcile Dicey's outlook with the erosion of the doctrine of implied repeal, a tendency discussed below.

The doctrine of parliamentary sovereignty is not universally accepted as intellectually viable, with some preferring terms such as 'parliamentary supremacy'.<sup>188</sup> It has been held that the term 'sovereignty' is unsatisfactory since it is difficult to ascribe to an institution composed of hundreds of members the individual will attached to a single monarch or

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<sup>183</sup> Dicey, *Introduction to the Study of the Law of the Constitution*, pp.3-4.

<sup>184</sup> Dicey, *Introduction to the Study of the Law of the Constitution*, pp.37-8.

<sup>185</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press, Cambridge, 2010), p.289.

<sup>186</sup> Hilaire Barnett, *Constitutional and Administrative Law*, Ninth Edition (Routledge, London, 2011), pp.122-3.

<sup>187</sup> <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtconv/265/265ii.pdf>

<sup>188</sup> A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, p.49.

sovereign.<sup>189</sup> In practice no institution is omnipotent, even if it may issue legislation as it sees fit (though this limitation on parliamentary sovereignty was allowed for by Dicey). Possibly the doctrine is self-contradictory, suggesting that Parliament is both all-powerful yet at the same time – according to the ‘continuing’ theory of parliamentary sovereignty – not able to bind itself, consequently appearing less than all-powerful. Conversely, if Parliament can bind itself, as it is held able to do in the ‘self-embracing’ interpretation, then its sovereignty might appear merely transient.<sup>190</sup> The extent to which Parliament is a rule-bound institution could make it difficult to regard as unfettered; and it is claimed that there are implied limits to the legislative authority of Parliament within the UK constitution.<sup>191</sup> Parliamentary sovereignty might be seen as an English rather than UK doctrine. In particular it is held that it is alien to the Scottish constitutional tradition.<sup>192</sup>

In so far as it was ever a coherent concept, various developments since the time of Dicey could be seen as having undermined the effectiveness of the doctrine of parliamentary sovereignty. Arguably Parliament has bound itself; rival legislative institutions have been created; and it has become possible – with the authorisation of an act of Parliament – for law without origins in the UK Parliament to take precedence over its acts. Moreover, implied repeal has been qualified.

Parliament has granted independence to former colonies. While it can in theory reverse the acts of Parliament giving effect to independence, or try to legislate directly for those former colonies, it has been noted that it cannot control the independent legal systems that have developed in those states since they obtained independence.<sup>193</sup>

From 1973, membership of what is now the European Union has meant that its organs can legislate for the UK, arguably usurping the parliamentary monopoly in this area,<sup>194</sup> though its ability to do so, from the UK perspective, is provided for by an Act of Parliament. Under the European Communities Act courts may disapply acts of Parliament that conflict with directly applicable European law, at least if they do so impliedly rather than expressly. This position was established by the second *Factortame* case in 1991.<sup>195</sup> The doctrine of implied repeal was thereby qualified. However, Parliament probably retains the right to pass legislation which expressly overrides European law (though with consequences for the position of the UK within the EU); and it can execute UK withdrawal from the EU if it chooses.<sup>196</sup> The Human Rights Act also challenges the

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<sup>189</sup> Sir W. Ivor Jennings, *The Law and the Constitution* (University of London Press, London, 1959), p.148; R. T. E Latham, *The Law and the Commonwealth* (Oxford University Press, London, 1949), p.523.

<sup>190</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press, Cambridge, 2010), p.106.

<sup>191</sup> Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart, Oxford, 2006), pp.19-20.

<sup>192</sup> See: Iain McLean and Alistair McMillan, ‘Professor Dicey’s Contradictions’, *Public Law* (2007), 3, pp.435-43.

<sup>193</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press, Cambridge, 2010), p.109.

<sup>194</sup> A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, p.69.

<sup>195</sup> Sir William Wade, ‘Sovereignty - Evolution or Revolution?’, *Law Quarterly Review*, 112, 1996.

<sup>196</sup> See: House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty* (Stationery Office, London, 2010), HC 633- I, esp. pp.17-20.

principle of implied repeal and perhaps by extension parliamentary sovereignty.<sup>197</sup> It is designed both not to repeal earlier legislation by implication; and not to be impliedly repealed by subsequent legislation. Moreover, as is discussed below, members of the judiciary are increasingly beginning to promote the idea that their powers under the common law can supersede those of Parliament.

Parliamentary sovereignty might also be regarded as compromised in practice, if not in law, by various other tendencies and developments. They include the apparent restraints imposed by global economic pressures and membership of various supranational organisations; and the introduction of devolved government to Scotland, Wales, Northern Ireland and Greater London. The rise of the referendum as a political decision-making device could be seen as inhibiting Parliament in its role as ultimate constitutional arbiter. Indeed the European Union Act arguably creates a legal limitation on parliamentary sovereignty in this respect.

The preeminent contemporary exponent of parliamentary sovereignty, Jeffrey Goldsworthy, has offered counter-arguments. He denies that implied repeal is essential to parliamentary sovereignty and holds that it persists while there is a consensus about its existence between officials in different branches of government; and that the judiciary alone cannot dispense with it. The idea that a change of consensus would be required is possibly a clue as to the task that would be faced by a constitutional codification process which sought to overturn parliamentary sovereignty. Goldsworthy argues that any such exercise in modifying constitutional arrangements should also involve the support of the public.<sup>198</sup>

What difference might a codified UK constitution make from the perspective of the doctrine of parliamentary sovereignty? Vernon Bogdanor writes: 'There is no point in having a constitution unless one is prepared to abandon the principle of the sovereignty of Parliament, for a codified constitution is incompatible with this principle. A constitution would have specifically to *limit* the sovereignty of Parliament'.<sup>199</sup> On international evidence, typically a codified constitution would create what might be seen as a hierarchy of law, some of which would be defined as comprising the codified constitution, taking precedence over other measures that were not constitutional. Fundamental rights and the division of powers between the UK Parliament and the devolved institutions (were a federal-type model followed) might be set out in a text to which they were both subject, to be upheld by the courts. Alterations to the constitution would probably entail a process more demanding than presently required for amending or repealing acts of Parliament, and might involve holding referendums. Some parts of the constitution may be deemed completely un-amendable. It is possible that courts would be required as far as possible to

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<sup>197</sup> Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University, 2009). But see also: Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, Oxford, 2008).

<sup>198</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press, Cambridge, 2010), p.7.

<sup>199</sup> Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009), p.14. For a proposed constitution which sets out this position, see eg: Liberal Democrat Working Group on Constitutional Reform, 'We, The People...' – *Towards a Written Constitution* (Liberal Democrats, London, 1990), Federal Green Paper No 13, Chapter three, Part one, Article 31, p.40.

interpret acts of Parliament in compliance with the codified constitution, but in so far as they could not be reconciled with it, would disapply or declare them void.

From these perspectives a codified constitution might be incompatible with the doctrine of parliamentary sovereignty. But need it be?<sup>200</sup> Goldsworthy has argued that the Australian constitution preserves a qualified form of parliamentary sovereignty, since the freedom of action of the state and federal parliaments is not limited, within their respective spheres of operation.<sup>201</sup> Possibly a codified constitution could be created from within the existing system, reconciling it as far as possible with the doctrine of parliamentary sovereignty. The procedure for declarations of incompatibility under the HRA offers a model which could be expanded to cover constitutional judicial review as a whole. Or judicial review as carried out under the European Communities Act could provide precedent for the disapplication of primary legislation.<sup>202</sup> The protection included in the Parliament acts which preserve the House of Lords veto over extensions to the life of a Parliament beyond five years could be extended to cover a wider range of provisions deemed to be constitutional. Indeed, some exponents of the doctrine of parliamentary sovereignty argue that it can be reconciled with provisions for justiciability and amendment procedures that are more stringent still. They attempt to distinguish between constraints on the 'manner and form' (or 'procedure and form') in which Parliament can legislate, and on the actual substance of the legislation it can produce. In this model, the former set of restrictions are believed to leave sovereignty intact. For instance, it might be that, following the example of the Canadian Charter of Rights, primary legislation could be passed overriding a statement of rights included in a constitutional text only if accompanied by an express statement this outcome was intended. Otherwise, it could be disapplied or declared void by the courts.<sup>203</sup>

### **The central executive and ministerial responsibility to Parliament**

The nature of the central executive – defined here as the body of officials and ministers at UK-level responsible for devising and implementing policy – is crucial to an understanding of the UK constitution. So too is its relationship with Parliament, the perceived flaws in which figure prominently in arguments in favour of constitutional codification.<sup>204</sup> This section begins with a consideration of the authority of the executive and how it is regulated; then considers the responsibility it has to Parliament, the primary means by which central government accountability is achieved in the UK.

#### *The executive: powers and regulation*

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<sup>200</sup> For a discussion of these issues, see eg: House of Commons Justice Committee, *Constitutional Reform and Renewal* (Stationery Office, London, 2009), HC 923, pp.20-22.

<sup>201</sup> Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, Oxford, 1999), p.1.

<sup>202</sup> For the ECA as already a higher form of law, see: Dawn Oliver, 'Written constitutions: principles and problems' in *Parliamentary Affairs*, Vol. 45, No. 2, 1992, p.148.

<sup>203</sup> See: Section 33 of the Canadian Charter of Rights; Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press, Cambridge, 2010), p.203.

<sup>204</sup> Lord Hailsham, *Elective Dictatorship: The Richard Dimbleby Lecture, 1976* (British Broadcasting Corporation, London, 1976).

In the UK the powers of the central executive are vested in the Crown. While the reality is more complex, the term ‘Crown’ is largely treated as interchangeable with the government. Drawing as it does on the authority of the Crown, some of the legal power of the executive resides in the Royal Prerogative.<sup>205</sup> The Royal Prerogative is particularly important to external affairs, including in the conduct of diplomacy, treaty-making and armed combat (see Part Three below and Appendix a).<sup>206</sup> Also central to the operation of the executive is convention – probably an even less definite constitutional source than the Royal Prerogative (see Part Three). That ministers in practice wield portions of the Royal Prerogative is itself determined by convention, since the power formally belongs to the monarch. Cabinet, the supreme committee of British government, has a basis in convention too. There is no statutory underpinning for its powers and practices, some of which are set out – though neither comprehensively nor always with absolute clarity – in the *Ministerial Code*.<sup>207</sup> A function of the conventions of Cabinet is to give expression to ‘collective responsibility’, which, it is proposed in this paper, is a component alongside ‘individual ministerial responsibility’<sup>208</sup> of the constitutional doctrine of ‘ministerial responsibility’.<sup>209</sup> Collective responsibility involves ministers deliberating and deciding as a group; and uniting publicly around decisions that are taken by Cabinet, regardless of the particular position they took in given discussions, which remain confidential. The convention of the outward united front around policy extends to all government ministers, whether within or without Cabinet,<sup>210</sup> unless specific exemptions are provided for.

There are various practical constraints on the effectiveness of collective responsibility.<sup>211</sup> One is that it is not possible for all Cabinet members fully to engage with all government business, given its scale and complexity. To some extent this problem is managed through the use of a network of Cabinet sub-committees, the decisions of which are treated as though they were made by full Cabinet. Another challenge to collective responsibility is that ministers may signal their dissent from certain positions through surreptitious briefing of the media. Under a Coalition government, such disputes, including in areas where there has been no formal ‘agreement to differ’, can become more open. Finally, some ministers may seek to take important decisions while minimising the involvement of Cabinet, which may fail to impose collective discipline upon them. For instance, often it is held that prime ministers have bypassed Cabinet and pursued a more personal style of government, working in small informal groups, or

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<sup>205</sup> Gavin Drewry, ‘The Executive: Towards accountable government and effective governance?’ in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), pp.209-10.

<sup>206</sup> A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, pp. 232-59.

<sup>207</sup> Cabinet Office, *Ministerial Code* (Cabinet Office, London, 2010).

<sup>208</sup> For the distinction between the two principles, see: Hilaire Barnett, *Constitutional and Administrative Law*, Ninth Edition (Routledge, London, 2011), pp.221-5.

<sup>209</sup> K.C. Wheare, *Government by Committee: An essay on the British constitution* (Clarendon Press, Oxford, 1968), p.163.

<sup>210</sup> For a recent official account of collective responsibility, see: Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government, 1<sup>st</sup> edition October 2011* (Cabinet Office, London, 2011), p.31.

<sup>211</sup> Sir Christopher Foster, *British Government in Crisis* (Hart, Oxford, 2005).

dealing directly with individual ministers ('bilateralism'), or alone. Often the supposed neglect of Cabinet government is portrayed as an undesirable departure from constitutional norms. However, because collective responsibility is enforced only by conventions, which are flexible in nature, there are difficulties inherent in determining with precision whether it has been violated; and it can be enforced only politically, primarily by Cabinet members.<sup>212</sup>

Another executive institution founded to a substantial extent in convention (though with some statutory basis) is the office of Prime Minister. This role is closely linked to that of the Cabinet; and prime ministers draw much of their ability to influence government through their being chair – by convention – of this body. They play a central role in interpreting and enforcing the doctrine of ministerial responsibility, including through drawing up (with the Cabinet Secretary) the *Ministerial Code* and making judgements about alleged ministerial non-compliance with it. By convention they wield key Royal Prerogative powers – including the ability to appoint and remove ministers and allocate their portfolios; and play a leading role in decisions about entering into military conflict, again implemented under the Royal Prerogative. There is considerable flexibility in the role of Prime Minister and it is often held that under the uncodified UK constitution it can be deployed to undermine Cabinet procedure, to the detriment of good governance.<sup>213</sup> Some accounts, on the other hand, argue that there is a problem of the premiership not being sufficiently strong.<sup>214</sup>

Other features of the authority and regulation of the executive involve statute and parliamentary consent. While the position of prime ministers is to a considerable extent grounded in convention, secretaries of state – rather than departments, which lack distinct legal existence – have more powers vested in them by acts of Parliament (which votes money to them also). As is discussed below, the primary means by which Parliament seeks to make the executive accountable for its actions is through focusing on individual ministers, partly for the exercise of their statutory responsibilities. The more prominent the prime-ministerial role in particular decisions, the more blurred the responsibility becomes, making parliamentary accountability more problematic. Executive transparency is provided for in part by the *Freedom of Information Act 2000*, which creates a statutory right to apply for official information. The effectiveness of this Act is arguably limited by the existence of numerous exemptions and the existence of a ministerial override.<sup>215</sup> Others hold that excessive freedom of information poses a threat to collective Cabinet responsibility.

The ministerial support staff – that is the Civil Service – now has a statutory basis, the *Constitutional Reform and Governance Act 2010*.<sup>216</sup> This Act provides both for impartial permanent civil servants, who largely remain in post regardless of changes in the holders

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<sup>212</sup> See: Andrew Blick and George Jones, *Premiership: the development, nature and power of the office of the British Prime Minister* (Imprint Academic, Exeter, 2010), esp. chapters 1 and 2.

<sup>213</sup> See eg: Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, p.21.

<sup>214</sup> Michael Barber, *Instruction to Deliver* (Politico's/Methuen, London, 2007).

<sup>215</sup> For the exemptions see Part two of the Act; and for the override Section 53.

<sup>216</sup> Part 1.

of ministerial offices or parties of government; and special advisers, whose employment involves the patronage of individual ministers and the retention of power by particular political parties. It establishes a statutory basis for the Civil Service Commission, for management of the Civil Service by the Prime Minister (in the guise of Minister for the Civil Service) and for the issuance of codes of conduct.

A codified constitution might well seek to set out some of the key powers of and restraints upon the UK executive. Rather than being derived from the varied sources of Royal Prerogative, convention and statute, they would be included in the constitutional text.<sup>217</sup> The portions of the Constitutional Reform and Governance Act dealing with the Civil Service could probably readily be incorporated into a constitutional text. The Freedom of Information Act might also be transplanted, possibly with modifications.<sup>218</sup> There might be a broader attempt formally to establish the concept of the 'state', or perhaps more narrowly the executive, as a specific constitutional entity.<sup>219</sup>

A definition might be offered of the Cabinet and the office of Prime Minister in a codified constitution.<sup>220</sup> Doing so would involve judgements about what these institutions were and/or should be. It might be claimed that it would be difficult to make a satisfactory statement of collective responsibility, if it were intended to be in some way justiciable. But a statutory model already exists. As Peter Hennessy notes, through the *Local Government Act 2000* 'the principle of Cabinet government is entrenched in local authorities, with quite detailed guidance on what this means'.<sup>221</sup> Perhaps courts would be reluctant to become involved in adjudicating in this area, as they might continue to be over issues such as the executive conduct of foreign affairs under the Royal Prerogative.<sup>222</sup> However, continued judicial deference of this sort might be regarded as desirable anyway. It could be argued that a placing a statement of the principles of executive government within a constitutional text would be helpful in giving them a firmer footing. It could also be seen as more democratically satisfactory for the executive to derive its authority and modes of operation from a constitution that was in some way democratically determined, rather than to a significant extent the Royal Prerogative and convention. Greater clarity could be achieved as well.

There may be calls to bolster existing regulatory mechanisms, for instance giving enhanced autonomy to the Independent Adviser on Ministerial Interests, who can inquire

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<sup>217</sup> For a proposed codification of the UK executive, see: Liberal Democrat Working Group on Constitutional Reform, *'We, The People...' – Towards a Written Constitution* (Liberal Democrats, London, 1990), Federal Green Paper No 13, Chapter three, Chapter four, pp.43-4. For some international equivalents see: Spanish Constitution, Part IV; Basic Law for the Federal Republic of Germany, VI and VIII.

<sup>218</sup> Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, pp.15-16.

<sup>219</sup> For a proposed constitutional definition of the executive see: Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), pp. 58-66; 192-99.

<sup>220</sup> See eg: Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, p.21.

<sup>221</sup> Peter Hennessy, 'From Blair to Brown: The Condition of British Government', *Political Quarterly* (2007), Volume 78, Issue three, July-September, p.348.

<sup>222</sup> N. W. Barber, 'Against a written constitution', *Public Law* (2008), Spring, p.14.

into potential violations of the *Ministerial Code*, but only if asked to do so by the premier.<sup>223</sup> There might be calls further to entrench the principles of permanence and political impartiality of the Civil Service<sup>224</sup>; or – perhaps less likely – establish a stronger temporary, partisan component within it. The latter course of action would bring the Civil Service more into line with many other states internationally, but would run counter to established UK constitutional orthodoxy.<sup>225</sup>

### *Executive accountability to Parliament*

Parliament has a variety of roles, including as a legislator; a forum for public debate; a source of government support and ministerial personnel; and as the main body responsible for ensuring that the executive is held accountable for its actions.<sup>226</sup> The accountability of the executive to Parliament is embodied in the doctrine of ministerial responsibility and its two components, collective responsibility and individual ministerial responsibility. Under the former component the government is answerable as a group for its overall policy and must command the confidence of the Commons. Individual ministerial responsibility involves ministers at the head of departments, who are drawn from one of the two Houses, being accountable to Parliament for the exercise of their specific powers and the organisation of their departments. It is now accepted as unrealistic that ministers can be held directly responsible for all activities that take place underneath them, particularly since the establishment from the late 1980s of arms length executive agencies. But the precise limits are unclear.<sup>227</sup> The doctrine of ministerial responsibility is enforced by various conventions, a number of which are described in the *Ministerial Code* and *Cabinet Manual*. Convention governs such matters as negotiations between party whips about parliamentary business. The manner in which civil servants give evidence to parliamentary committees, encapsulated in the so-called ‘Osmotherly Rules’<sup>228</sup>, is also determined by convention.

As well as convention, what is known as the ‘law and custom of Parliament’ governs some of the ways in which Parliament holds the executive accountable. This constitutional source – which is not legally enforceable – includes the Standing Orders of the House of Commons, which provide for the existence of select committees, a vital component in executive accountability to Parliament. Legislative procedures are another

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<sup>223</sup> Independent Adviser on Minister’s Interests, *Annual Report 2010-11* (Cabinet Office, London, 2011), paragraph 2.1.

<sup>224</sup> See eg: Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, p.23.

<sup>225</sup> See eg: Andrew Blick, *People Who Live in the Dark: the history of the special adviser in British politics* (Politico’s/Methuen, London, 2004).

<sup>226</sup> Dawn Oliver, ‘Reforming the United Kingdom Parliament’ in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), pp.167-186.

<sup>227</sup> Hilaire Barnett, *Constitutional and Administrative Law*, Ninth Edition (Routledge, London, 2011), pp.224-8. See: Geoffrey Marshall (ed.), *Ministerial Responsibility* (Oxford University Press, Oxford, 1989); Matthew Flinders, *The Politics of Accountability in the Modern State* (Ashgate, Aldershot, 2001); Gavin Drewry, ‘The Executive: Towards accountable government and effective governance?’ in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), pp.187-212.

<sup>228</sup> ‘Departmental Evidence and Response to Select Committees’, (Cabinet Office, London, 2009).

part of the law and custom of Parliament, enabling both Houses to scrutinise and potentially to amend the legislative proposals of government. The internal arrangements of the parties also play a part in the role of Parliament in ensuring executive accountability, for instance in determining the election of members to Commons committees.

Some provision for executive accountability is provided by, or has a basis in, statute. For instance, the role of Parliament in treaty-making is set out in the Constitutional Reform and Governance Act.<sup>229</sup> The *Civil Service Code*, issued under the same Act, emphasises that civil servants are answerable to ministers who are in turn answerable to Parliament. Privileges of Parliament, such as the special rights of free speech accorded to its members, are provided for by the *Bill of Rights 1689*.<sup>230</sup>

Within the uncodified UK constitution, and through the doctrine of ministerial responsibility, Parliament can be seen as having the primary responsibility for performing a function widely accepted as vital within any set of constitutional arrangements: limiting the central executive through holding it to account for its actions and policies. In other territories the courts can have a more prominent role in this area ascribed to them by a codified constitution, but their ability to do so in the UK is relatively circumscribed, subordinated to the legislative supremacy or sovereignty of Parliament. Disagreement exists about how well suited is the UK Parliament for acting as the main check upon the government. Some hold that this system is desirable because the political (as opposed to legal) form of accountability which it provides for is the most effective variety.<sup>231</sup> A common counter-argument involves an observation of the multiple roles of Parliament. It provides support and ministerial personnel for the government, as well as holding it to account, arguably a conflict of interest. It is held that the executive – which is often backed by a well-disciplined majority in the Commons, which became increasingly over time the primary parliamentary chamber – is able to dominate Parliament and is therefore not properly restrained by the supposed principal check upon it.<sup>232</sup> In this sense the principle of separation of powers does not apply to the UK constitution.

The identification of these supposed weaknesses is often central to arguments in favour of establishing a codified UK constitution. In the words of Lord Hailsham:

the Sovereignty of Parliament has increasingly become, in practice, the sovereignty of the Commons, and the sovereignty of the Commons has increasingly become the sovereignty of the government, which, in addition to its influence in Parliament,

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<sup>229</sup> Part 2.

<sup>230</sup> Article 9. See: Joint Committee on Parliamentary Privilege, *Volume I – Report & Proceedings* (Stationery Office, London, 1999), HL 43-I; HC 214-I, Chapter 2.

<sup>231</sup> Adam Tomkins, *Our Republican Constitution* (Hart, Oxford, 2005).

<sup>232</sup> Dawn Oliver, 'Reforming the United Kingdom Parliament' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), p.171; Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, pp.15-16. For an assessment of the strength of the UK executive using international comparisons, see: Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale, University Press, London, 1999), pp.132-3

controls the party whips, the party machine and the civil service. This means that what has always been an elective dictatorship in theory, but one in which the component parts operated in practice to control one another, has become a machine in which one of those parts has come to exercise a predominant influence over the rest.<sup>233</sup>

A codified constitution might be expected to set out some of the key features of executive accountability to Parliament discussed above, such as individual ministerial responsibility and perhaps some of the specific applications of it as set out in the *Ministerial Code*. It could be argued that this approach would be valuable from the point of view of transparency and establishing basic principles, and might encourage greater adherence to constitutional values. However, how far the rules of accountability would or should be enforceable, for instance through the courts, is debatable. Precise conclusions about whether they had been upheld in a particular circumstance would be difficult to arrive at. Furthermore, the judiciary would probably be reluctant to involve themselves in deciding such matters.

It might be that the existence of some parliamentary committees – such as the Backbench Business Committee; Joint Committee on Human Rights; and semi-parliamentary Intelligence and Security Committee – would be stipulated. Whether all parliamentary committees would be is less likely, in so far as they are subject to regular alterations when Whitehall is reorganised, though the general practice of establishing committees could be provided for in a codified constitution. It seems likely that a codified constitution would provide for the main features of financial accountability to Parliament, as enforced by the Commons Public Accounts Committee, supported by the National Audit Office and its head, the Comptroller and Auditor-General, the independence of which could be in some way constitutionally enshrined, along perhaps with the Commons Public Accounts Commission. Within this arrangement the exceptional direct responsibility to Parliament of civil servants who are Accounting Officers might also be stipulated.<sup>234</sup>

It is possible that a codified constitution process would seek to introduce new practices to enhance parliamentary oversight of the executive, strengthening Parliament as an institution in its own right.<sup>235</sup> For instance, recent calls for improved standards in the preparation and scrutiny of legislation might be given expression in a constitutional text. Means might be sought for giving Parliament, as opposed to the executive, more control over its own timetable; and for playing a more active role in overseeing expenditure. A particular problem that may attract attention during a codification process is the large quantity of secondary legislation, issued under the authority of parent acts, giving effect to ministerial policy programmes, but often subject to little or no parliamentary

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<sup>233</sup> Lord Hailsham, *Elective Dictatorship: The Richard Dimbleby Lecture, 1976* (British Broadcasting Corporation, London, 1976), p.18-19.

<sup>234</sup> See eg: Constitution of the Kingdom of the Netherlands 2002, Chapter 4.

<sup>235</sup> For a set of proposals for inclusion in a codified constitution along these lines see: Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, pp.15-20.

oversight.<sup>236</sup> Parliament might be given a larger role in considering decisions to reorganise Whitehall departmental functions, which is effected through such devices.<sup>237</sup> Consideration may be given to possibilities for restricting the creation of so-called ‘Henry VIII’ powers, which provide for the amendment of acts of Parliament through secondary legislation. A codification process may wish to explore means of rectifying the problems involved in realistically holding ministers accountable for all that takes place in their departments.

More radical changes to the executive/legislative relationship would probably be advocated during the course of a constitutional codification process. It could be argued that the fusion of executive and Parliament is incompatible with the latter performing the key constitutional role of ensuring that the former is held to account. The radical solution to this perceived problem might be to determine the composition of the executive in direct elections separate from those to Parliament, along the lines of the presidential system of the United States.<sup>238</sup> Within this changed configuration, the executive might be seen as directly accountable to the electorate, as would be the Commons (and perhaps a recomposed Lords), with both institutions in a relationship of co-governance. From this perspective, the doctrine of separation of powers would have been newly-introduced to this part of the UK constitution.

### **External and supranational dimensions**

The debate about codifying or not codifying the UK constitution needs to take into account the relationship between the UK and the outside world. The UK is closer to a dualist than a monist model with regard to the status of international agreements entered into by the UK government. In the UK treaties made under the Royal Prerogative (subject to the terms of the Constitutional Reform and Governance Act) do not in themselves alter domestic law, though customary international law is in theory part of UK law. Any changes to UK law required to give effect to international agreements depend upon parliamentary authorisation. In contrast, under more monist systems, such as exist in France and the U.S, broadly speaking international agreements are automatically integrated into the legal hierarchy, taking precedence over domestic law.<sup>239</sup>

Two treaty commitments in particular have been incorporated into UK law with significant direct consequences for UK constitutional arrangements. The first is the European Convention on Human Rights, incorporated under the HRA. Amongst other stipulations, the HRA states in Section 2:

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<sup>236</sup> See eg: Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), pp.77-8.

<sup>237</sup> See eg: Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, p.22.

<sup>238</sup> See: Graham Allen, *The Last Prime Minister: being honest about the UK presidency*, Second Edition (Imprint Academic, Exeter, 2003).

<sup>239</sup> David Feldman, ‘The internationalization of public law and its impact on the UK’ in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution*, Seventh Edition (Oxford University Press, Oxford, 2011), pp.132-61. See eg: French Constitution, Article 55; Constitution of the Kingdom of the Netherlands 2002, Article 94.

## 2 Interpretation of Convention rights.

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

In that it is protected from implied repeal the Human Rights Act can be said to possess some similarity to the provision of a codified constitution, and challenges traditional constitutional understandings in the UK. An even greater impact has been made by the European Communities Act 1972, giving domestic legislative expression to UK membership of what is now the European Union (an organisation all the members of which other than the UK possess codified constitutions). The European legal order is held by its own organs to be superior to national legal systems.<sup>240</sup> This position is disputed at the national level in the member states, where it tends to be asserted that it is only through domestic enactment that European law has force. But it can reasonably be said that the European Communities Act incorporates a supranational legal system into UK law and – at least while the act remains in force – means that European law overrides regular UK law. In this sense it too resembles a component of a codified constitution.

Codification of the UK constitution, if it was attempted, would have to take international agreements and their impact into account. Existing statutory provision for parliamentary oversight of treaty-making might be included within the codified constitution, and possibly strengthened.<sup>241</sup> Some of the arrangements for parliamentary oversight of the European business of government, including the devising of legislative measures, could similarly be given a basis in the codified constitution. Current provision under the *European Union Act 2011* requiring referendums before most possible instances of further sovereignty sharing at EU level, is not itself protected from repeal. A codified constitution might entrench it. A constitutional text might hold that joining organisations such as the European Union should be made subject to a binding referendum held in advance. A clear domestic procedure by which withdrawal from the EU could be effected

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<sup>240</sup> Hilaire Barnett, *Constitutional and Administrative Law*, Ninth Edition (Routledge, London, 2011), p.185-7.

<sup>241</sup> See eg: French Constitution, Title VI; US Constitution Section 10.

could be set out in the constitutional text. Some would argue that a constitutional codification exercise itself should include within its scope the possibility of UK withdrawal from the EU.

As to the incorporation of international agreements into UK law, a codified constitution would presumably wish to retain the dualist tendency of UK arrangements. Membership of the EU (assuming it was to be retained) could then be provided for positively by a specific constitutional article.<sup>242</sup> There are a range of ways in which a codified constitution could determine EU membership, including possibly stipulating that European law was effective subject to, rather than overriding, the UK constitution.<sup>243</sup> Some commentators see constitutional codification as a means of protecting UK arrangements from external pressures, in particular the EU.<sup>244</sup> There might be pressure for provision to ensure that acts of Parliament took priority over European law, though such a measure would make problems for the position of the UK within the EU. If EU membership was dealt with by a codified constitution, section 18 of the European Union Act, which seeks to assert that EU law exists in UK law by virtue only of UK parliamentary statute, might then be judged redundant, since the constitutional text would now be the domestic basis of the authority of EU law and of the authority of Parliament.

In a codified system, rather than provided for by the HRA, the Convention rights could be incorporated through the constitutional text, possibly by stating that it was incorporated, or specifically setting out the rights for which it provided. Some might argue that, in the process, the contents of various other international human rights instruments, for instance covering economic, social and cultural rights might be apt for constitutional protection. A UK Bill of Rights could be constructed, interwoven with and perhaps adding to various international agreements.<sup>245</sup> A codified constitution might also require courts as far as possible to give consideration to unincorporated international agreements in their deliberations. During a codification process, others might advocate withdrawal from the European Convention on Human Rights, possibly coupled with the introduction of a UK Bill of Rights.

When the external relations of the UK are considered, another important subject with constitutional implications arises: the relationship with the former Empire.<sup>246</sup> The Crown has various authorities and functions involving Crown Dependencies, Overseas Territories and Commonwealth countries of which the monarch remains head of state. While these states are not formally part of the UK, constitutional codification, which is likely to have implications for the status of the Crown, would entail consideration of their relationship with the UK constitution. A model that may merit consideration is that

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<sup>242</sup> For one possible means of handling this issue, see: Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), p.199.

<sup>243</sup> N. W. Barber, 'Against a written constitution', *Public Law* (2008), Spring, pp.15-18.

<sup>244</sup> See: Frank Vibert, *Constitutional Reform in the United Kingdom – An Incremental Agenda* (Institute of Economic Affairs, London, 1990), p.21.

<sup>245</sup> Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), pp.125-49.

<sup>246</sup> For a discussion of the possible territorial extent of a UK codified constitution, see: Rodney Brazier, 'Enacting a Constitution', *Statute Law Review*, Volume 13, Number 2, Autumn 1992, p.120.

employed in the Netherlands. An overall Charter for the Kingdom of the Netherlands exists, covering the Netherlands and some of its former colonies; within which each has its own constitution.<sup>247</sup> A codified constitution might also be a means by which the UK could renounce its theoretical right to reverse the acts of Parliament granting independence to previous components of its Empire. Portions of the *Statute of Westminster 1931*, including its preamble providing in part for consultation with other countries of which the monarch is head of state over changes to the royal succession, might be considered apt for inclusion in – or modification by – a codified constitution.

### **Part Three: Constitutional sources**

Codification of the UK constitution, if it took place, would be likely to involve transferring the constitution, however defined, from the various different sources in which it is currently based to a single location which would become the primary constitutional source (or expression of the constitution) – the constitutional text. The following part considers the implications of such a shift, assessing various different constitutional sources in turn.

#### **Constitutional conventions**

Constitutional conventions are rules governing the operation of the UK constitution which are not enacted as law (though their existence may be recognised by the courts).<sup>248</sup> They can be seen as helping to ensure that the constitution functions effectively and in accordance with principles not explicitly provided for by its legal configuration. For instance, as discussed above, they are important to ensuring that a constitution which is in some legal senses pre-democratic accommodates democracy. Doubt exists about the definition of conventions. It is sometimes noted that they are not simply descriptions of what happens; but of what *should* happen.<sup>249</sup> There can be problems in separating conventions from other constitutional features that have been observed such as usages and generalised principles.<sup>250</sup> A distinction is proposed in this paper between doctrines: that is, overarching constitutional principles such as the rule of law; and conventions: more practical rules, which may serve to give effect to doctrines. Conventions are often also distinguished from the law and custom of Parliament, as contained in such sources as Standing Orders.<sup>251</sup>

The establishment, alteration and cessation of constitutional conventions may well not be determined by single, deliberate acts, as shown by the development of the convention that

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<sup>247</sup> Aalt Willem Heringa and Philipp Kiiver, *Constitutions Compared: An Introduction to Comparative Constitutional Law* (Intersentia, Antwerp, 2007), pp.25-6.

<sup>248</sup> For a classic text on this subject, see: Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984).

<sup>249</sup> Sir W. Ivor Jennings, *The Law and the Constitution* (University of London Press, London, 1959), p.133.

<sup>250</sup> Geoffrey Marshall and Graeme C. Moodie, *Some Problems of the Constitution* (Hutchinson University Library, London, 1971), pp.26-8.

<sup>251</sup> For the law and custom of Parliament, see eg: A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, p.19.

the Prime Minister can be drawn only from the Commons, not the Lords. It seems to involve a combination of precedent, principle and the beliefs of those involved about what the rules are.<sup>252</sup> At any given time it is impossible to state with certainty and wide agreement what are all the conventions of the constitution.<sup>253</sup> While some conventions are described in documents with official status, such as the *Ministerial Code*, *Cabinet Manual* or *Guide to Judicial Conduct*, there is no definitive list, and the claims made in these documents may themselves be disputed. There may be disagreement about what are the conventions in relation to certain issues, such as the procedures to be followed after a Prime Minister has resigned in circumstances where there is no overall majority in the Commons.<sup>254</sup> Even when a convention is known to exist, it can be vaguely formulated<sup>255</sup>, making it difficult to discern how precisely it should be applied in a particular set of circumstances. This flexibility or amorphousness could be held to afford certain constitutional players – in particular the central executive – considerable discretion as to how it should interpret and act upon conventions.

It might be argued that the uncodified quality of many conventions is now beginning to be replaced by an accelerating tendency for publication in official documents such as the *Ministerial Code* and the *Cabinet Manual*; a process within which the executive, once again, is often the dominant party. In some cases – including that of the *Civil Service Code*, first promulgated in 1996 – codified conventions have gone on to be provided with a statutory basis (in the case of the *Civil Service Code*, under Section 5 of the Constitutional Reform and Governance Act).<sup>256</sup>

There has been some discussion of why conventions are followed<sup>257</sup>, with one suggestion being that they are obeyed when there is a desire to avoid undesirable political consequences that may follow from failure to do so; or to put it positively, ‘that they express prevailing constitutional values’.<sup>258</sup> Conventions cannot directly be enforced by the courts. However, a court may recognise that a convention exists and take it into account, as happened when the UK government sought in 1976 to prevent the publication of the diaries of the former Cabinet minister, Richard Crossman. On this occasion the court recognised the existence of collective responsibility (assuming collective responsibility is classified as a convention rather than a doctrine). Elsewhere in the Commonwealth, the Canadian Supreme Court in 1982 recognised the existence of a

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<sup>252</sup> See eg: Joseph Jaconelli, ‘The nature of constitutional convention’, *Legal Studies* (1999), Vol. 19, pp.24-45.

<sup>253</sup> Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009), pp.222-4.

<sup>254</sup> See eg: Robert Blackburn, ‘Monarchy and the Personal Prerogatives’, *Public Law*, Spring 2004: pp.546–63; Andrew Blick and Peter Hennessy, *The Hidden Wiring Emerges: the Cabinet Manual and the working of the British constitution* (ippr, London, 2011), p.26.

<sup>255</sup> Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984), p.4.

<sup>256</sup> Andrew Blick and Peter Hennessy, *The Hidden Wiring Emerges: the Cabinet Manual and the working of the British constitution* (ippr, London, 2011). See also: Aileen McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’, *Modern Law Review* (2008), Vol. 71 (November) No.6, pp.853-77.

<sup>257</sup> See eg: Joseph Jaconelli, ‘Do constitutional conventions bind?’, *Cambridge Law Journal* (2005), 64, pp.149-67.

<sup>258</sup> A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, p.25.

convention regarding consultation with the provinces over constitutional change.<sup>259</sup> Scope also exists for judicial review of decisions adversely affecting individuals if those making the decisions failed to follow constitutional conventions that there were legitimate grounds for expecting them to abide by. This principle may apply to conventions that have been included in codes such as the *Ministerial Code* or *Cabinet Manual*. In its assessment of the draft *Cabinet Manual* the House of Lords Select Committee on the Constitution described:

a risk...that if a minister arrives at a particular decision and expresses himself in terms which show that he has not considered the relevant parts of the Manual, it could be argued in judicial review or other legal proceedings that he had failed to take into account a relevant consideration.<sup>260</sup>

### **Constitutional codification and conventions**

A number of matters which are currently regulated wholly or partly by convention might reasonably be expected to be included within a codified constitution.<sup>261</sup> Often relating to the way in which the Royal Prerogative is exercised, they include:

- Principles governing the granting or withholding of assent by the head of state to bills;
- Rules governing the appointment and resignation of prime ministers, including when there is no single party majority in the House of Commons;
- The role of the Prime Minister in advising the head of state over ministerial and other appointments;
- The role of the Prime Minister as head of government;
- The powers and operational principles of Cabinet;
- The formula for the distribution of finance between the different nations of the UK;
- The circumstances in which it is necessary to hold a referendum on changes of a constitutional nature (other than those covered by the European Union Act); other procedural requirements necessary for such alterations;
- The circumstances in which the UK Parliament can and cannot legislate for devolved matters;

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<sup>259</sup> Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009), pp.221-2.

<sup>260</sup> House of Lords Select Committee on the Constitution, *The Cabinet Manual*, HL 107 (Stationery Office, London, 2011), p.13.

<sup>261</sup> For a proposed constitution which seeks to codify a variety of existing conventions, see: Liberal Democrat Working Group on Constitutional Reform, *'We, The People...' – Towards a Written Constitution* (Liberal Democrats, London, 1990), Federal Green Paper No 13.

- Certain requirements described in the *Ministerial Code*, such as the stipulation that ministers should provide truthful and accurate information to Parliament;
- The regular meeting of Parliament;
- The role of civil servants in providing evidence to parliamentary committees;
- The practice of parliamentary hearings for favoured candidates for major public appointments, before they take up office; and
- The status of the advice of government law officers.

It is clear from this list that there are some exceptionally important issues that are presently regulated by convention that might become part of a codified constitution, were such an entity established. The need to make key conventions clearer to the public and directly legally enforceable is identified as a motive for introducing a codified UK constitution.<sup>262</sup> But, if an attempt were made to base a codified constitution on present practices, identifying existing conventions clearly and in a consensual fashion would be a difficult task.<sup>263</sup> Moreover, conventions are involved in the operation of any constitution, uncodified or codified.<sup>264</sup> They would develop around a UK codified text if introduced, though possibly not performing such a prominent role as at present.

### **The Royal Prerogative**

For the purposes of the present paper, two important features of the Royal Prerogative are considered: its general legal and political status; and the particular powers exercised under it, a number of which might reasonably be expected to be dealt with in a codified constitution, if such an entity existed for the UK.

#### *General legal and political status of the Royal Prerogative*

A recent government review of the Royal Prerogative focused on its manifestation as a collection of: ‘powers which are peculiar to the executive and derived from the historic status of the monarch’.<sup>265</sup> While there has not always been universal agreement about what the Royal Prerogative is, a number of other authorities seem to share the approach adopted by the government.<sup>266</sup> Most prerogative powers are in practice – that is, on a

<sup>262</sup> Lord Scarman, *Why Britain needs a Written Constitution*, The Fourth Sovereignty Lecture (Charter 88 Trust, London, 1992), p.4.

<sup>263</sup> For an account of an exercise along these lines in Australia, see: C. J. G. Sampford “‘Recognise and Declare’’: An Australian Experiment in Codifying Conventions’, *Oxford Journal of Legal Studies* (1987), Vol. 7 No.3, p.369.

<sup>264</sup> Rodney Brazier, ‘Enacting a Constitution’, *Statute Law Review*, Volume 13, Number 2, Autumn 1992, p.112.

<sup>265</sup> Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, London, 2009) p.8.

<sup>266</sup> See eg: A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, p.248.

basis of convention – exercised by ministers or civil servants on their behalf; though some remain personal to the monarch. The official review noted that the courts determine whether particular powers exist under the Prerogative. However, not all Prerogative powers have had their existence validated, or not recently. The fullest account available dates from the early nineteenth century.<sup>267</sup> As part of the *Governance of Britain* constitutional reform programme pursued during the Labour premiership of Gordon Brown, the first full internal government review of the Prerogative powers was conducted. But even for this process, ‘the nature, range and complexity of the prerogative powers meant that the survey did not attempt to provide an exhaustive list of all those that may exist’. (Nor did it ‘seek to cover the Royal prerogative as it relates to devolved matters that fall within the competence of the Ministers of the devolved administrations in Northern Ireland, Scotland and Wales’.) The government divided the list it produced into four categories:

- a) prerogative powers exercised by Ministers;
- b) executive constitutional / personal prerogative powers exercised by the Sovereign;
- c) legal prerogatives of the Crown, such as Crown immunity (to the extent that it continues to exist in view of the Crown Proceedings Act 1947) and
- d) archaic prerogative powers, most of which are either marginal (relating to small, specific issues or largely superseded by legislation), or no longer needed.<sup>268</sup>

The contents of the list are reproduced in Appendix a of this report. It demonstrates that the Royal Prerogative is a diverse range of powers, ranging from the trivial and archaic to those of first-order significance that would probably be included in some form in a UK codified constitution, if such an entity came into being.

#### *Restraint and accountability of the Prerogative*

The Prerogative can, according to legal principle, only be retrenched, not expanded. Parliament can abolish or restrict Prerogative powers, or create similar powers on a statutory basis. But it cannot create new Prerogative powers; nor can the courts accept their existence. However, the courts can in some respects perform what might be seen as a creative role. First, they can identify a Prerogative authority the existence of which was open to question. Second, they are able to adapt old powers to circumstances which have changed. The third form of judicial discretion arises when Parliament has created a new statutory set of authorities in a general area where the Royal Prerogative operates, but not

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<sup>267</sup> Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Butterworth & Son, London, 1820); Ministry of Justice, *Review of the Executive Royal Prerogative Powers*, p.8. For a more recent academic assessment of the Royal Prerogative, see Rodney Brazier, ‘Constitutional Reform and the Crown’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, Oxford, 1999), pp.337-62.

<sup>268</sup> Ministry of Justice, *Review of the Executive Royal Prerogative Powers*, pp.2 and 5-6.

expressly abolished it. The courts may then be in the position of assessing whether or not the Prerogative has been reduced.<sup>269</sup>

In overseeing the Prerogative, courts can both make decisions about the existence and nature of particular powers, and examine the way in which they are used. They can do so through more traditional judicial review, considering whether ministerial actions were within the scope of existing powers; their reasonableness; and their procedural fairness; and under the Human Rights Act, determining whether rights provided for under the European Convention on Human Rights have been violated. The judiciary has become increasingly assertive with respect to the Prerogative in recent decades. But there remain features of it – particularly those involving foreign affairs – with which the courts remain reluctant to engage.<sup>270</sup>

Another way in which the exercise of the Prerogative is regulated is through conventions. As is discussed above, these understandings are both vague and not directly legally enforceable. Consequently, it is not clear when it might be appropriate for important constitutional Royal Prerogative powers to be deployed in certain ways. For instance the monarch in theory possesses personal reserve powers to (amongst other things) dismiss prime ministers and select their replacements; and refuse to grant Royal Assent to bills. While the existence of such powers might be needed to preserve democracy in extreme circumstances, there is no precision about when it might be appropriate and necessary to deploy them.

A significant feature of the Royal Prerogative is its extra-parliamentary nature. It affords authorities to ministers which have not been authorised by Parliament (although in areas such as control of the Armed Forces, Prerogative and statutory powers may be meshed together with one-another<sup>271</sup>). Moreover, there is generally no legal requirement for Parliament to play a part in the exercise of the Prerogative (an exception here is the Prerogative power to ratify treaties, which the House of Commons can now in theory veto under Part 2 of the Constitutional Reform and Governance Act, provided the ministerial bypass allowed for under the Act is not exercised<sup>272</sup>).

However, as discussed above, Parliament can legislate to alter the Prerogative. Moreover, it can in theory hold ministers to account for any and all of their actions, regardless of the particular authority under which they were carried out. Parliamentary approval (and subsequent scrutiny) is required for all expenditure, including that entailed by the exercise of the Prerogative. Finally, ministers may feel political pressure to consult Parliament over the use of a Prerogative power (as did the Labour government over the invasion of Iraq of 2003); and conventions may exist stipulating a role for Parliament.

### *The Royal Prerogative and constitutional codification*

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<sup>269</sup> A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, pp.254-7.

<sup>270</sup> A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, pp.257-9.

<sup>271</sup> Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, London, 2009) pp.13-14.

<sup>272</sup> *Constitutional Reform and Governance Act 2010*, Part Two. For the ministerial override, see Section 22.

There is a strong likelihood that the Royal Prerogative in its present form would not survive the introduction of a codified UK constitution. If a constitution is to be, as the Gordon constitution puts it, ‘the supreme law of the state’, providing the only lawful basis for ‘the exercise of power’<sup>273</sup> then it would seem the Prerogative could no longer be a source of constitutional authority. In the explanatory notes to Article 1 of the IPPR constitution ‘prerogative power’ is identified as being supplanted by ‘the written provisions of this Constitution’.<sup>274</sup> The varied collection of powers which are at present grouped together within the Prerogative might be separated and expressed in different instruments according to their nature (or possibly in some cases abolished altogether). These sources could include primary legislation, possibly secondary legislation and – for those of a significant constitutional nature – inclusion in a constitutional text. An equivalent to the Privy Council, the organ of the Prerogative, might be established by the constitution.

Constitutional powers which were formerly part of the Prerogative might be given greater clarity. The drafting of a constitution might follow the principle that as far as possible all significant constitutional powers should be provided for expressly in the text. There might be an attempt to list them all exhaustively, as well as providing definitions of each. It could settle questions such as whether the executive possessed discretionary emergency powers beyond those provided for in statute (by the *Civil Contingencies Act 2004*)<sup>275</sup>; and, if so, what they were. It is probably the case that even a detailed codified constitution could not avoid leaving some room for doubt about all the precise uses to which powers within the various categories it set out might be put, particularly as the passage of time presented new circumstances to which governments had to respond. Nonetheless, through such an approach, a codified constitution might establish a clearer idea about which powers exist and their nature than is possible under the Prerogative, for which no definitive official document has been produced.

The establishment of a codified constitution might lead to changes in the allocation of responsibility for various Prerogative powers. At present it is in practice mainly ministers and officials as well as – theoretically at least – the monarch personally who make decisions about its exercise. During a possible constitutional codification process some would advocate the sharing of legal control of parts of the Prerogative with the Commons and perhaps the Lords; for instance, for engaging in armed conflict (which might be made contingent, presumably with some exceptions, upon a Commons vote on a substantive motion in advance);<sup>276</sup> or for the appointment of the Prime Minister by the monarch (which could follow an investiture vote by MPs). Moreover, the introduction of a codified constitution might encourage and facilitate more extensive judicial consideration

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<sup>273</sup> Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), p.46.

<sup>274</sup> See eg: Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (Mansell, London, 1993), p.61.

<sup>275</sup> For a discussion of this issue, see: Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, London, 2009) pp.19-21.

<sup>276</sup> Simon Burall, Brendan Donnelly and Stuart Weir (eds), *Not In Our Name: Democracy and foreign policy in the UK* (Politico’s/Methuen, London, 2006), pp.187-90.

of the powers that currently exist under the Prerogative.

### **Acts of Parliament**

A substantial and growing proportion of the UK constitution is provided for by acts of Parliament. There is no official definition or list of constitutional acts of Parliament; and important constitutional provisions are made by sections of acts alongside more trivial sections. An indicative list of acts containing within them key constitutional provisions, partly based on the work of the parliamentary Joint Committee on the Draft Civil Contingencies Bill, is produced in the Appendix b to this report.

It is notable that acts of Parliament possess a degree of clarity not associated with conventions or the Royal Prerogative, since there is no question about the existence of an act (though in 2004 the courts considered the validity of the *Parliament Act 1949* and by extension the *Hunting Act 2004*<sup>277</sup>) and they all by definition exist in written form. Legally they supersede other constitutional sources such as conventions and the Royal Prerogative. Consequently, acts of Parliament could be seen as closer in form to the contents of a codified constitution, and easier to translate as part of a codification process. However, there is – except in the more radical judicial suggestions – no specific legal distinction between constitutional and other acts, and identifying those acts or parts of acts which should be included would not be a straightforward task.

### **Judicial decisions**

The judiciary is an important component of the UK constitution, particularly in its function of upholding the rule of law. As well as being part of the constitution, the courts also help determine what the constitution is through the decisions they make. Important to an understanding of the part the judiciary plays is the term ‘common law’ in its different applications. One meaning is as descriptive of a legal system (applying in England and Wales) in contrast with that of civil law. The common law system – to generalise – ‘tends to be case-centred and hence judge-centred, allowing scope for a discretionary, *ad hoc*, pragmatic approach to the particular problems that appear before the courts’. On the other hand ‘the civil law system tends to be a codified body of general abstract principles which control the exercise of judicial discretion’.<sup>278</sup> Another connotation of common law is in contrast to statute law. While the latter is legislation produced by Parliament, the former involves the ‘the substantive law and procedural rules that have been created by the judiciary through the decisions in the cases they have heard’.<sup>279</sup>

These two applications of the term ‘common law’ show that it is both an important

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<sup>277</sup> See: House of Lords Select Committee on the Constitution, *Constitutional aspects of the challenge to the Hunting Act 2004* (London, Stationery Office, 2006), HL 141.

<sup>278</sup> Gary Slapper and David Kelly, *The English Legal System*, Twelfth Edition (Routledge, Abingdon, 2011), pp.4-5. The authors note, however that ‘both of these views are extremes’.

<sup>279</sup> Gary Slapper and David Kelly, *The English Legal System*, Twelfth Edition (Routledge, Abingdon, 2011), p.7. A third connotation of ‘common law’ is as applied to common law courts, as distinct from equity courts, from the late middle ages to the 1870s.

feature of the constitution; and that the common law can develop its own way of operating. Important constitutional practices such as the judicial review of executive action were developed under the common law. As this tendency suggests the judiciary possesses significant discretion under the common law system, including in the constitutional sphere. A key restraint on judicial discretion is that through producing statute law Parliament can overturn common law. Whether Parliament is unlimited in this ability is a subject of controversy.<sup>280</sup>

The judiciary possesses significant license, including in constitutional matters, when interpreting legislation. Law may be unclear because of unavoidable linguistic issues, or because of poor drafting or conception. In making decisions, generally courts are supposed to follow decisions made by courts of equal or higher standing (although the Supreme Court can potentially overturn earlier decisions by the House of Lords/Supreme Court), and take into account decisions of lower courts. When they do so, rather than the earlier decision itself, they apply the reasons for it (*ratio decidendi*), which they determine, affording them further flexibility. They may also take into account *obiter dicta* from earlier cases – statements which are not part of binding decisions, again according to their discretion. The judiciary has further flexibility in precisely distinguishing *ratio decidendi* from *obiter dicta*, since they are not clearly labeled. If there are no relevant earlier decisions, then the court may set a new precedent. All common law must have been created at some point. For these reasons it is reasonable to argue that – though the orthodox position is that it only applies the law – the judiciary can make the law, including over constitutional issues.<sup>281</sup>

A limitation on the scope of judicial decisions to determine constitutional issues is that there is no codified constitution taking precedence over all other legal enactments, which can be used to disapply them in as far as they do not conform to that constitution. It could be held that there are a set of quasi-constitutional principles associated with judicial review that can be used as a basis for invalidating administrative acts and subordinate legislation. But as far as acts of Parliament are concerned, with the exception of the European Communities Act and the Human Rights Act, the only hierarchy that the judiciary have specifically recognised is that the more recent act supersedes the earlier (this approach has however been questioned, as is discussed elsewhere in this paper).

Subject to these constraints, the ways in which judicial decisions have helped define the UK constitution – arguably even creating constitutional law – include:

- Confirming the existence of certain Royal Prerogative powers and how they may be exercised;
- Establishing legal doctrines of a constitutional nature, such as the ‘Carltona principle’, which arose from the case *Carltona Ltd v Commissioners of Works* in

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<sup>280</sup> Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), pp.18-19.

<sup>281</sup> Gary Slapper and David Kelly, *The English Legal System*, Twelfth Edition (Routledge, Abingdon, 2011), pp.94-150.

1943. The Court of Appeal decided that the functions of ministers are in practice usually carried out by officials; and that decisions made by officials should be treated as the decisions of ministers<sup>282</sup>;
- The second *Factortame* case of 1991 which has been interpreted as meaning that the *European Communities Act 1972* was protected from implied repeal, and that an outside force – the judiciary – could disapply an Act of Parliament (at least while the European Communities Act was in force);
  - Establishing common law freedoms;
  - Passing judgement on major constitutional controversies, such as with the *Jackson* case in 2004, when the House of Lords ruled that the *Parliament Act 1949*, which amended the *Parliament Act 1911*, was valid<sup>283</sup>;
  - Developing the constitutional role of the judiciary itself, for instance through expanding the scope of judicial review more clearly into reviewing the exercise of the Royal Prerogative; and
  - Recognising, though not directly enforcing, constitutional conventions.

### Other constitutional sources

There are further constitutional sources in the UK. They include:

*Doctrines.* Doctrines can be regarded as a tier above conventions, as overarching principles which are given effect by such means as conventions and recognition by the courts. Examples of doctrines include parliamentary sovereignty; the rule of law; and ministerial responsibility (all considered above).

*External influences.* The role of international agreements and supranational legal systems in the UK constitution is discussed above.

*The Law and Custom of Parliament.* While not enforceable by the courts, the law and custom of Parliament is firmer than convention in that it is more clearly defined than much convention, and enforceable by the parliamentary authorities. Some key components of the UK constitution, that might be included within the text of a codified constitution, were it established<sup>284</sup>, fall within this category, as discussed above.

*Expert authorities.* As shown in this paper, the views of Dicey have influenced the

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<sup>282</sup> Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government*, 1<sup>st</sup> edition October 2011 (Cabinet Office, London, 2011), p.25-6.

<sup>283</sup> See: House of Lords Select Committee on the Constitution, *Constitutional aspects of the challenge to the Hunting Act 2004* (London, Stationery Office, 2006), HL 141.

<sup>284</sup> Liberal Democrat Working Group on Constitutional Reform, *'We, The People...' – Towards a Written Constitution* (Liberal Democrats, London, 1990), Federal Green Paper No 13, Chapter three, Part two, p.42.

perceptions of practitioners in the UK constitution, including those who subscribe to the doctrine of parliamentary sovereignty. Other authorities too have achieved lasting influence. Bagehot's view of the rights of the monarch – to be consulted, to encourage and to warn – became the orthodoxy, replicated, with additions, in the *Cabinet Manual*.<sup>285</sup>

*Parties.* The rules and functioning of political parties can play an important constitutional role. For instance, their internal processes for electing leaders can determine who becomes Prime Minister, if there is a changeover between elections. Political parties have become increasingly subject to public regulation, and the receipt of public finance by various means.<sup>286</sup> A codification process might wish to address their status and funding.<sup>287</sup>

## Part Four: Political malaise and constitutional change

An argument offered in favour of codifying the UK constitution is that it could be a means of addressing perceived political malaise afflicting the UK.<sup>288</sup> In the post-1945 era, the UK has seen a decline in satisfaction with prevailing constitutional arrangements. From the late 1950s/early 1960s observers such as journalists and academics, prompted by the decline in the world power status of the UK and perceived economic stagnation, began questioning the effectiveness of the institutions and methods of British governance.<sup>289</sup> There is also evidence of a decline in public confidence in the political system. The Royal Commission on the Constitution arranged a survey in 1973, finding that 48 per cent believed the system works either mainly or extremely well. As of 2011, the figure was 31 per cent, broadly representative of its level in annual surveys taken for the Hansard Society since 2004.<sup>290</sup> There is a tendency towards less popular participation in formal political activities such as party membership and voting. When people do vote, they have become less likely to support one of the two largest parties, with support generally increasing for such parties as the Liberal Democrats and the Celtic nationalists. While this latter trend might only be an obvious problem from the point of view either of the main two parties and/or those committed to the Union, it could be indicative of broader disillusion with political arrangements.

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<sup>285</sup> Andrew Blick and Peter Hennessy, *The Hidden Wiring Emerges: the Cabinet Manual and the working of the British constitution* (ippr, London, 2011), p.20; Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government, 1<sup>st</sup> edition October 2011* (Cabinet Office, London, 2011), p.8.

<sup>286</sup> A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, pp.32-3; Hilaire Barnett, *Constitutional and Administrative Law*, Ninth Edition (Routledge, London, 2011), p.283-6.

<sup>287</sup> Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, pp.9-10.

<sup>288</sup> Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, London, 2010), pp.4-5.

<sup>289</sup> Peter Hennessy, *Whitehall* (Pimlico, London, 2001).

<sup>290</sup> See: [http://hansardsociety.org.uk/blogs/parliament\\_and\\_government/pages/audit-of-political-engagement.aspx](http://hansardsociety.org.uk/blogs/parliament_and_government/pages/audit-of-political-engagement.aspx)

These tendencies have helped produce an unprecedented period of constitutional reform. Entry into what is now the European Union in 1973 can be seen as a policy response to the reduced circumstances of the UK as a world power. In its 1997 General Election manifesto, Labour presented constitutional reform as a means of addressing popular disaffection with politics. The programme it pursued included devolution; the *Human Rights Act 1998*; the removal, through the *House of Lords Act 1999*, of most hereditary peers from the House of Lords; the *Freedom of Information Act 2000*, providing a statutory right to apply for official information under the *Freedom of Information Act 2000*; the introduction of cabinet systems and directly elected mayors (subject to local referendums) to local government under the *Local Government Act 2000*; through the *Constitutional Reform Act 2005*, the establishment of a Supreme Court and the introduction of new provisions for judicial independence; with the *Constitutional Reform and Governance Act 2010* placing the Civil Service and provision for parliamentary oversight of treaty-making on a statutory basis; and various measures intended to make parliamentary oversight of the central executive more effective.<sup>291</sup>

The Coalition has similarly presented its constitutional agenda as intended to reverse declining public faith in politics. Its programme has included further parliamentary reforms; a referendum on the voting system; a reduction in the number of parliamentary seats and an equalisation of the number of voters in each; the *Fixed-term Parliaments Act 2011*, removing from the Prime Minister the right to request dissolutions and making five years the regular term of a Parliament; the *European Union Act 2011*; directly elected police commissioners under the *Police Reform and Social Responsibility Act*; and the *Localism Act 2011*.<sup>292</sup>

While these changes have various underlying motives, the political and social tendencies of the post-1945 era described above have played an important part in prompting them. However, in so far as they were intended to reverse trends that were perceived by some (but not necessarily all) as problems, they have arguably not been successful. In an assessment of the New Labour period of constitutional alteration Matthew Flinders concludes that:

a series of reforms were implemented with little appreciation of what (in the long run) the government was seeking to achieve; or how reform in one sphere of the constitution would have obvious and far-reaching consequences for other elements of the constitutional equilibrium. The result has been a situation of constitutional anomie in which long-standing principles or rules have been jettisoned or corrupted, but not replaced.<sup>293</sup>

The notion of a lack of public faith in politics remains an issue on the political agenda. Arguably constitutional reform has created more issues and doubts than it has resolved<sup>294</sup>;

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<sup>291</sup> See: Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009).

<sup>292</sup> See: Cabinet Office, *The Coalition: our programme for government* (Cabinet Office, London, 2010).

<sup>293</sup> Mathew Flinders, *Democratic Drift, Majoritarian Modification and Democratic Anomie in the United Kingdom* (Oxford University Press, Oxford, 2010), pp.287-8.

<sup>294</sup> Sir John Baker, 'Our Unwritten Constitution', Maccabaeen Lecture in Jurisprudence Lecture in

and has engendered pressure for further reform. For instance, devolution has challenged existing constitutional understandings in the UK, and as it is extended tests them further. At the same time it has not, as was hoped by some, successfully undermined the separatist movement in Scotland, and may have encouraged it through providing a political opening for the Scottish National Party, which has formed the Scottish government since 2007. Some kind of referendum on Scottish independence is now certain. Devolution has also had knock on effects in areas where it has not been introduced. Opinion research evidence suggests growing resentment in England associated with asymmetrical devolution; and desire for some form of distinct English governance.<sup>295</sup>

Various other constitutional changes effected since the 1970s have produced as-yet-unresolved controversy. There is a pronounced lack of consensus around, for instance, membership of the European Union and the Human Rights Act. They have also arguably created doubts about some of the key features of the UK constitution discussed in this paper. Developments such as entry into the EU and the introduction of the Human Rights Act have led some observers to conclude that a shift from a 'political' to a 'legal' constitution has taken place.<sup>296</sup> The increased use of referendums and other public engagement mechanisms could be seen as a threat to the representative form of democracy; and the cumulative impact of numerous changes has been arguably to undermine the doctrine of parliamentary sovereignty both practically and in law.

This last tendency of a possible erosion of parliamentary sovereignty is associated with a constitutional conflict that could arise in future. Declining confidence in the political system could be seen as not solely involving the attitude of the public towards arrangements for its governance, but between different institutions of the constitution. For instance, an upward trend has been observed in rebelliousness amongst backbench MPs of all the main parties in the House of Commons.<sup>297</sup> The judiciary has recently shown increased interest in the idea that it can displace the legislative supremacy or sovereignty of Parliament. For instance, in the event that Parliament, at the behest of the executive, passed legislation which could be seen as severely compromising the rule of law, it might refuse to apply it; or it might treat a class of constitutional statutes as immune from implied repeal. Jeffrey Goldsworthy, who disapproves of this tendency, writes that:

Today, a number of judges and legal academics in Britain and New Zealand are attempting a peaceful revolution, by incremental steps aimed at dismantling the doctrine of parliamentary sovereignty, and replacing it with a new constitutional framework in which Parliament shares ultimate authority with the courts.<sup>298</sup>

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Jurisprudence, British Academy, 24 November 2009.

<sup>295</sup> See also: Richard Wyn Jones, Guy Lodge, Aisla Henderson and Daniel Wincott, *The dog that finally barked: England as an emerging political community* (ippr, London, 2012).

<sup>296</sup> See eg: Adam Tomkins, *Public Law* (Oxford University Press, Oxford, 2003), pp.23-4; Dawn Oliver, *Constitutional Reform in the United Kingdom* (Oxford University Press, Oxford, 2003), p.18.

<sup>297</sup> Philip Cowley, *The Rebels: How Blair Mislaid His Majority* (Politico's, London, 2005).

<sup>298</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press, Cambridge, 2010), p.137.

A direct clash between judiciary and politicians would amount to a serious constitutional conflict.<sup>299</sup> Perhaps it would force the instigation of a constitutional codification exercise of some kind; and arguably the best way of preventing it from happening would be through constitutional codification. On the other hand it could be held that to establish a codified constitution would be to facilitate precisely these kind of conflicts. Moreover, in some accounts, the underlying principles of the common law are more fundamental not only than parliamentary sovereignty but codified constitutions, where they have been introduced.<sup>300</sup>

What else do these trends and the changes they have prompted suggest about the subject of codifying or not codifying the UK constitution? Perhaps the political and social tendencies discussed here point to a need for codification. Such an exercise might promote a wider sense of public ownership of and consequently greater confidence and participation in the political system.<sup>301</sup> Reduced trust could perhaps be countered by clarification of the rules. Codification might promote a more cohesive UK. The *Governance of Britain* green paper argued in 2007 that:

there is now a growing recognition of the need to clarify not just what it means to be British, but what it means to be the United Kingdom. This might in time lead to a concordat between the executive and Parliament or a written constitution.<sup>302</sup>

Possibly thinking along similar lines, the Welsh First Minister, Carwyn Jones, recently called for the establishment of a constitutional convention on the future of the UK in order to maintain the Union.

Codification might be seen as the next logical development of the process of change, serving to provide a new form for a constitution the content of which has been so radically altered. It might perhaps provide the opportunity to resolve some of the issues remaining following this period of dramatic alteration; and it could offer the possibility of constitutional stabilisation, through establishing an amendment procedure that might make further change more considered and inclusive – and perhaps harder to effect.<sup>303</sup>

As well as a clash between judiciary and politicians, other events might force the pace towards codification. For instance, a crisis involving possible Scottish secession from the Union, or a reconfiguration of its place within it, could trigger a radical reconsideration of UK constitutional arrangements. Dawn Oliver argues that the introduction of a wholly or mainly elected House of Lords would mean it could no longer perform its role as a constitutional check; and ‘the case for moving, perhaps bit by bit, to a written

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<sup>299</sup> For an assessment of this prospect, see: Sir John Baker, ‘Our Unwritten Constitution’, Maccabaeian Lecture in Jurisprudence, British Academy, 24 November 2009.

<sup>300</sup> Jeffrey Goldworthy, *Parliamentary Sovereignty* (Cambridge University Press, Cambridge, 2010), pp.2.

<sup>301</sup> Liberal Democrat Working Group on Better Governance, *For the People, By the People* (Liberal Democrat Party, London, 2007), Policy Paper 83, p.14.

<sup>302</sup> Ministry of Justice, *The Governance of Britain* (The Stationery Office, London, 2007), CM 7170, p.62.

<sup>303</sup> See eg: Frank Vibert, *Constitutional Reform in the United Kingdom – An Incremental Agenda* (Institute of Economic Affairs, London, 1990), p.21.

constitution...would then become overwhelming'.<sup>304</sup>

Various possible arguments exist that the developments discussed here make codification neither more desirable nor more plausible.<sup>305</sup> If constitutional reform in recent decades has not achieved all that was hoped for it; and has perhaps created new or exacerbated existing difficulties, it might be asked why a further reform should be expected to prove helpful. With substantial change in the constitution ongoing, it might not be an apt moment to seek to impose a codified entity.<sup>306</sup> A codification process could further inflame already existing disagreements about the constitution.

It could be held that there is already underway movement towards a codified constitution. A consequence of constitutional developments in recent decades has been that much more of the UK constitution is set out in official, publicly-available documents.<sup>307</sup> They include acts of Parliament (such as the *Human Rights Act 1998* and *Constitutional Reform Act 2005*); and various statutory and non-statutory codes (see Appendix c). This trend has involved Royal Prerogative powers being shifted to a statutory basis; and conventions being defined more explicitly in codes, and in some cases then becoming grounded in acts of Parliament. Arguably there is a direction of travel towards greater formalisation and regulation that might lead on to full codification.<sup>308</sup> The appearance of the *Cabinet Manual* in 2011 could be seen as a substantial development here.

Yet while more of the constitution is *codified*, this trend has not yet amounted to *full codification*, and does not inevitably mean it will come about. While the *Cabinet Manual* was initially conceived of as a possible first step towards a codified constitution, this idea was not continued under the Coalition. The existence of a *Cabinet Manual* in New Zealand, which can be traced to 1979, has not yet led to a codified constitution in that country.<sup>309</sup> It may be that, in writing down more of its constitution, the UK is responding to contemporary trends by continuing to develop along its own distinct path.

## Part Five: Conclusions

The consideration of the existing UK constitution and the possible difference that codification would make suggests a number of conclusions about the desirability or otherwise of codification; the process that might be involved, were a decision taken to seek to bring about codification; and the issues of substance with which such a process would have to engage. They are dealt with in turn in this conclusion.

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<sup>304</sup> Dawn Oliver, 'Reforming the United Kingdom Parliament' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, seventh edition (Oxford University Press, Oxford, 2011), p.186.

<sup>305</sup> Anthony King, *The British Constitution* (Oxford University Press, Oxford, 2007), esp. pp.353; 365.

<sup>306</sup> A difficulty noted by Frank Vibert, *Constitutional Reform in the United Kingdom – An Incremental Agenda* (Institute of Economic Affairs, London, 1990), p.21.

<sup>307</sup> Peter Hennessy, 'From Blair to Brown: The Condition of British Government', *Political Quarterly* (2007), Volume 78, Issue three, July-September, p.346.

<sup>308</sup> See eg: Vernon Bogdanor and Stefan Vogenauer, 'Enacting a British Constitution: Some Problems', *Public Law* (2008), Spring, pp.38-9.

<sup>309</sup> See: Blick and Hennessy, *The Hidden Wiring Emerges*.

## *Desirability*

Central arguments against codifying the UK constitution include the claims that there is no compelling case for doing so; and that this programme would bring with it undesirable consequences. The system of governance in the UK, it could be held, has accommodated many substantial changes such as the rise of democracy since the nineteenth century; and the establishment and extension of devolved government from the late-1990s. These developments have been accomplished without a complete break in underlying constitutional arrangements. No crisis has created a ‘constitutional moment’ necessitating codification; and it is hard to conceive of such an event in the foreseeable future. While some countries may require codified constitutions to enforce adherence to appropriate principles of governance, the political culture of the UK does not require this kind of regulation. Some of the criticisms of the present UK constitution seem to involve scenarios – such as a potential unraveling of democracy or the rule of law – that have not occurred and are unlikely to. There is no definite evidence of powerful public demand for codification. This lack of appetite could be seen as helping undermine the case for taking on a task which would, however it was approached, be substantial – possibly enormous – and surely controversial. Disagreements would be likely to arise over how to define the *existing* constitution. Moreover there would be pressure to bring about overt substantive change, establishing the constitution *as it should be*, however defined, which would involve less consensus still.

A codified constitution could be seen as likely to impose a problematic inflexibility upon the UK, through creating demanding amendment procedures. At the same time it might be perceived as producing a democratically inappropriate transfer of political decision-making authority from elected representatives in Parliament to an unelected judiciary. In as far as codification involves an attempt to break with a previous system and establish new arrangements in its place, it might be seen as an inapt constitutional approach. The recent period of rapid constitutional change has produced significant tensions which should be resolved before further development is contemplated.

A number of points support the other side of the argument. The act of codifying might be seen as a valuable exercise in itself, enabling a full discussion about the way in which the UK is governed. Present arrangements, whereby the constitution is confusingly spread across different sources, would be ended. There could as a consequence be more clarity, facilitating wider public understanding of the nature of government and individual rights. Procedures could be established for changing the constitution that might make such alteration more coherent and inclusive. Key features of it – such as provision for devolved government – might formally be protected from alteration in a way they are not at present: that is, constitutional entrenchment. The constitution might take precedence over all regular law and official acts; and it could as such be justiciable.

Underlying these ideas are two related propositions. First, it is held that the UK constitution should be – but is not – characterised by popular sovereignty, that is universal ownership by the population. Second, the supremacy or sovereignty of

Parliament is held in practice to facilitate dominance by the central executive over all other institutions and constitutional principles. Indeed, the executive possesses powers under the Royal Prerogative that have never been approved by Parliament and are mainly subject only to informal parliamentary supervision. Codification is seen as a means of making the executive and the parliamentary authority which it utilises subject to a higher authority – the constitution as expressed in a text.

Some of the possible arguments against codification could be criticised for not sufficiently taking into account that there are many different kinds of codified constitution.<sup>310</sup> Their introduction can involve building upon and not necessarily departing from existing traditions – though it might be argued that a new beginning is sometimes desirable.<sup>311</sup> Amendment procedures can vary substantially, from more to less stringent. Methods of alteration can differ across distinct parts of the same constitution.<sup>312</sup> Constitutional change can be achieved without textual amendment, through such means as the development of conventions and judicial interpretations.<sup>313</sup> The role of the judiciary in constitutional review can be more or less extensive too;<sup>314</sup> and can take on different forms. Some kind of pre-legislative scrutiny could be used to ensure constitutional compliance<sup>315</sup>, reducing the need for judicial arbitration. Moreover, the flexibility of the UK constitution; and the idea that it is defined politically rather than judicially, should not be overplayed. While the judiciary might be given an important role in upholding a codified constitution, it could be noted that in some senses its discretion would be restrained under this new system, as compared with the present position. Under the uncodified constitution, the courts do not have an explicit role in constitutional review. However they are in practice afforded discretion in interpreting different constitutional sources such as acts of Parliament and Royal Prerogative powers; and may possibly at some point seek to displace the supremacy or sovereignty of Parliament, asserting an authority to do so under the common law. A codified system could create more clarity around the contents of the UK constitution; and make more explicit what the judiciary could and could not do in upholding it. For these reasons it is arguable that a codified constitution is a means of preventing the inappropriate wielding of power by judges, rather than facilitating it. Furthermore, the possible tension between parliamentary sovereignty and the rule of law suggested by the existing constitution might be addressed.

Finally, it might be held that there presently exists a momentum of change in the UK

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<sup>310</sup> Rodney Brazier, *Constitutional Reform: Reshaping the British political system* (Oxford University Press, Oxford, 2008), p.160.

<sup>311</sup> Rodney Brazier, 'Enacting a Constitution', *Statute Law Review*, Volume 13, Number 2, Autumn 1992, pp.107-8.

<sup>312</sup> Dawn Oliver, 'Written constitutions: principles and problems' in *Parliamentary Affairs*, Vol. 45, No. 2, 1992, p.149.

<sup>313</sup> Aalt Willem Heringa and Philipp Kiiver, *Constitutions Compared: An Introduction to Comparative Constitutional Law* (Intersentia, Antwerp, 2007), pp.3-4.

<sup>314</sup> See eg: Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale, University Press, London, 1999), p.220 (for variations in amendment procedure); p.226 (for variations in judicial review); Dawn Oliver, 'Written constitutions: principles and problems' in *Parliamentary Affairs*, Vol. 45, No. 2, 1992, p.142.

<sup>315</sup> Dawn Oliver, 'Towards a written constitution?' in Chris Bryant MP (ed.), *Towards a new constitutional settlement* (Smith Institute, London, 2007), p.149.

constitution, which makes codification both a likely and desirable destination. Instability and tension within the UK political system might best be resolved by a codification process. Indeed, it could be presented as helping to preempt a crisis that could prove to be a ‘constitutional moment’, perhaps involving a confrontation between the judiciary and politicians or a threat to the Union, that might in turn make codification unavoidable. Equally it could be seen as building on the increased writing down of the constitution in official, publicly-available documents already taking place.

### *Process*

It is clear that the task of codifying the UK constitution – if it were embarked upon – would be substantial. The UK would be doing more than replacing one codified constitution with another as, for instance, has taken place repeatedly in France. It would be establishing within a mature democracy an entity that does not exist. While there are limited precedents and codification could be approached partly as building on existing structures and practices, it would be a step of historic significance not to be approached lightly. The process would need to take place over a period of time significantly longer than that normally used for the production of legislation. Perhaps it could be enacted by stages rather than all at once. It might well involve the creation of an instrument which possessed a legal status different from a regular act of Parliament, or indeed any existing UK constitutional source – and would in this case need to operate with this goal in mind. A consensus across different social groups might be deemed necessary.<sup>316</sup> The final objective could be the establishment of what might be termed a new ‘rule of recognition’ for the UK constitutional system.<sup>317</sup> That is to say, it would be necessary to achieve acceptance amongst those responsible for operating the law that the codified constitution was the legitimate source of legal authority.

Two considerations important to the composition of a constitutional design process would be who to involve in it; and its precise scope. Various different groups might be expected to participate, partly depending upon how far the constitution was intended to be entrenched and justiciable – that is, how far it was meant to break with previous UK tradition. Since it is in the nature of the existing system that the UK-level executive plays a prominent constitutional role, including in effecting constitutional change, then it might be that a codification process would have to be initiated by a UK government, or at least endorsed by one. But if this process was intended to establish a constitution which commanded sufficient acceptance within the UK to prove effective and lasting, devolved and perhaps local government might have to be involved in some way; and opposition parties. Crucially, if a primary purpose of codification were explicitly to attain popular sovereignty, then the population would have to be involved meaningfully, perhaps not only in authorising and approving the constitution, but designing it. An inclusive process could be required if the overturning of the supremacy of Parliament was to be widely

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<sup>316</sup> Rodney Brazier, *Constitutional Reform: Reshaping the British political system* (Oxford University Press, Oxford, 2008), pp.162-3.

<sup>317</sup> See: H. L. A. Hart, *The Concept of Law*, Second Edition (Clarendon Press, Oxford, 1997).

accepted.<sup>318</sup> Given the complexity of the issues involved there would also be a role for experts of various disciplines, drawing on the relevant theories and national and international evidence. Media outlets would doubtless seek to wield influence, both over whether or not a codified constitution was required, and if it were to be introduced what its content should be.

Another issue to be considered in establishing a codification process would be its parameters. First, what would be determined as constitutional issues for the purpose of the exercise? Would, for instance, electoral systems be regarded as appropriate for treatment within a constitutional text? Decisions taken about what subject matter to include would have direct consequences for the complexity of a codification task and the length and detail of the text that was ultimately produced. Second, how far would a text set out simply to codify the present UK constitution, or to use the codification process deliberately to change it?<sup>319</sup> In a sense, to codify inevitably means to change, since it would involve to some extent defining more precisely constitutional sources such as conventions and doctrines, a prominent feature of which at present is their uncertainty. Moreover, the introduction of amendment procedures and new forms of constitutional enforcement would themselves entail systemic change. Furthermore, there would probably be significant pressure explicitly to set about defining the constitution *as it should be* rather than just *as it was*.<sup>320</sup> Various features of the present UK constitution – such as the relationship between the executive and Parliament; and the position of local government – are a subject of criticism. Codification would be seen by some as the opportunity to correct such perceived problems.<sup>321</sup> But it would probably be necessary to impose certain absolute limitations on a process. For instance, the overturning of devolution settlements without specific consent from those in the devolved areas concerned would surely be ruled out. It seems equally likely that the fundamental abrogation of certain individual rights would be in some way prohibited.

Regardless of its specific scope, a process would be accompanied by controversy of various kinds. The appropriateness of such an exercise would probably be challenged, along with the idea that a codified constitution was required at all. The financial and political resources devoted to it would be queried. Some would hold that its parameters were overly restricted if a process did not allow for such possibilities as Scottish independence or withdrawal from the European Union. Significant disagreements could also arise from attempts to define the existing constitution; and would definitely be produced by attempts considerably to alter it. A process might be designed to allow for the expression and where possible reconciliation of these different outlooks. However, the inclusion of certain items for consideration might distort the entire debate. It cannot

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<sup>318</sup> Rodney Brazier, 'Enacting a Constitution', *Statute Law Review*, Volume 13, Number 2, Autumn 1992, pp.122-4; Dawn Oliver, 'Written constitutions: principles and problems' in *Parliamentary Affairs*, Vol. 45, No. 2, 1992, pp.146-8.

<sup>319</sup> N. W. Barber, 'Against a written constitution', *Public Law* (2008), Spring, pp.11-13.

<sup>320</sup> Dawn Oliver, 'Towards a written constitution?' in Chris Bryant MP (ed.), *Towards a new constitutional settlement* (Smith Institute, London, 2007), pp.146-7.

<sup>321</sup> Graham Allen MP, 'The need for a written constitution' in Chris Bryant MP (ed.), *Towards a new constitutional settlement* (Smith Institute, London, 2007), pp.124-5; N. W. Barber, 'Against a written constitution', *Public Law* (2008), Spring, pp.11-13.

be assumed that in such circumstances media coverage would always serve the purpose of public education.

### *Substance*

Decisions taken about the scope of a codification project, discussed above, would have implications for the text that was produced. Whatever process was used, a variety of choices would need to be made about the precise substance of the constitution. Special attention would have to be given to the form in which it was produced and the prose style used.<sup>322</sup> An overly detailed text might be incomprehensible to the lay reader, to the detriment of public understanding, negating a likely goal of codification. Brevity might also create more flexibility.<sup>323</sup> However, if excessively general the text could lack meaning and lead to a reliance on convention and regular legislation which could defeat the purpose of codification. Moreover a vague text might afford undesirable levels of discretion to the judiciary, or whoever was charged with upholding the constitution.<sup>324</sup> For similar reasons, the desired length of the constitution would be a significant issue to be considered, closely related to matters of scope, style and level of detail.<sup>325</sup>

The legal status of the constitution – including its enforceability and procedures for its amendment – would be an important issue. At the lowest level, a first model<sup>326</sup>, a declaration or code that had no direct legal status might be introduced. However, whether such a statement would qualify as a codified constitution or simply an attempt to create a new convention is debatable. A slightly harder version of this first model might involve the introduction of a regular Act of Parliament compiling core clauses from existing constitutional legislation, but not specially entrenched or justiciable. The *New Zealand Constitution Act 1986* – most of which is in no way formally entrenched – provides a model here to some extent; as does the *New Zealand Bill of Rights Act 1990*.

However, many would hold that a necessary implication of a codified constitution is that it should possess a more than ordinary legal status. It might be expected that following a codification exercise, the judiciary would have some kind of specified role in upholding the constitution; and that alterations to the constitutional text would involve something more demanding than usual legislative procedures.<sup>327</sup> As has been noted there are various different means by which these changes could be given effect. To some extent,

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<sup>322</sup> Rodney Brazier, 'Enacting a Constitution', *Statute Law Review*, Volume 13, Number 2, Autumn 1992.

<sup>323</sup> See eg: Lord Scarman, *Why Britain needs a Written Constitution*, The Fourth Sovereignty Lecture (Charter 88 Trust, London, 1992), p.2.

<sup>324</sup> For an account of these issues, see: Rodney Brazier, 'Enacting a Constitution', *Statute Law Review*, Volume 13, Number 2, Autumn 1992, pp.107-8.

<sup>325</sup> Dawn Oliver, 'Towards a written constitution?' in Chris Bryant MP (ed.), *Towards a new constitutional settlement* (Smith Institute, London, 2007), p.146.

<sup>326</sup> For discussion of possible models, see eg: Rodney Brazier, 'How Near is a Written Constitution', *Northern Ireland Legal Quarterly*, Vol 52, No.1, Spring 2001, pp.1-19; see also: Rodney Brazier, *Constitutional Reform: Reshaping the British political system* (Oxford University Press, Oxford, 2008), pp.130-3; Dawn Oliver, 'Towards a written constitution?' in Chris Bryant MP (ed.), *Towards a new constitutional settlement* (Smith Institute, London, 2007).

<sup>327</sup> See eg: Lord Scarman, *Why Britain needs a Written Constitution*, The Fourth Sovereignty Lecture (Charter 88 Trust, London, 1992), p.2.

mechanisms could be adapted from within the existing constitution. Constitutional review could be based on the model offered by the Human Rights Act, whereby courts can declare an Act incompatible with Convention rights but not disapply or render it void, leaving ministers and Parliament to resolve the issue. Ministers might be required to issue statements of constitutional compatibility (or otherwise) with any bill they brought forward, as they do under the Human Rights Act. Precedent for a harder form of review also exists, derived from the European Communities Act 1972, which overrides later acts of Parliament that conflict with it but do not expressly repeal it. Constitutional acts or sections within acts could by this means be protected from alteration by Parliament, requiring it specifically to express its intention to do so.<sup>328</sup> Otherwise, amendments to statutory provisions deemed to be constitutional could be included within the Parliament acts as subject to the absolute veto of the House of Lords.<sup>329</sup> Within this kind of arrangement, a second model, the constitution might possibly be expressed as an Act of Parliament<sup>330</sup>; and could even be held compatible with the doctrine of parliamentary sovereignty, if such compliance is believed to be important. Indeed, certain entrenchment measures, such as referendum requirements, could also arguably be compatible with parliamentary sovereignty. Otherwise, the UK might be seen as operating in accordance with the 'New Commonwealth Model', within which the UK has been located alongside New Zealand and Canada. Participants in this group, it is held, no longer to adhere to parliamentary supremacy, nor are they bound by judicial/constitutional supremacy.<sup>331</sup>

Further along the scale, in a third model, courts might be given full powers to declare all official actions and legislation, including primary legislation, in so far as they could not be reconciled with the constitution, disapplied or void. Amendment requirements such as approval from devolved assemblies, referendums and legislative supermajorities could be used to entrench components of the constitutions. Portions of it, such as basic rights, might even be declared un-amendable; a measure surely irreconcilable with the doctrine of parliamentary sovereignty. Even this approach could draw on some components of the present UK constitution. For instance, measures similar to those intended to ensure that devolved assemblies comply with the various limitations placed upon them could be applied to the UK Parliament. The constitution would then be something more than an act of Parliament as presently understood. This approach would, broadly speaking, accord the most closely to international democratic norms for codified constitutions, and with proposals that have been made for the UK along these lines.

Alongside these decisions about the formal composition of the constitution and its status, there would be a need to resolve various issues of its content. Once again, the boundary between codifying the existing constitution and firmly changing it would not always be

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<sup>328</sup> For an assessment of this prospect, see: Sir John Baker, 'Our Unwritten Constitution', Maccabean Lecture in Jurisprudence, British Academy, 24 November 2009.

<sup>329</sup> See eg: Vernon Bogdanor and Stefan Vogenauer, 'Enacting a British Constitution: Some Problems', *Public Law* (2008), Spring, p.54.

<sup>330</sup> For the proposal of a law entrenching constitutional statute, see: Peter Hennessy, 'From Blair to Brown: The Condition of British Government', *Political Quarterly* (2007), Volume 78, Issue three, July-September, p.346.

<sup>331</sup> Stephen Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism', *International Journal of Constitutional Law* (2010), Vol. 8, No.2.

clear, partly because the precise present position is in doubt. The composition of and relationship between the two chambers of Parliament, if a bicameral legislature was retained, would probably need to be defined to some extent. Similarly, consideration would have to be given to the status of the monarchy and the Established Church. Assuming a statement or Bill of Rights was included, there would be a need to determine which rights would be afforded protection. If economic and social rights were clearly provided for, the constitution would increasingly take on the character of an entity which not only limited government, but placed upon it a responsibility positively to act in some areas. The status of arrangements for devolution would need to be resolved. Would they enjoy an equal footing with the UK Parliament under the constitution? If so, where would England fit into the new arrangement; and would the UK then clearly adopt a federal model? It seems likely that the different legal systems applying in the UK would be retained. The parliamentary and other means by which the central executive is held to account would probably figure in a constitutional text. The document might seek to settle the extent to which Parliament retained its legislative supremacy. It would also be required to define the relationship between the UK constitution and international agreements. In particular the status of European law and the European Convention of Human Rights would need to be dealt with, either within the context of a broadly dualist system – or less likely – a shift towards monist arrangements.

## APPENDICES

### Appendix A: Royal Prerogative powers

An internal government review of Prerogative powers took place between November 2007 and May 2008. Its findings are quoted from below.<sup>332</sup>

#### *Ministerial prerogative powers*

***Government and the Civil Service*** [NB: Since this list was produced, Part One of the *Constitutional Reform and Governance Act 2010* placed the Civil Service on a statutory footing]

*Powers concerning the machinery of Government including the power to set up a department or a non-departmental public body*

*Powers concerning the civil service, including the power to appoint and regulate most civil servants*

*Power to prohibit civil servants and certain other crown servants from issuing election addresses or announcing themselves, or being announced as, a Parliamentary candidate or a Prospective Parliamentary candidate*

*Power to set nationality rules for ‘non-aliens’ – British, Irish and Commonwealth citizens – concerning eligibility for employment in the civil service*

*Power to require security vetting of contractors working alongside civil servants on sensitive projects*

*Powers concerning the Office of the Civil Service Commissioners, the Security Vetting Appeals Panel, the Office of the Commissioner for Public Appointments, the Advisory Committee on Business, the Civil Service Appeal Board and the House of Lords Appointments Commission, including the power to establish those bodies, to appoint members of those bodies and the powers of those bodies*

#### *Justice system and law and order*

*Powers to appoint Queen’s Counsel*

*The power to make provisional and full order extradition requests to countries not covered by Part 1 of the Extradition Act 2003*

*The prerogative of Mercy*

*Power to keep the peace*

#### *Powers relating to foreign affairs*

*Power to send ambassadors abroad and receive and accredit ambassadors from*

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<sup>332</sup> Reproduced from Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, London, 2009) pp.31-4.

*foreign states*

*Recognition of states*

*Governance of British Overseas Territories*

*Power to make and ratify treaties [ratification now subject to some parliamentary control, under Part Two of the Constitutional Reform and Governance Act 2010, but still exercised under the Prerogative]*

*Power to conduct diplomacy*

*Power to acquire and cede territory*

*Power to issue, refuse or withdraw passport facilities*

*Responsibility for the Channel Islands and Isle of Man*

*Granting diplomatic protection to British citizens abroad*

### ***Powers relating to armed forces, war and times of emergency***

*Right to make war or peace or institute hostilities falling short of war*

*Deployment and use of armed forces overseas*

*Maintenance of the Royal Navy*

*Use of the armed forces within the UK to maintain the peace in support of the police or otherwise in support of civilian authorities (eg to maintain essential services during a strike)*

*The government and command of the armed forces is vested in Her Majesty*

*Control, organisation and disposition of armed forces*

*Requisition of British ships in times of urgent national necessity*

*Commissioning of officers in all three armed forces*

*Armed forces pay*

*Certain armed forces pensions which are now closed to new members*

*War pensions for death or disablement due to service before 6 April 2005*

*(section 12 of the Social Security (Miscellaneous Provisions) Act 1977 provides that the prerogative may be exercised by Order in Council*

*Crown's right to claim Prize (enemy ships or goods captured at sea)*

*Regulation of trade with the enemy*

*Crown's right of angary, in time of war, to appropriate the property of a neutral which is within the realm, where necessity requires*

*Powers in the event of a grave national emergency, including those to enter upon, take and destroy private property*

### ***Miscellaneous***

*Power to establish corporations by Royal Charter and to amend existing Charters (for example that of the British Broadcasting Corporation, last amended in July 2006)*

*The right of the Crown to ownership of treasure trove (replaced for finds made on or after 24 September 1997 by a statutory scheme for treasure under the Treasure Act 1996)*

*Power to hold public inquiries (where not covered by the Inquiries Act)*

*Controller of Her Majesty's Stationery Office as Queen's Printer:*

*the power to appoint the Controller*  
*the power to hold and exercise all rights and privileges in connection with prerogative copyright*  
*Sole right of printing or licensing the printing of the Authorised Version of the Bible, the Book of Common Prayer, state papers and Acts of Parliament*  
*Power to issue certificates of eligibility in respect of prospective inter-country adopters (in non-Hague Convention cases)*  
*Powers connected with prepaid postage stamps*  
*Powers concerning the visitorial function of the Crown*

### ***Other prerogative powers***

*In the Governance of Britain Green Paper, the Government confirmed that no changes would be proposed to the majority of either the legal prerogatives of the Crown or the Monarch's constitutional or personal prerogatives. In some areas the Government proposes to change the mechanism by which Ministers arrive at their recommendations for the Monarch's exercise of the power. These prerogatives are listed below. Also listed are certain prerogatives of a largely historical nature.*

### ***Constitutional/personal prerogatives***

*Powers within the constitutional/personal prerogative category of powers include:*

*Appointment and removal of Ministers*  
*Appointment of Prime Minister*  
*Power to dismiss government*  
*Power to summon, prorogue and dissolve Parliament*  
*Assent to legislation*  
*The appointment of privy counsellors*  
*Granting of honours, decorations, arms and regulating matters of precedence.*  
*Queen's honours – Order of the Garter, Order of the Thistle, Royal Victorian Order and the Order of Merit*  
*A power to appoint judges in a residual category of posts which are not statutory and other holders of public office where that office is non-statutory*  
*A power to legislate under the prerogative by Order in Council or by letters patent in a few residual areas, such as Orders in Council for British Overseas Territories*  
*Grant of special leave to appeal from certain non-UK courts to the Privy Council*  
*May require the personal services of subjects in case of imminent danger*  
*Grant of civic honours and civic dignities*  
*Grant of approval for certain uses of Royal names and titles*

### ***Powers exercised by the Attorney General***

*The Attorney General's Office consulted on the role of the Attorney General in 2007. That consultation set out the functions of the Attorney General. A number of those functions are non-statutory and have been described as prerogative powers. These*

*functions include:*

*Functions in relation to charities*

*Functions in relation to criminal proceedings – including the power to enter a nolle prosequi*

*Functions in relation to civil proceedings – including the ability to institute legal proceedings to protect a public right at the relation of a person who would otherwise lack standing (relator proceedings)*

### ***Archaic prerogative powers***

*The nature of the prerogative has changed over time. Historically the Royal prerogative has been described as residual powers of the Crown. In particular there are some powers which can be described as residual powers relating to small, specific issues or which are a legacy of a time before legislation was enacted in that area. It is unclear whether some of these prerogative powers continue to exist.*

*Guardianship of infants and those suffering certain mental disorders*

*Right to bona vacantia*

*Right to sturgeon, (wild and unmarked) swans and whales as casual revenue*

*Right to wreck as casual revenue*

*Right to construct and supervise harbours*

*By prerogative right the Crown is prima facie the owner of all land covered by the narrow seas adjoining the coast, or by arms of the sea or public navigable rivers, and also of the foreshore, or land between high and low water mark*

*Right to waifs & strays*

*Right to impress men into the Royal Navy*

*Right to mint coinage*

*Right to mine precious metals (Royal Mines); also to dig for saltpetre*

*Grant of franchises, e.g. for markets, ferries and fisheries; pontage & murage.*

*Restraining a person from leaving the realm when the interests of state demand it by means of the writ ne exeat regno*

*The power of the Crown in time of war to intern, expel or otherwise control an enemy alien*

### ***Legal Prerogatives of the Crown***

*The legal prerogatives of the Crown are powers that the Monarch possesses as an embodiment of the Crown. Sometimes described as Crown “privileges or immunities”, these prerogatives have been significantly affected by statute - in particular, the Crown Proceedings Act 1947.*

*Crown is not bound by statute save by express words or necessary implication*

*Crown immunities in litigation, including that the Crown is not directly subject to the contempt jurisdiction and the Sovereign has personal immunity from prosecution or being sued for a wrongful act*

*Tax not payable on income received by the Sovereign*

*Crown is a preferred creditor in a debtor's insolvency*  
*Time does not run against the Crown (ie no prescriptive rights run)*  
*Priority of property rights of the Crown in certain circumstances*

**Appendix B: Acts of Parliament of a constitutional nature: an indicative list, partly derived from the Joint Committee on the *Draft Civil Contingencies Bill* report of 2003<sup>333</sup>**

- Magna Carta 1297
- Bill of Rights 1688
- Crown and Parliament Recognition Act 1689
- Act of Settlement 1700
- Union with Scotland Act 1707
- Union with Ireland Act 1800
- Parliament Acts 1911-49
- Life Peerages Act 1958
- European Communities Act 1972
- House of Commons Disqualification Act 1975
- Ministerial and Other Salaries Act 1975
- British Nationality Act 1981
- Representation of the People Act 1983
- Intelligence Services Act 1994
- Government of Wales Act 1998
- Human Rights Act 1998
- Northern Ireland Act 1998
- Scotland Act 1998
- House of Lords Act 1999
- Local Government Act 2000
- Freedom of Information Act 2000
- Criminal Justice Act 2003
- Civil Contingencies Act 2004
- Constitutional Reform Act 2005
- Government of Wales Act 2006
- Equality Act 2010
- Constitutional Reform and Governance Act 2010
- Fixed-term Parliaments Act 2011
- European Union Act 2011

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<sup>333</sup> House of Commons/House of Lords Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill* (Stationery Office, London, 2003), HL 184/ HC 1074, p.49.

## Appendix C: Key statutory and non-statutory constitutional codes<sup>334</sup>

- The ‘Barnett Formula’ for determining annual increases in funding in Northern Ireland, Scotland and Wales, which became operational in 1979 (1980 for Wales);
- The ‘Osmotherly Rules’, governing what officials can and cannot say in front of parliamentary committees, first formally issued in 1980;
- The *Ministerial Code*, first made publicly available in 1992 as *Questions of Procedure for Ministers*;
- The *Seven Principles of Public Life*, first issued by the Committee on Standards in Public Life in 1995
- The *Civil Service Code*, first issued in 1996 (now placed on a statutory basis by the *Constitutional Reform and Governance Act 2010*);
- Since the late 1990s, the various concordats drawn up between devolved and central tiers of governance in the UK and the devolution ‘Memorandum of Understanding’;
- The *Code of Practice on Consultation*, first issued in 2000;
- The *Code of Conduct for Special Advisers*, first published in 2001 (also now with a basis in the *Constitutional Reform and Governance Act*);
- *Core Tasks for Select Committees*, 2002, setting out the work programmes of House of Commons select committees;
- The *Central-Local Concordat* of 2007, setting out the appropriate relationship between central and local government; and
- The *Cabinet Manual*, published in 2011

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<sup>334</sup> Based on list produced in: Andrew Blick and Peter Hennessy, *The Hidden Wiring Emerges: the Cabinet Manual and the working of the British constitution* (ippr, London, 2011).