Codifying – or not codifying – the UK constitution:  
A Literature Review

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Contents

Executive Summary: Page 3

Questions Arising: Page 6

Introduction: Page 8

Section 1: Page 9

Section 2: Page 17

Section 3: Page 25

Section 4: Page 31

Bibliography: Page 40
Executive Summary

The current UK constitutional settlement

An important theme in much of the literature is that the UK lacks a codified constitution; and the international peculiarity of this position. The absence of a UK codified constitution is regarded as of substantial significance in many accounts – but not all. There is disagreement about whether existing UK arrangements are desirable, or whether a codified constitution of some kind should be adopted. It is often held that establishing a codified UK constitution, where none already exists, would be a formidable task.

The antiquity and continuity of the UK constitution are frequently accentuated; so too is its flexibility. It is suggested that the lack of a critical moment at some point in history provided by military defeat, colonial independence or revolution, helps explain why the UK does not have a codified constitution. As well as references to the long endurance and resilience of the un-codified UK constitution, the literature contains discussion of notable codification exercises in UK (or rather, English) history.

At the heart of most interpretations of the UK constitution lie assessments of ‘parliamentary sovereignty’; a controversial subject, with disputes about both its nature and desirability. Some believe that a codified constitution could be compatible with continuation of parliamentary sovereignty. However, the more commonly held view is that there is in practice a direct choice between the either the retention of parliamentary sovereignty or the establishment of a codified constitution. There is a debate over whether and how Parliament can create a codified constitution, given the doctrine of parliamentary sovereignty.

Another key theme in the literature assessing the UK constitution is the idea that it has in recent decades – and particularly since 1997 – been subject to increasing change. There is a view that as a consequence of cumulative changes since the 1970s parliamentary sovereignty has been eroded. Associated with the narrative of constitutional change is a parallel one of pathology, of problems that have developed within the UK settlement. There is consideration of the idea that substantial constitutional change, especially since 1997, might lead on to full codification; and whether it might be a means of resolving problems associated with the pathology narrative.

Past proposals for a codified UK constitution

There have since the 1970s been a number of proposals for a codified UK constitution. They have been produced by individuals and groups holding a wide variety of different political outlooks. The existence of support for codification from such varied standpoints could be interpreted as an argument in favour of such an exercise. On the other hand, it might be held that the clear ideological content of some of these proposed texts underlines the difficulties inherent in achieving consensus around a possible codified constitution for the UK. Most of the proposed constitutions see codification as intertwined with substantial change to the nature of the UK settlement; possibly suggesting that such a dynamic might apply to an actual codification of the UK constitution.
There is a tendency to assert the concept of popular sovereignty. Most of those who propose codified UK constitutions appear to envisage constitutional supremacy as supplanting Parliament; with judges able to rule acts of Parliament incompatible with the constitution and strike them down.

There is significant variance in the approach to the issues of the monarchy and the Established Church. The constitution-designers tend to propose change to Parliament, the way its membership is determined; and its relationship with the executive. A number of the proposed constitutions provide for devolved governance covering the whole of the UK. The relationship with the European Union is addressed in divergent ways.

All the constitutions provide for the protection of rights; but they differ over precisely what rights, and their enforceability. Those who propose codified constitutions seek to entrench them through amendment procedures, often – but not always – involving referendums. There is some discussion by authors of proposed constitutions of possible processes for their establishment, often, once again, involving referendums.

**Consideration of comparable constitutions internationally**

Within this body of work, constitutional documents are presented as important entities. One general theme in the literature is that constitutional texts are not mere neutral descriptions, rather they perform an action of some kind. The function of a number of constitutions is presented as being to replace an old order with a new one.

A general tendency worldwide to adopt codified constitutions has been observed. The extent to which constitutions are contained in a single document or spread across different texts varies. It may be that there is not a straightforward binary opposition between ‘written’ and ‘unwritten’ constitutions. The two countries other than the UK singled out as lacking codified constitutions are Israel and New Zealand. It is possible to place the UK constitution within the ‘New Commonwealth Model’, alongside New Zealand and Canada.

International constitutions can be analysed and differentiated by consideration of their content. A number of different themes can be explored, including: location of the text; its length; preambles; sovereignty; amendment procedures; provision for the separation of powers; judicial constitutional review; heads of state and of government/parliamentary and presidential systems; bicameral and unicameral legislatures; federal and unitary systems; and fundamental rights.

**Constitution-building processes**

There is no recent direct equivalent to be found to a UK codification project, which would entail a long-established, relatively stable democracy, moving from an uncodified settlement and a doctrine of parliamentary sovereignty to a codified constitution; but some significant comparisons can be drawn.

The background to constitution-building exercises is diverse, but can involve an attempt to respond to a problem of some kind, such as a specific social division, or a more general malaise. A process may be preceded by previous failed attempts to achieve similar goals, or a long campaign to such ends, or academic identification of
certain problems. A constitution-building process may be seen as associated with broad social tendencies; and often requires, to be effective, active support or at least cooperation from central government and its leadership. There may be an interaction between long- and short-term circumstances.

Elite-level activity such as expert drafting and negotiations between politicians is often central to the design of constitutional reform packages. But there is likely to be pressure from various social groups to be involved meaningfully in the devising of constitutional proposals. Design processes may be subject to criticism if they are judged to have been conducted in an excessively exclusive fashion. The literature offers a variety of different ways in which wider involvement might be secured, including some recent innovations.

Once a proposal for constitutional change has been devised, it requires some kind of procedure for its approval. The literature on constitution-building suggests that as well as through votes (possibly requiring super-majorities) in legislatures, there is a widespread tendency for obtaining approval (or otherwise) through referendums, though not in every case. Issues such as timing, the framing of the question and whether or not there is a super-majority requirement are likely to have a significant impact on whether or not the proposal is successfully adopted through referendum.
Questions arising

Implications of and prospects for codification

- How significant for the UK is the lack of a codified constitution? What are the advantages and disadvantages for the UK of this informal settlement? What would be the possible impacts of a codification of the UK constitution, if it were brought about?

- Need a constitutional codification project be combined with a project of constitutional change, or could the position as it is be codified? Is a codified constitution necessarily a vehicle for particular political ideas and objectives? What problems might be raised by such a tendency, were a constitutional codification process embarked upon?

- Do current constitutional trends in the UK entail movement towards a codified settlement?

- Under what range of circumstances might there develop a concerted effort in the UK to adopt a codified constitution? How likely are such circumstances?

Sovereignty and justiciability

- How viable, in theory and in practice, is the doctrine of parliamentary sovereignty?

- Would the doctrine of parliamentary sovereignty create difficulties for any attempt to establish a codified UK constitution? Is it possible that parliamentary sovereignty could be retained within a codified constitutional settlement?

- Should a codified constitution rest on the principle of popular sovereignty?

- To what extent does a codified constitution necessarily entail justiciability, including the possibility of courts striking down primary legislation?

Codification process

- How feasible a task is UK constitutional codification? Could it be achieved incrementally, rather than through a ‘big bang’?

- What particular features of UK political and constitutional culture need to be taken into account?

- What lessons internationally and from within the UK are there for any codification process that might be embarked upon?

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1 The term ‘codified’ is preferred to ‘written’ in this review, since large portions of the UK settlement exist in written form, while codification implies an attempt not just to write down, but to systematise.
• If the decision were taken to attempt to introduce a codified constitution, how far and by what means should members of the public be involved in devising it? What are the practical considerations and resource implications?

• What institutions, procedures and legislation would appropriately play a part in initiating and approving a codified UK constitution? Would one or more referendums inevitably be involved, and would they require simple or ‘super’ majorities?

**Constitution content**

• What general issues would a codified UK constitution need to address? What would it not need to address? Are there particular provisions that would require inclusion in a UK codified constitution which might appear peculiar internationally?

• Is there an appropriate length and writing style for the text of a codified constitution? Should it be contained in one document, or two or more interlinked texts?

• Should a codified constitution contain a preamble and/or opening clauses setting out certain basic principles? If so, what should they be?

• Are there any particular decisions of substance associated with a constitutional codification exercise which might prove controversial? What are the prospects for their resolution?

• Are there features of the existing UK settlement that would be deemed in some way unalterable and beyond the scope of a codification process?

• How might a codified constitution, if adopted, be entrenched? What would be an appropriate amendment procedure? Should some constitutional provisions be un-amendable?
Introduction

This literature review has been carried out at the request of the House of Commons Political and Constitutional Reform Committee. The purpose is impartially to convey the contents of key pieces of primary and secondary literature. It is intended to inform and help guide possible future research in this area, as well as identify core questions which the literature suggests need to be answered. There is an emphasis on more recent sources, generally from the last decade or so. In instances where particular texts, though older, make a valuable contribution to the discussion, they have been included as well. The review divides into four sections:

- Assessments of the current UK constitutional settlement, from historical, political-science and legal perspectives; including its development, strengths and weaknesses;

- Past proposals for a codified UK constitution, including their substance and ideas about processes leading to their introduction;

- Consideration of comparable constitutions internationally, including their structure, content and status; and

- Literature produced about and by constitution-building processes in comparable international democracies and within the UK.

Particular themes considered throughout the review are:

a) The process that might or might not lead to a codified UK constitution, including who would participate; how they would go about devising this settlement; and how it could democratically be ratified;

b) The issues of substance with which that process would have to engage, such as the enforceability of the constitution, its precise contents; and whether it included a Bill of Rights; and

c) The desirability of introducing a codified constitution to the UK, or not: the arguments that have been advanced for and against such a settlement.

This review has been carried out at the Centre for Political and Constitutional Studies, King’s College London, with financial support from the Joseph Rowntree Charitable Trust and the Nuffield Foundation. The Centre is a specialist research unit within the Institute for Contemporary History at King’s College London. It is a politically non-aligned body, promoting scholarly studies and interdisciplinary research into political and constitutional issues, particularly those of contemporary public policy relevance. The Centre’s staff is led by Professor Robert Blackburn (Director) and Professor Vernon Bogdanor (Research Professor), supported by a team of Research Fellows and leading scholars at King’s College London specialising in constitutional law, contemporary history, political science, comparative government, public policy, and political philosophy.
Section 1
Assessments of the current UK constitutional settlement, from historical, political-science and legal perspectives; including its development, strengths and weaknesses

An un-codified constitution

An important theme in much of the literature is that the UK lacks a codified constitution. A distinction is drawn between a constitution as the rules determining political conduct, which the UK like any other country has, and a codified constitution, that is a single document or collection of documents within which they are contained, which the UK lacks. The absence of a UK codified constitution is regarded as of substantial significance in many accounts but not all. Anthony King argues that ‘constitutions…are never…written down in their entirety, so the fact that Britain lacks a capital – C Constitution is far less important than is often made out.’

There is disagreement about whether existing UK arrangements are desirable, or whether a codified constitution of some kind should be adopted. Stein Ringen argues that ‘the American theory’ that a constitution ‘can be laid down in a single document…is impossible’ while the ‘British theory’ that ‘holds a constitution to be a complex and evolving living organism that cannot be set in stone once and for all…is a better answer to the question of what a constitution is than the American formalistic answer’. It is often held that establishing a codified UK constitution, where none already exists, would be a formidable task:

> It is clear that neither a Bill of Rights and Duties nor a written constitution could come into being except over an extended period of time, through extensive and wide consultation, and not without broad consensus upon the values upon which they were based and the rights and responsibilities which derived from them.

Lord Hailsham’s 1976 Richard Dimbleby Lecture, ‘Elective Dictatorship’, is considered in this review since it is an early example of advocacy of a codified UK constitution. Hailsham stated that ‘Only a revolution, bloody or peacefully contrived, can put an end’ to the existing settlement. Doubts have been expressed about whether there exists a sufficient level of public demand for such an exercise to be successful; whether agreement could be reached over content and whether the content that was devised would be desirable. There is discussion of the extent to which codification would involve attempting to define the constitution as it is or altering as

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5 Ringen, ‘Constitutional authority in British democracy’, p.20.

6 *The Governance of Britain*, p.63.

well as codifying it. There is a suggestion that an attempt to capture the existing constitution in full would meet with great difficulty when it came to defining satisfactorily in writing the various conventions regulating the operation of the UK settlement.

The UK is depicted as being internationally peculiar in possessing an un-codified constitution, with New Zealand and Israel frequently cited as the only other democratic states sharing this characteristic. For some the peculiarity of UK arrangements itself is a strength; for others it is a weakness. British peculiarity is portrayed by some as being associated with the supposedly democratically unsatisfactory anomaly of the Royal Prerogative powers, which are wielded by the executive and do not have a basis in parliamentary statute. The UK constitution appears in the literature as ‘flexible’, relatively easy to change, and in ways which are not always widely noticed; and being difficult precisely to define. Some seek to stress flexibility as an advantage which could be threatened by codification; others emphasise the ‘obscurity’ of the UK constitution as a problem. One writer complains: ‘nobody knows what it is’. Codification has been advocated partly in order ‘to clarify the principles’.

An historic constitution
The UK constitution is often assessed from an historical perspective. Its antiquity and continuity are frequently accentuated. The longevity of the constitution may be regarded as valuable in its own right. A review of prerogative powers issued by the Labour government in 2009 stated: ‘Our constitution has developed organically over many centuries and change should not be proposed for change’s sake’.

12 See eg: The Governance of Britain, pp.16-23.
14 See eg: King, The British Constitution, pp.8;10; Stuart Weir and David Beetham, Political Power and Democratic Control in Britain (London: Routledge, 1999), pp.22-23.
19 See: Lord Hailsham, Elective Dictatorship, p.3.
particular through codification.\textsuperscript{21} Perhaps to some extent in contradiction of the idea of its being flexible and relatively easy to change, an entity which has changed only ‘very gradually over time’ is often presented.\textsuperscript{22} For some gradual change is a merit of the UK constitution; while others see an entity resistant to ‘rational reform’.\textsuperscript{23}

It is suggested that the lack of a critical moment at some point in history provided by military defeat, colonial independence or revolution, helps explain why the UK does not have a codified constitution.\textsuperscript{24} Others seem to propose a reverse chain of causality, suggesting that the nature of its constitution has helped insulate the UK against upheaval.\textsuperscript{25} The lack of a tradition of constitutional codification in the UK, if the existence of such a tendency is accepted, would mean that a codification process would not have a clear precedent to follow – or perhaps be restricted by. If a ‘constitutional moment’ can only come in extreme circumstances, there are implications for the likely success of any attempt to introduce a codified constitution not taking place at such a time.

As well as – and in some senses contradicting – references to the long endurance and resilience of the un-codified UK constitution, the literature contains discussion of notable codification exercises in UK (or rather, English) history, including \textit{Magna Carta} in 1215, the constitutions introduced under Oliver Cromwell in the 1650s, and the 1688 \textit{Bill of Rights}.\textsuperscript{26} The processes leading to and content of these documents might be taken into account in the consideration of a possible attempt to establish a codified constitution for the UK.

\textit{Parliamentary sovereignty}

Alongside historical approaches, theoretical accounts are offered of the UK constitution and in particular its un-codified nature. At the heart of most interpretations of the UK constitution lie assessments of ‘parliamentary sovereignty’.\textsuperscript{27} The literature broadly suggests that parliamentary sovereignty refers to the idea that Parliament can legislate how it chooses, that no authority supersedes it, and that, in the words of Lord Hailsham in 1976 ‘The limitations on its power are only political and moral’.\textsuperscript{28} The House of Commons European Scrutiny Committee has recently quoted Professor Adam Tomkins as informing it that:

\begin{itemize}
  \item\textsuperscript{22} King, \textit{The British Constitution}, p.1. In 2007 the government suggested that a distinction could be made between constitutional change within the existing legal framework, and constitutional change which requires ‘legislative intervention’. \textit{The Governance of Britain}, p.9.
  \item\textsuperscript{23} Holme and Elliott (eds), \textit{1688-1988: Time for a New Constitution}, p.3.
  \item\textsuperscript{25} See: Lord Hailsham, \textit{Elective Dictatorship}, p.3.
  \item\textsuperscript{26} \textit{The Governance of Britain}, pp.12-14; Bogdanor, \textit{The New British Constitution}, p.11.
  \item\textsuperscript{28} Lord Hailsham, \textit{Elective Dictatorship}, p.4.
\end{itemize}
the doctrine establishes...the legal supremacy of statute. It means that there is no source of law higher than—i.e. more authoritative than—an Act of Parliament. Parliament may by statute make or unmake any law, including a law that is violative of international law or that alters a principle of the common law. And the courts are obliged to uphold and enforce it.29

Parliamentary sovereignty is a controversial concept, with disputes about both its nature and desirability. Some argue that the label is misleading.30 Iain McLean describes it as ‘incoherent’.31 As is discussed below, a growing number of commentators now argue that parliamentary sovereignty is becoming increasingly compromised. Arguments for the desirability of parliamentary sovereignty tend to centre on the idea that it is a major source of the supposed merits of the un-codified UK constitution such as its flexibility and strength32; and that it is a guarantor of democracy, since the dominant component of Parliament, the Commons, is elected.33 Parliamentary sovereignty is sometimes said to have come in practice and regrettably to mean dominance by an executive under the control of whichever group possesses a majority in the House of Commons; and the geographical centralisation of power.34 In the assessment of some it overrides the other supposed traditional central feature of the UK settlement, the rule of law,35 though not all agree.36

The doctrine of parliamentary sovereignty is portrayed in certain interpretations as a barrier to the existence of a codified constitution.37 But others suggest that a codified constitution could be compatible with continuation of parliamentary sovereignty. According to this view, it is possible that the content of a codified UK settlement could include reference to parliamentary sovereignty. In the last Parliament, the Commons Justice Committee noted that the then Justice Secretary, Jack Straw, told it:

There are two models of a written Constitution. One is a text which seeks to bring together the fundamental principles, sometimes called conventions, of our constitutional arrangements, the most important of which is that Parliament is sovereign...The second model is an entrenched and overarching Constitution which is more powerful than Parliament.38

31 McLean, What’s Wrong with The British Constitution?, p.11.
32 See: Lord Hailsham, Elective Dictatorship, p.3.
34 See eg: Lord Hailsham, Elective Dictatorship, p.14; Stein Ringen, ‘Constitutional authority in British democracy’, p.20.
35 Lord Hailsham, Elective Dictatorship, p.4.
37 See eg: Richard Gordon, Repairing British Politics, pp.10-11.
Straw said that he favoured the former idea. However, the more commonly held view is that there is in practice a direct choice between either the retention of parliamentary sovereignty or the establishment of a codified constitution: ‘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’.\textsuperscript{39} Under this interpretation, a codified constitution would include in its content a limitation of the powers of the UK legislature. A frequently voiced argument against the overturning of parliamentary sovereignty in this way is that it would transfer power from Parliament and an elected House of Commons to unelected judges who would be responsible for interpreting the constitution, and might thereby be drawn inappropriately into policy-making.\textsuperscript{40}

Consideration of the parliamentary sovereignty concept suggests certain implications for the type of process that could be used to establish a codified UK constitution. Perhaps Parliament is as capable of establishing a codified constitution as it is supposedly able to do anything else. As Lord Hailsham put it ‘Seeing that Parliament is omnipotent it can in theory give us a new constitution as easily as it can nationalise the coal mines or join the Common Market’.\textsuperscript{41} However it could be that Parliament cannot be bound even by an Act of Parliament, and that a codification of the UK constitution that involved limiting the powers of Parliament cannot be brought about from within the existing UK settlement. Some analysts have argued that processes can be devised to overcome this obstacle. Dawn Oliver discusses whether the ‘transition to the new constitution’ might involve ‘the present parliament “committing suicide”’. It could conceivably require ‘a referendum, or resolutions of the current two houses of parliament endorsing it, and then the two houses of parliament irrevocably dissolving themselves or being dissolved by the monarch’.\textsuperscript{42}

\textit{Accelerating change}

Another key theme in the literature assessing the UK constitution is the idea that it has in recent decades – and particularly since 1997 – been subject to increasing change. In the words of Robert Hazell ‘The UK is going through a period of quite extraordinary constitutional change’.\textsuperscript{43} Bogdanor argues that prevailing constitutional arrangements in the UK began to be challenged in the 1960s at a time of perceived economic decline.\textsuperscript{44} Entry into the European Economic Community (now the European Union) in 1973 is judged to have had a substantial impact upon the UK constitution. It is noted that \textit{parts} of the UK settlement (rather than the constitution as a whole) have increasingly become codified, particularly from the early 1990s onwards. ‘Although the British constitution remains in some respects a “political constitution” it is

\textsuperscript{40} See: Sir John Baker, ‘Our Unwritten Constitution’, p.41.
\textsuperscript{41} Lord Hailsham, \textit{Elective Dictatorship}, p.5.
\textsuperscript{42} Oliver, ‘Towards a written constitution?’, p.149. See also: Hood Phillips Q.C., \textit{Reform of the Constitution}, p.156.
\textsuperscript{44} Bogdanor, \textit{The New British Constitution}, p.4.
becoming increasingly formalized.’”45 In the words of Peter Hennessy ‘there has been a great deal of writing down of the British constitution since Mrs Thatcher left office’.46 There is wide acknowledgement that the Labour government which took office in 1997 rapidly enacted a substantial package of constitutional change, ranging from devolution, to the Freedom of Information Act, greater independence for the judiciary and the Human Rights Act.47 The rise of the referendum as a device of popular decision-making since the 1970s48 has established a constitutional mechanism that it is suggested could form part of a process leading to a codified settlement. There is a view that as a consequence of cumulative changes since the 1970s parliamentary sovereignty has been eroded. Jeffrey Jowell and Dawn Oliver write that: ‘The legal doctrine of sovereignty has been modified by British membership of the European Union’.49 Iain McLean argues that in addition to EU membership, there have appeared ‘two further challenges to parliamentary sovereignty…devolution within the United Kingdom…[and] human rights law.’50 According to Bogdanor ‘In practice…if not in law, parliamentary sovereignty is no longer the governing principle of the British constitution’.51 It has also been argued that that ‘Britain, like so many countries in this new century, is moving steadily to a model of democracy that limits governmental power in certain areas, even where the majority may prefer otherwise. The Rule of Law supplies the foundation of that new model’.52

The view has been expressed that the Labour constitutional reform programme was not carried out as part of a clearly defined plan (‘the new constitution is…internally inconsistent’53); and that it has left much ‘unfinished business’, such as with the House of Lords, which is likely to mean more change still in future. ‘Reforms tend to give rise to pressure for further reforms or adjustments’.55

Associated with the narrative of constitutional change is a parallel one of pathology, of problems that have developed within the UK settlement.56 These supposed difficulties are variously said to include weakened national identity for the UK57; the

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47 For an official account of these changes, see: The Governance of Britain, p.10.
50 McLean, What’s Wrong with The British Constitution?, p.11.
54 Hazell, Constitutional Futures Revisited, p.2.
use of parliamentary sovereignty to undermine the rights of minority groups\(^\text{58}\); the emergence of a ‘presidential’ premiership eroding other components of the constitution including the Civil Service, Cabinet and Parliament, and leading to less effective government. There are also claims about declining public confidence in the system. In the words of the Conservative Democracy Task Force:

> There is a sense of malaise and decay surrounding British government and British democracy, reflected in widespread public cynicism, a fall in turnout and clear polling evidence of loss of faith in both the intentions and competence of politicians.\(^\text{59}\)

Adam Tomkins argues that as well as ‘hyperbolic’ advocacy of the UK settlement having declined, ‘even moderate support for it is now relatively difficult to find.’\(^\text{60}\)

The literature considers the idea that substantial constitutional change, especially since 1997, might lead on to full codification. Rodney Brazier writes: ‘the question which should be asked now that so much of the [Labour] party’s constitution-making is in place is what could be done with the legal form’ of the UK constitution. He goes on to note a range of options including ‘complete codification, that is, a written constitution properly so-called’.\(^\text{61}\) Consideration is given to whether a codified constitution could be achieved by a process of further incremental reform, rather than a ‘big bang’.\(^\text{62}\) Some believe that the erosion of parliamentary sovereignty associated with this accelerated development has lessened the obstacles to the process of establishing a codified UK constitution.\(^\text{63}\)

Anthony King has argued that the recent accelerated change does not point to a need for codification:

> there is no need for a written constitution...the United Kingdom has already undergone – ever since the late 1960s – a period of intense and unremitting constitutional change. Good sense would seem to suggest that the time has come to pause, to absorb the changes that have already taken place and to reflect upon them, certainly before embarking on new and potentially hazardous constitutional adventures.\(^\text{64}\)

Tomkins holds that ‘the move away from a political constitution towards a legal one is a mistake…Politics is able both democratically and effectively to stop government, to check the exercise of executive power, to hold it to account. The courts, no matter what their powers and no matter what their composition, will always find it more

\(^{62}\) Dawn Oliver, ‘Towards a written constitution?’, p.150.
\(^{64}\) King, *The British Constitution*, pp.353; 365.
Codification is sometimes portrayed as a possible means of resolving problems associated with the pathology narrative. In order to counteract the tendency it observed towards a ‘presidential’ premiership, the Conservative Democracy Task Force called for the more effective codification of processes of Cabinet government, though not supporting full codification of the UK settlement. One supporter of the traditional un-codified constitution has argued that the changes since 1997 have compromised this model – ‘our unwritten constitution has been unravelled’ – and that there are grounds for considering judicial review as a means of upholding constitutional values. Rabinder Singh QC sees a codified constitution as a means of protecting rights against abuse. The Governance of Britain Green Paper published by the Ministry of Justice in 2007 suggests that a ‘written constitution’ might help clarify ‘what it means to be the United Kingdom’. Richard Gordon writes:

our profound disillusionment with politics can only get worse with the ‘constitution’ we have...a written Constitution is not merely a desirable objective; it is in fact a constitutional necessity if true representative democracy is to be achieved in Britain.

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65 Tomkins, Our Republican Constitution, p.10.
67 Gough, An End to Sofa Government, pp.3-5.
70 The Governance of Britain, p.62.
71 Richard Gordon, Repairing British Politics, p.3.
Section 2
Past proposals for a codified UK constitution, including their substance and ideas about processes leading to their introduction\textsuperscript{72}

Outlines and blueprints
There have since the 1970s been a number of proposals for a codified UK constitution. They have been produced by individuals and groups holding a wide variety of different political outlooks. The existence of support for codification from such varied standpoints could, on the one hand, be interpreted as an argument in favour of such an exercise. On the other hand, it might be held that the ideological content of some of these proposed texts underlines the difficulties inherent in achieving consensus around a possible codified constitution for the UK. A further point that arises is that most of the proposed constitutions identified for this review see codification as intertwined with substantial change to the nature of the UK settlement; suggesting that such a dynamic might apply to an actual codification of the UK constitution.\textsuperscript{75}

Some proposed codified constitutions have been outlines rather than precise blueprints.\textsuperscript{74} They include the sketches produced by O. Hood Phillips Q.C. in 1970;\textsuperscript{75} Lord Hailsham in 1976;\textsuperscript{76} and Frank Vibert in an Institute of Economic Affairs pamphlet in 1990.\textsuperscript{77} The Liberal Democrat paper ‘For the People, By the People’, discussed in some detail the possible content and process for establishing a ‘written constitution’.\textsuperscript{78} There have also been actual texts produced. In 1990 John Macdonald QC drafted for the Liberal Democrats an illustrative text, 79 articles in length.\textsuperscript{79} Totalling 54 clauses and 4 schedules, Tony Benn’s \textit{Commonwealth of Britain Bill} first appeared in 1991.\textsuperscript{80} The Institute for Public Policy Research (IPPR) proposed codified constitution was first published also in 1991, with 129 clauses and six schedules.\textsuperscript{81} In 2010 Richard Gordon QC published a ‘possible model’ for a ‘written Constitution’ for the UK, with 248 clauses.\textsuperscript{82} Also in 2010, Vernon Bogdanor and Stephen Hockman QC produced a paper which – while not prescribing what a

\begin{thebibliography}{99}
\item \textsuperscript{72} For an earlier analysis of this kind, see: Dawn Oliver ‘Written constitutions: principles and problems’, 45 \textit{Parliamentary Affairs} 135, 1992.
\item \textsuperscript{73} There has also been an attempt to include in a single statement the UK constitution \textit{as it is}, see: Vernon Bogdanor, Tarunabh Khaitan and Steven Vogenauer, ‘Should Britain Have a Written Constitution?’, \textit{The Political Quarterly}, Vol. 78, Issue 4 (2007), pp.506-517. See also: Hennessy, ‘From Blair to Brown: The Condition of British Government’, p.346. For a spoof constitutional document intended to illustrate defects in the UK settlement see: \textit{The Unspoken Constitution} (Liverpool: Democratic Audit, 2009).
\item \textsuperscript{74} For a particularly succinct account of a codified constitution, see: Lord Scarman, \textit{Why Britain needs a Written Constitution}, The Fourth Sovereignty Lecture (London: Charter 88 Trust, 1992), p.2.
\item \textsuperscript{75} Hood Phillips, \textit{Reform of the Constitution}.
\item \textsuperscript{76} Lord Hailsham, \textit{Elective Dictatorship}.
\item \textsuperscript{77} Frank Vibert, \textit{Constitutional Reform in the United Kingdom – An Incremental Agenda} (London: Institute of Economic Affairs, 1990), p.21.
\item \textsuperscript{78} ‘For the People, By the People’, Policy Paper 83, Liberal Democrat Conference Autumn 2007.
\item \textsuperscript{79} ‘A Draft Written Constitution for the United Kingdom’ in \textit{“We, The People...” – Towards a Written Constitution} (London: Liberal Democrats, 1990), Federal Green Paper No.13, Appendix 2.
\item \textsuperscript{80} \textit{Commonwealth of Britain Bill} (HMSO: London, 1991).
\item \textsuperscript{81} The edition used here is: Institute for Public Policy Research (IPPR), \textit{A Written Constitution for the United Kingdom} (London: Mansell, 1993).
\item \textsuperscript{82} Gordon, \textit{Repairing British Politics}.
\end{thebibliography}
codified constitution should be – set out the issues of process and substance which an effort to produce such an entity, if embarked upon, would need to resolve. \(^{83}\)

**Preambles and declaratory clauses**

The full texts that have been put forward all include preambles and opening declaratory clauses. Analysis of them could be construed as suggesting that a codified constitution would be not neutral, but a vehicle for the expression of particular values. There is a tendency to assert the concept of popular sovereignty, as in the Macdonald text which states in Article 1 that ‘This Constitution….derives its validity from the people of the United Kingdom with whom sovereignty lies’. \(^{84}\)

In Tony Benn’s *Commonwealth of Britain Bill* the preamble refers to various ‘defects’ in the British system of government making it ‘urgent that the United Kingdom adopts a new constitution’. Section 1 states that ‘Britain shall be a democratic, secular, federal Commonwealth’ while Section 2 stipulates ‘The Commonwealth shall be dedicated to the maintenance of the welfare of all its citizens, in whom all sovereign power shall be vested’.

The IPPR preamble opens with the phrase ‘We the People of the United Kingdom’ and goes on to assert various principles including ‘human rights and fundamental freedoms…principles of social justice…adequate means of livelihood for all…informed consent and active participation of people [in government]…a respect for the rule of law both by individuals and by government…’ \(^{85}\)

Richard Gordon’s preamble describes weaknesses with the existing constitutional settlement including that ‘in particular, the principle of parliamentary sovereignty has not proved sufficiently effective to continue to protect fully the interests of the people of the United Kingdom…’. It ends with the statement ‘We the People of the United Kingdom therefore establish and adopt this Constitution for the United Kingdom’. \(^{86}\)

**Constitutional supremacy**

Most of those who propose codified UK constitutions considered here appear to envisage constitutional supremacy as supplanting the doctrine of parliamentary sovereignty; with judges able to rule acts of Parliament incompatible with the constitution and strike them down. The clear exception is Benn.

Hood Phillips supports a constitution that ‘would be declared to be the supreme law of the land’; subject to ‘entrenchment sanctioned by judicial review’. \(^{87}\) He anticipates that judges would be required ‘to take an oath of loyalty to the new Constitution’. \(^{88}\) The Judicial Committee of the Privy Council would be the most suitable choice as the

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\(^{84}\) ‘A Draft Written Constitution for the United Kingdom’, p.36.

\(^{85}\) *A Written Constitution for the United Kingdom*, pp.31-32.


court upon which was conferred ‘Ultimate appellate jurisdiction’ in cases in which a constitutional issue was raised.89

Article 1 of the Macdonald text states that ‘This constitution is the supreme law [of the UK]…The Constitution is binding on the Crown and any law or prerogative that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.’90

Benn allowed for the High Court to ‘undertake a judicial review of any administrative act of the Executive, on application by any person complaining of a denial of one or more of’ their rights as set out in the Bill. But he does not envisage judicial review of primary legislation and allows for parliamentary review of ‘any decision of the High Court’, which could lead to the High Court being required to re-examine a decision that was judged to have violated the rights of an individual.91 In a commentary on his Bill, Benn opposes ‘a Bill of Rights which elevates judges above Parliament’ and states that ‘To undermine the House of Commons by subordinating it to judges…would be to undo centuries of struggle by the governed against the governors, and thereby inflict a grave defeat upon the very idea of democracy’.92

Gordon’s text states that (section 3) ‘This Constitution is the supreme law of the state and the exercise of power is only lawful if permitted by this Constitution’; and that (section 7) ‘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’. The Supreme Court would also be able to declare EU law incompatible with the constitution, though the EU law would remain valid.93

Monarchy and the Established Church
There is wide variance in the approach to the issues of the monarchy and the Established Church. Within Hood Phillips’s constitution the role of the monarchy would be preserved seemingly wholly intact, but with clearer formulation of conventions ‘to protect the Queen as ultimate guardian of the Constitution as far as possible from involvement in politics’.94

Benn proposes abolition of the monarchy and Disestablishment of the Church, with a President to be elected by both Houses of Parliament.95

The IPPR constitution would preserve the monarchy but with all its powers derived from the constitution and no remaining personal prerogatives of political significance – for instance, the Prime Minister would be elected by the House of Commons. The IPPR approach deliberately leaves open the possibility that the Sovereign could be replaced by an appointed or elected official, with no need to change the overall structure of the constitution.96

90 ‘A Draft Written Constitution for the United Kingdom’, p.36.
91 Commonwealth of Britain Bill, I, 4-5.
92 Benn, Common Sense, pp.119-120.
93 Gordon, Repairing British Politics, pp.46-47.
94 Hood Phillips, Reform of the Constitution, p.146.
95 Commonwealth of Britain Bill, II, 10-11.
96 A Written Constitution for the United Kingdom, pp.53-57; 57; 188.
Parliament: organisation, elections and powers

The constitution-designers tend to set out plans to reorganise Parliament, the way its membership is determined; and its relationship with the executive. For instance, there is broad support for an elected second chamber; and some support for proportional representation to be used in elections for at least one of the chambers. Hailsham envisages an elected second chamber, which would ‘like the Senate of the United States, be elected to represent whole regions, and unlike that Senate, would be chosen by some form of proportional representation’.97

Under the IPPR constitution both chambers of Parliament would be elected on a fixed four-year cycle, at two-year intervals, on different forms of proportional representation. The Second Chamber would be given an equal role to the Commons over constitutional amendments and statutes with constitutional implications. The prerogative powers of the executive such as for entering into military combat would be subject to parliamentary control.98

‘For the People, By the People’ proposes the Single Transferable Vote for the Commons and the second chamber. Elections to the latter would be in larger constituencies, in thirds, every four years, with members serving a single, non-renewable term of twelve years.99 The paper also advocates various measures intended to ensure more effective parliamentary oversight of executive activities.100

Gordon supports some form of proportional representation or the Alternative Vote for the Commons (renamed the House of Representatives), with the requirement that there should be as far as possible an equal balance between male and female elected representatives; and four-year fixed-term parliaments. The Lords – renamed the Senate – would be 70 per cent elected by proportional representation.101 Under Gordon’s constitution, most Royal Prerogative power would be subject to control by Parliament (and the courts). Parliament would have new abilities to veto certain executive powers; and initiate legislation and public inquiries.102

Regions and nations of the UK

Hailsham advocates a ‘federal constitution’ with ‘devolved assemblies’ in which ‘Scotland, Wales and Northern Ireland would all obtain self-government in certain fields’. For Hailsham, rather than there being a single English unit within this federal settlement there would be ‘regions of England’.103 Hailsham envisaged that the referendum on approving a codified constitution he advocated would have to offer separatists the possibility of an ‘opt out’ from the UK. ‘This involves a risk of disaster, but one, I believe, which we would have to take’.104

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99 ‘For the People, By the People’, pp.8-9.
100 ‘For the People, By the People’, pp.21-3.
101 Gordon, Repairing British Politics, pp.57-80.
102 Gordon, Repairing British Politics, pp.51-94.
103 Lord Hailsham, Elective Dictatorship, p.15.
104 Lord Hailsham, Elective Dictatorship, p.16.
Benn supports a federal structure for the UK, with national parliaments for England, Scotland and Wales. Part XII of his *Commonwealth of Britain Bill* provides for British withdrawal from Northern Ireland.

The IPPR constitution creates assemblies for Scotland, Wales, Northern Ireland and twelve English regions; and provides for the possibility – subject to referendum in the territory concerned – for secession from the UK. Gordon does not create a federal UK or entrench devolution in his codified constitution, but he sets out a secession mechanism involving a petition and referendums.

In Benn’s *Government of Britain Bill* there is specific provision for the autonomy of local government. The IPPR creates a constitutional position for local government – but not a uniform system – including a general competence and an independent source of taxation.

**Europe**

For Vibert a codified constitution:

> would help buttress institutions and practices not only from erosion within the United Kingdom but from pressures from outside – notably from the European Community. By defining what are the key considerations in Britain’s democratic practices, it would help define the deficiencies in Community arrangements and facilitate their reform.

Benn’s *Commonwealth of Britain Bill* provides for ‘The supremacy of Parliament’. It states that:

> Where legislation passed by the Commonwealth Parliament conflicts with any directive or regulation issued or approved by the Council of Ministers or the Commission of the European Communities, British legislation shall prevail, and shall be so accepted by British courts.

By contrast the IPPR text ‘recognises and gives effect to the obligations assumed by the United Kingdom as a member of the Community of Nations and of the European Community’.

**Rights**

The protection of individual rights is a concern of all the constitutions considered here. However, there is divergence on precisely what rights should be provided for

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105 *Commonwealth of Britain Bill*, VIII.
107 IPPR, *A Written Constitution for the United Kingdom*, pp.82-83.
110 *Commonwealth of Britain Bill*, IX and Schedule 4.
111 IPPR, *A Written Constitution for the United Kingdom*, p.95.
113 *Commonwealth of Britain Bill*, II, 12.
and how. Hood Phillips supports the introduction of a declaration of rights. He argues that they would be mostly ‘liberties’ and that ‘The inclusion of general duties of the State or Government to provide welfare benefits, education, health services and so on, is not suggested’. Schedule 1 of Benn’s *Commonwealth of Britain Bill*, entitled ‘The Charter of Rights’ provides not only for ‘political’ and ‘legal’ rights but also a wide range of ‘social’ and ‘economic’ rights. The IPPR provides for ‘Fundamental Rights and Freedoms’ and ‘Social and Economic Rights’. However, the latter ‘are not enforceable in any court’. Gordon’s constitution includes provision for ‘Civil and political rights and freedoms’; ‘Fair process rights’; ‘Democratic rights’; ‘Rights of special groups’; ‘Economic and social rights’; as well as for corresponding ‘Responsibilities’.

Amendment procedures

Those who propose codified constitutions seek to entrench them through amendment procedures, often – but not always – involving referendums. For Hood Phillips the most appropriate procedure for constitutional amendment would be ‘a Constitution Amendment Bill passed by a special majority of (say) two-thirds of each House’. But he opposes the use of referendums since:

> It is difficult to frame a complex technical question in a way suitable to be answered ‘yes’ or ‘no’ by large numbers of people who have not the necessary background and have not followed all the previous discussions.

Hailsham argued that once it was adopted and in force ‘the new Constitution…would be unalterable, except by a special procedure involving an Act of the newly constituted Parliament, perhaps passed by a qualifying majority, followed by [a] referendum’. Benn’s constitution would be entrenched by the requirement that affecting alteration to it would involve ‘the agreement of both Houses of the Commonwealth Parliament and the endorsement of the people in a referendum’. Amendment to Macdonald’s constitution would require a two-thirds majority in each chamber of Parliament.

Process

There is some discussion by authors of proposed constitutions of how they might be established. They tend to be more concerned with ratification procedures than drafting processes, possibly since they have already created a text or outline themselves. Often approval through referendums is deemed necessary.

Hood Phillips considers the issue of whether Parliament can create a codified constitution by which it is bound. The solution he puts forward is to bring into existence a “New” Parliament which would owe its existence to a Constitution not


\*120 Lord Hailsham, *Elective Dictatorship*, p.16.

\*121 *Commonwealth of Britain Bill*, XIII, 51.

\*122 ‘A Draft Written Constitution for the United Kingdom’, p.45.
enacted by itself, from which it would derive both its powers and its limitations’. 123 The alternative he proposes is for Parliament to transfer its powers to a ‘Constituent Assembly, and at the same time to abolish itself. The Constituent Assembly would then draft a Constitution creating a Parliament with limited powers’. 124 Any new constitution would also require approval in a referendum. 125 Hailsham on the other hand (as noted above) argues that an ‘omnipotent’ Parliament can create a codified constitution; though, like Hood Phillips, he advocated the holding of a referendum as well. 126

The process proposed by Vibert separates out constitutional reform from codification. He writes that codification:

*is not something that can be done when there is an unfinished agenda of institutional reform, for example in respect of the Second House. Therefore a two step procedure would seem desirable. The first stage would consist of the implementation of specific institutional reforms, including the incorporation of the European Convention of Human Rights into British law. The second stage would involve the preparation of the constitutional document which would, inter alia, reflect the new changes.* 127

‘For the People, By the People’ argues that ‘this new constitution should not just be a matter for politicians to write and impose from on high. Its creation should be a process which involves the citizens whose lives it will affect’. It calls for a process instigated by Parliament, followed by a referendum on the principle of a ‘written constitution’. Assuming a ‘yes’ vote, there would then be established a constitutional convention sitting for perhaps five or six years, producing a draft to be made the subject of a further referendum. 128

Bogdanor and Hockman argue that:

*The draft of a constitution would obviously have to be produced by a small body of people – a mixture of experts (for example lawyers and academics) and members of the public perhaps.*

They also discuss whether ratification could be carried out only by representative bodies including Parliament; or would involve a referendum. 129

Hennessy expresses doubts about the use of referendums to ratify constitutions because ‘They tend…to become a general plebiscite on the government of the day or an instrument for bifffing the political class in general’. As the ‘swift’ alternative to a ‘protracted series of deliberations and consultations’ he discusses the possibility of a ‘Tommy Cooper style, “just like that” approach to a written constitution’. There would be:

123 For a summary, see: Hood Phillips, Reform of the Constitution, pp.33-34.
126 Lord Hailsham, Elective Dictatorship, pp.15-16.
127 Vibert, Constitutional Reform in the United Kingdom, pp.21-22.
128 ‘For the People, By the People’, p.6.
129 ‘Towards a codified constitution’.
an all-party convention to agree a core list of constitutional statues and to
draft a law entrenching them, so that they could not be amended or repealed
by an incoming government without a specific pledge in their party’s general
election manifesto. Future constitutional measures such as a War Powers Act
or a Civil Service Act could be added to the list if the Speaker of the House of
Commons certified them as core constitutional statutes.¹³⁰

Section 3
Consideration of comparable constitutions internationally, including their structure, content and status

General themes
This section considers the literature which compares the codified constitutions (and in some cases, un-codified arrangements) of different countries. Unsurprisingly, this body of work presents constitutional documents as important entities. Arguments against their significance are noted however. For instance, S.E. Finer, Vernon Bogdanor and Bernard Rudden, though arguing that constitutional texts are important and merit consideration, state that:

> These documents are highly incomplete, if not misleading guides to actual practice, that is to what is often called the ‘working constitution’ or the ‘governance’ of a country...it is demonstrably the case that rules included in one constitution may be omitted from others...in countries where the law is respected, the constitutional text frequently becomes permeated with the interpretation given it by the courts.\(^{131}\)

Beau Breslin expresses one version of the counter-argument:

> Constitutions matter...what makes them matter are the institutions, culture, traditions, and so on that give life to a polity; but the texts matter too, both for symbolic and practical reasons...constitutions are profoundly important because they help to form collective public identities; they help to shape a country’s public character. They are models for a political world that go well beyond describing the architectonic features of a polity’s government institutions. The very best ones have a spirit, a transcendent quality that encourages public veneration. The worst ones become symbols of a faltering and disordered community.\(^{132}\)

One general theme in the literature is that constitutional texts are not mere neutral descriptions, rather they are, as Judith Pryor puts it: ‘performative: they perform an action, rather than only describe an event or make a statement’. Moreover, Pryor goes on, they are ‘foundational’, having a ‘constitutive effect on national discourse’.\(^{133}\)

A function of some constitutions, argue A. W. Heringa and Ph. Kiver is:

> To replace an older order with a new one. In the case of the US, the Constitution was to bring about a closer unification in the late 18th century of thirteen newly independent colonies. In the case of Germany, the Basic Law was adopted as a partial reestablishment in 1949 of republican democratic statehood. France’s present day Constitution was meant as a far-reaching institutional overhaul in the late 1950s of battered state structures. The Dutch

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Constitution of 1814/1815 meant the restoration of the monarchy and, at the same time, the creation of a unitary and independent state after two decades of French domination; in the 1950s, the Charter for the Kingdom was adopted so as to establish a quasi-federal rather than a colonial relation between the Netherlands proper and its overseas territories.  

Following this interpretation a codified UK constitution could be seen as desirable to the extent that some kind of break with the past is judged necessary. If attempted, process and content might be designed in such a way as to give effect a new order, were such an outcome wanted.

A general tendency worldwide to adopt codified constitutions has been observed. Donald S. Lutz writes: ‘Over the past two centuries, we have moved from a situation where almost no country had a written constitution to one where almost every country has one’. As in literature specifically considering the UK constitution, international constitutional comparisons often draw attention to the exceptionality of the UK in lacking a codified constitution.

However, in her study of Irish, Australian, New Zealand and UK constitutional texts, Pryor suggests there is not ‘a simple binary opposition between the written and the unwritten’ and sets out to ‘deconstruct these terms in order to show that each term invades the other’. She holds that ‘In each national context, a tension is at work between the “written” and the “unwritten”, between the “letter” of the most fundamental laws and their unwritten “spirit”. A deep ambivalence towards writing is thus, paradoxically, a constitutive characteristic of all constitutions’. Pryor observes a tendency for codified constitutions to draw to some extent on an external set of ‘unwritten’ values – noting the phrase from the 1776 US Declaration of Independence, ‘“We hold these truths to be self-evident”…at once referring outside itself to an apparently “unwritten” set of truths concerning right relations in a community and constituting in writing what exactly these truths were’. She goes on to hold that ‘several nations with written foundational texts…depend upon [emphasis in original] the idea of the British constitution’s immemorial origins in order to legitimate themselves. They then continued to disseminate the value of this supposedly unwritten origin in order to conserve the hegemony of the respective colonial states they found’. Other authors have noted the importance of operational conventions both to states with and without codified constitutions.

Pryor’s argument has a number of possible implications for the issues addressed in this review. It might be held that the difference between un-codified and codified constitutions is not as great as some imagine, and consequently a focus on the idea of shifting from the former to the latter is misguided. If some reference to an external, un-codified set of values is likely to be retained even within a codified constitution,

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136 Pryor, *Constitutions: Writing Nations, Reading Difference*, p.3.
then it could be that the process producing it must take this outcome into account; and the content of the text that is produced might need specifically to make such connections. It could be held that the existence of codified constitutions in countries with a heritage shared with the UK points to the potential viability of a codification project in the UK.

There are two countries other than the UK commonly singled out as lacking codified constitutions: Israel and New Zealand. Some significant observations regarding these states can be made on a consideration of the literature. It is perhaps noteworthy that in their genesis both have connections with the UK; New Zealand as former colony, Israel as a Mandate after the Second World War. Furthermore, as with the UK, the literature suggests that there should be a degree of caution in making generalisations about the constitutions of these nations as ‘unwritten’. In New Zealand there exists a foundation document in the form of the 1840 Treaty of Waitangi – ‘likened to both Magna Carta and a sacred covenant…firmly positioned in a written tradition that masks the lack of a codified constitutional settlement’;¹⁴⁰ and the Constitution Act 1986 (though nearly all of it is in no way entrenched). At the time of the foundation of the state of Israel it was initially intended that the constitution would be codified. Subsequently in 1950 the decision was taken to introduce a series of basic laws which would eventually come to comprise a codified constitution (though movement in this direction halted after the mid-1990s). In 1995 the Supreme Court ruled that it had the power to invalidate laws inconsistent with two recently passed basic laws relating to human rights – in other words, the principle of constitutional judicial review began to develop.¹⁴¹

Another comparative perspective on the UK constitution places it within a ‘New Commonwealth Model’. Partly influenced by the introduction of the UK Human Rights Act 1998 and the limited judicial review it facilitates, Stephen Gardbaum has grouped the UK with New Zealand and Canada as operating what he describes as an ‘intermediate model of constitutionalism that straddles the pre-existing dichotomy of parliamentary sovereignty and constitutional or judicial supremacy’.¹⁴²

Analysing, comparing and contrasting content

International constitutions can be analysed and differentiated by consideration of their content.¹⁴³ A number of different themes can be explored, including:

**Location.** Codified settlements may vary in the extent to which they are concentrated in a single document; or spread across different texts which between them comprise a

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¹⁴⁰ Pryor, Constitutions: Writing Nations, Reading Difference, p.6.
codified constitution (for instance, there may be a separate or partially separate statement of rights). But often there is a central document which may be regarded as the constitution, with or without other associated texts.

**Length.** Breslin describes a tendency for ‘the abandonment of brief and general texts in favor of detailed and lengthy ones’. A computerised study published in 1978 found that:

> The more recent in date a constitution is, the longer it will be. In each decade since 1945, the average length has increased by between 1,300 and 1,900 words. The average length of constitutions promulgated in the consecutive periods has increased by almost a third in thirty years.

Another tendency observed is for federal constitutions to be longer than their unitary counterparts, because of the need for additional detail regarding states’ rights.

**Preambles.** Codified constitutions often but not always (the Netherlands constitution is an exception) begin with a preamble, the ‘declaratory introduction to the constitution’. Breslin describes how ‘Preambles often perform the task of isolating the polity’s highest values’. Often they define sovereignty, as in the case of the preamble to the US constitution.

**Sovereignty.** As Heringa and Kiver put it:

> Who actually makes a constitution? The “maker” of a constitution is not necessarily its physical author, but rather the entity from whose authority the constitution is derived. This authority resides with the sovereign: the original source of all public power from which all other power flows. Most constitutions derive their claim to authority from having been enacted by the people, a concept called popular sovereignty.

Often sovereignty is defined in the preamble to the constitution. Famously the preamble to the US constitution begins with the words ‘We the people’. The UK is exceptional Internationally because of its doctrine of parliamentary sovereignty, as discussed in Section One. In some countries, such as Finland, sovereignty is shared between the people and the parliament. In the international comparative literature on constitutional texts, there are a variety of sub-debates associated with the issue of sovereignty, including over the possible challenge to national sovereignty posed by supranational organisations including the European Union.

**Amendment.** The requirements for changes to codified constitutions can be expected to be more demanding than those for non-constitutional law; for instance super-

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144 Oliver and Carlo Fusaro (eds) How Constitutions Change, manuscript, Chapter 18.
145 Breslin, From Words to Worlds, p.85.
146 Van Maarseveen and van der Tang, Written constitutions, p.186.
147 Finer, Bogdanor and Rudden, Comparing Constitutions, p.17.
149 Breslin, From Words to Worlds, p.68.
majorities in legislatures and/or popular referendums. In the words of one set of authors:

*The provisions on the means by which a constitution may be amended are of both judicial and political importance: they are themselves an exercise of the constituent power in spelling out how its own creation may be changed; they divide the amending power among people, legislature, and executive, or between a federation and its components; and they may express basic values. The last are revealed in those features stated to be unamendable: the republican form of government in France, and in Germany the basic human rights and the federal structure.*

Separation of powers. This doctrine involves the idea that public authority can be distinguished into legislative, executive and judicial power. The extent to and way in which separation is enacted varies across different constitutions. The UK is exceptional in its tradition of a fusion, rather than separation, of powers. A common feature in democracies (including the UK) is the idea that the judiciary should be independent and impartial.

Constitutional review. Constitutional review involves the judiciary having a role in upholding the constitution. There is variation in the realisation of this idea. In the US, all judges can review the constitutionality of legislation, while in Germany and a number of other states, judicial review is limited to a special constitutional court. In France constitutional review of legislation was traditionally only permitted before it was enacted, and not by a genuine court but a Constitutional Council. Since 2008 (as part of a package of reforms the implementation of which is discussed below) the review by the Council of legislation already in force has been permitted. The UK is unusual in not allowing judges to invalidate legislation on the basis of the constitution. The UK shared this characteristic (as of 2009) with the Netherlands; and in Nordic countries constitutional judicial review is substantially circumscribed.

Heads of state and of government / parliamentary and presidential systems. In some systems there is a directly elected head of government (often a president); in other systems the head of government (often a prime minister) may depend on the legislature. In some cases the head of state may not be the head of government. For instance, in Germany, the (indirectly-elected) President is the head of state while the Chancellor is the head of government. In other cases – particularly where the president is directly elected – the head of state and head of government is the same person. The type of arrangement in place is important to the operation of government and accountability.

Whether the legislature is bicameral or unicameral, and if the former what is the relationship between the two chambers and how their composition is determined. Important subjects here include voting systems. In a federal constitution, the second chamber may provide for the representation of states.

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**Federal and unitary systems.** In a federal system there are sub-units which possess powers enshrined in the constitution. Countries fitting into this category include the US and Germany. In unitary states such as France and – according to the doctrine of parliamentary sovereignty – the UK, sub-units are empowered only by the central authority. Some unitary states, including Belgium and Spain, have developed to a point where they can now be regarded as quasi-federal.

**Fundamental Rights.** Codified constitutions may include statements of the rights of individuals. The kinds of rights which are included in a constitution may vary; for instance, the German constitution refers, alongside civil and political rights, to social and economic rights such as protection for trades unions. A ‘Bill of Rights’ with constitutional status may form a document distinct from the main constitution.153

**Further analytical perspectives** are offered in the international comparative literature. They include consideration of the provision for emergency powers and how they relate to bills of rights; the constitutional provision for the handling of international affairs, which is generally divided in some way between the executive and legislature; and whether there is a right of secession for sub-units.154 Another issue raised is that some constitutional texts deal with subjects that others do not: for instance, sovereignty, electoral systems and the role of political parties.

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Section 4

Literature produced about and by constitution-building processes in comparable international democracies and within the UK

There exists some recent literature on the theme of constitution-building and reform in general;\textsuperscript{155} and a number of particular studies.\textsuperscript{156} There is no recent direct equivalent to be found to a UK codification project, which would entail a long-established, relatively stable democracy, moving from an un-codified settlement and a doctrine of parliamentary sovereignty to a codified constitution. Perhaps the closest relatively recent comparison is the ‘patriation’ of the Canadian Constitution through the Constitution Act 1982. Before this change, most constitutional amendment in Canada was a matter for the United Kingdom, not the Canadian, Parliament. Consideration of ‘patriation’ of the Canadian constitution dated back at least as far as the 1920s and there were a series of failed attempts before 1982, on which the Constitution Act to some extent built. The constitution now came under direct Canadian control, with a new amendment procedure established. The constitution also introduced a Charter of Rights and Freedoms which enabled judges to strike down primary legislation (with some provision for provincial opt-outs); and a new statement of aboriginal rights.\textsuperscript{157}

Aside from the Canadian example, now three decades old, there are various more recent cases of attempted or actual constitutional change from the 1990s onwards that, while not directly analogous to a possible UK codification process, may be instructive for a consideration of this subject. Some judicial decisions could arguably be seen as amounting to acts of constitution-building, through their creative interpretation of existing arrangements. However the focus here is on formal changes to constitutional structures, texts and legislation, not their interpretation, however inventive it may be.

The background to constitution-building exercises

It can be inferred from the literature that the background to constitution-building exercises is diverse, but can involve an attempt to respond to a problem of some kind, such as a social division, or a more general malaise. A process may be preceded by previous failed attempts to achieve similar goals, or a long campaign to such ends, and academic identification of particular problems. A concerted effort at constitution-building of some kind may be seen as associated with broad social tendencies; and generally involves active support or at least cooperation from central government and its leadership; and an interaction between long- and short-term political circumstances.

\textsuperscript{155} One author has even noted a series of ‘General Principles of Constitution Design’. Lutz, Principles of Constitutional Design, p.218-220.
\textsuperscript{156} A thematic collection on constitutional change which includes a series of individual international studies as well as general analysis will be appearing later this year, and was kindly provided for the purpose of this review in manuscript form: Oliver and Fusaro (eds) How Constitutions Change.
The background to the referendums on electoral reform held in New Zealand in 1992 and 1993 can be traced to the 1970s and the demands for a system more proportionate than first-past-the-post made in this decade. There were signs of dissatisfaction with the ‘two-party club’ which the existing system facilitated. Following a Report by the Royal Commission on the Electoral System, which recommended a move to Mixed Member Proportionality in 1986, the Electoral Reform Coalition was established to promote this proposal. The National Party included a commitment to a referendum in its 1990 manifesto more as a political device than out of genuine commitment to change.158

Three major constitution-building exercises in the 1990s in the UK involved devolution for Wales, Scotland and Northern Ireland. In the case of the first two, the long-term background was a growth in support for separatism from the late 1960s. The Labour Party, which had a large political base both in Scotland and Wales, was encouraged by this trend to consider the introduction of a degree of self-government. An attempt to establish devolution in both nations fell at the referendum stage in 1979, after legislation had already been passed by Parliament. There followed a long period (1979-1997) in which both nations were governed by a Conservative government in Westminster which enjoyed only limited electoral support in Scotland and Wales; followed by a return to power of Labour.159 The background to devolution in Northern Ireland was a protracted period of conflict followed by an agreement between parties and governments.160

The Australian Republic Referendum of 1999 has been portrayed as following on from a tendency over a number of decades whereby:

Australia had ceased to see itself as an outpost of Britain, the ‘White Australia’ policy had been abandoned, immigration from Asia and Eastern


It has been suggested that initiatives such as the British Columbia Citizen’s Assembly of 2004 should be seen in part as responses to perceived international political malaise manifesting itself in such trends as declining popular participation.\footnote{Mark E. Warren and Hilary Pearse, ‘Introduction: democratic renewal and deliberative democracy’, in Mark E. Warren and Hilary Pearse (eds), \textit{Designing Deliberative Democracy: The British Columbia Citizens’ Assembly} (Cambridge: Cambridge University Press, 2008), p.2.} A further motive for the establishment of the Citizen’s Assembly was the desire of the governing Liberal Party to secure a change in an electoral system (similar to First-Past-the-Post) which it disliked following the 1996 election, which delivered a disproportionate result at its expense. There were also reform campaign groups such as Fair Vote Canada and the Electoral Change Coalition of British Columbia; as well as demands for change from the leader of the Green Party.\footnote{John Ferejohn, ‘Conclusion: the Citizens’ Assembly model’ in Warren and Pearse (eds), \textit{Designing Deliberative Democracy}, p.197.}

The German federal reforms of 2006 built on earlier efforts which had stalled when a ‘Federalism Commission’ of 2003-2004 failed to reach agreement on certain issues. The changes reflected longstanding academic concern about matters such as the efficiency and legitimacy of federalism, which had intensified following unification in 1990 and eventually spilled over into the political environment. When the German election of 2005 ended in the formation of a Grand Coalition, the federal reform idea was revived by the coalition parties:

\textit{that wanted to demonstrate that their grand coalition was capable of passing important legislative reform bills...} \footnote{Arthur Gunlicks, ‘German Federalism Reform: Part One’, \textit{1 German Law Journal}, vol. 8 (2007), p.113.}

\textit{Design and participation}

Elite-level activity such as expert drafting and negotiations between politicians is often central to the design of constitutional reform packages. In federal states, dealings between different tiers of government may be important. The German federal reforms of 2006 were prepared by an expert group during the negotiations leading to the formation of the Grand Coalition the previous year; and published as an appendix to the coalition agreement. They were then approved by a conference of State prime ministers; with a working group of the coalition parties finalising the details. The lower chamber of the German legislature, the Bundestag, was not involved.\footnote{Arthur Gunlicks, ‘German Federalism Reform: Part One’, pp.113-114.}

One account of the substantial French constitutional reforms of 2008 notes that they were ‘mainly based on the research work done by a comité des sages (expert
committee...for the reflection and the proposition on the modernization and rebalancing of the institutions of the Fifth Republic’.166

But there is likely to be pressure from various social groups beyond the elite to be involved meaningfully in the devising of constitutional proposals.167 Design processes may be subject to criticism if they are judged to have been conducted in an excessively exclusive fashion, for instance, as with the Convention on the Future of Europe which began sitting in 2003.168 Viven Hart writes that: ‘A democratic constitution is no longer simply one that establishes democratic governance. It is also a constitution that is made in a democratic process. There is thus a moral claim to participation, according to the norms of democracy… How the constitution is made, as well as what it says, matters.’169 The literature offers a variety of different ways in which wider involvement might be secured, including some recent innovations.

A model of public participation in devising a programme of constitutional change – innovative for its time – can be found in the Canadian ‘patriation’ process of 1982. The introduction of the Constitution Act 1982 in Canada followed extensive discussions between the Canadian Prime Minister and the provincial Canadian prime ministers; and other negotiations between the centre and the provinces in the ‘Continuing Committee of Ministers on the Constitution’. In an attempt to break a deadlock in autumn 1980 the federal government announced its intention to proceed unilaterally with a package. Public hearings were then held on the constitutional document from late 1980 by a ‘Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada’. Over a two-month period it received oral evidence and written submissions; and the government introduced amendments designed to respond to some of the criticisms that were raised in the hearings. Proceedings were televised. Peter H. Russell writes that:

_The crucial instrument in the process of building legitimacy for the federal initiative was the special parliamentary committee...This committee...was...a new phenomenon in Canada’s constitutional politics...the remarkable feature of this parliamentary committee and the key to its political efficacy was the extent to which its government majority was willing (one might even say desired) to accept amendments to the government’s proposal. What better way to foster the image of a people’s package?...The process itself created a new public expectation about public participation in constitution making._170

However, one arguable weakness of this process was that it was handled (prompted by political circumstances) at federal level. The Quebec province of Canada did not agree to the new constitution.

The referendum on electoral reform held in New Zealand in 1992 involved citizens in determining the nature of a constitutional package. Voters were given a choice not only about whether they wanted to shift to a parliamentary electoral system other than first-past-the-post, but a range of options about which system they favoured. A contrast could be drawn with the Australian Republic Referendum, which offered the electorate only the choice of moving to an indirectly elected president, when there was evidence of support for the idea of a directly elected head of state. However, some criticisms have been made of the New Zealand approach. Keith Jackson writes:

"The non-binding referendum held in New Zealand on 19 September 1992, apart from being unique, was by any standards a complex exercise. Voters, the great majority of whom had little or no theoretical or practical knowledge of any electoral system outside their own, were asked to choose, in a double-headed referendum, between change or no change as well as indicating, if they so wished, a preference for one of four other systems...The situation was further exacerbated by the fact that the full details of the alternative system to be run against first-past-the-post in the second referendum...were not scheduled to be available until after the results of the first referendum were known..."  

When the first referendum supported change and identified a favoured system, a second referendum was held on General Election day the following year. Unlike the first referendum, its result was binding.

The initial development of Scottish devolution has been portrayed by its advocates as an inclusive process. The all-party Campaign for a Scottish Assembly appointed in 1988 a Constitutional Steering Committee, which called for the establishment of a Scottish Constitutional Convention. In the following year the Convention met and at its first meeting adopted the ‘Claim of Right’. The Convention was a broad – though unelected – grouping that included the Liberal Democrat and Labour parties (for different reasons, the Conservatives and Scottish National Party declined to participate) as well as civil society participation including the churches, trades unions and local government representatives. This wide base is portrayed by some as a strength for the Convention, particularly in comparison with the earlier attempt at Scottish devolution of the 1970s. However, it has been argued that such was the hegemony of the Convention within the devolution movement that there was insufficient scrutiny of some of its proposals. The Convention produced two reports: Towards Scotland’s Parliament (1990) and Scotland’s Parliament, Scotland’s

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173 See eg: ‘For the People, By the People’, p.6.
175 See eg: Bogdanor, Devolution in the United Kingdom, pp.197-8.
They set out the scheme that would form the basis for Scottish devolution.

There exist in the literature accounts of innovative means of engaging the public in constitution-building possibly easier to replicate than the Scottish Constitutional Convention. An example often cited of a constitution-building exercise that consulted widely and inclusively is that held in South Africa in the mid-1990s. Perhaps a more appropriate comparison for the UK is with a process considering reform of the electoral system of the Canadian province of British Columbia. The British Columbia experiment involved deliberation and decision-making responsibilities being handed over to members of the public in a Citizens’ Assembly. The Citizens’ Assembly has been described as representing: ‘the first time in history that ordinary citizens have been empowered to propose fundamental changes to political institutions to their fellow citizens’.

The Citizens’ Assembly sat over 11 months in 2004. It was established to review and if necessary propose a replacement for the electoral system. The Assembly was established by the government of British Columbia (with the support of the legislature) which committed to holding a referendum on the recommendations of the Assembly. It was composed of 160 randomly selected citizens (a process known as sortition) with a basic quota of one man and one woman from each electoral district plus two aboriginal members. Initially members spent weekends learning about different electoral systems; then they took evidence during 50 public hearings attended by around 3,000 citizens and received approximately 1,600 written submissions. The Assembly then deliberated over different electoral systems and voted on options. It decided to recommend the adoption of the Single Transferable Vote.

A number of claims have been made in the literature about the strengths of this system. They include that it showed that ordinary citizens are willing and able collectively to make decisions about a complex political issue; that it was meaningful because the government was committed to holding a referendum on the recommendation that was made; and that its operation was independent from

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176 See eg: Synove Skjelten, A people’s constitution: Public participation in the South African constitution-making process (Vorna Valley: Institute for Global Dialogue, 2006);
government. The Assembly has proved influential and transferrable, with similar processes being used in the Province of Ontario in Canada and in the Netherlands.179

Arguable problems identified include that while the process was independent, the terms of reference – which covered only the electoral system, not related issues such as the size of the legislature – were determined by government. Furthermore the proposals were submitted to a more traditional form of public decision-making, a referendum. The electorate as a whole had not been through the same process of education and careful deliberation as the members of the Assembly. Moreover, the super majority requirement set for the referendum once again revealed the ability of the government to determine the overall framework within which the Assembly functioned. Finally in the words of Graham Smith: ‘A Citizens’ Assembly does not come cheap…The budget for the 16 months of operation (from selection through to publication of the report) was $5.9 million (Canadian dollars)’.180

In the period since the introduction of devolution in the UK, the consideration of developments to the Welsh, Scottish and Northern Ireland settlements have involved extensive and active public consultation and engagement, perhaps notably that carried out by the Northern Ireland Human Rights Commission over the period 2000-2008 into the idea of a Northern Ireland Bill of Rights.181 However in these cases the centrality of elites was preserved to a greater extent than with the British Columbia experiment.

**Ratification and outcomes**

Once a proposal for constitutional change has been devised, it requires some kind of procedure for its approval. ‘Patriation’ of the Canadian constitution involved (as well as a judicial challenge and High Court ruling) approval from both houses of the Canadian Parliament, and ultimately the sanction of the UK Parliament through the *Canada Act 1982*, which included the *Constitution Act 1982* within it. There was no formal role in this process for provincial legislatures. The only provincial legislature that did vote on the package, that of Quebec, rejected it. Quebec could not stop the package from being introduced but its non-participation could be seen as lessening the legitimacy of the new arrangement. Subsequent attempts to create a Canadian constitution into which Quebec was incorporated involved negotiations between federal and provincial authorities and eventually culminated in the ‘Charlottetown Accord’ on which a national referendum was held – yielding a ‘no’ vote – in 1992.182

The German federal reforms were enacted in March 2006 in accordance with Article

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179 Smith, *Power Beyond the Ballot*, pp.76-77; For the work of the Ontario Citizens’ Assembly, go to: [http://www.citizensassembly.gov.on.ca/](http://www.citizensassembly.gov.on.ca/).
180 Smith, *Power Beyond the Ballot*, pp.76-77.
79 of the Basic Law, which requires a two thirds majority in both chambers of the German legislature, the Bundestag and the Bundesrat.\(^{183}\)

In France, under Article 89 of the 1958 constitution, constitutional change requires a referendum, unless – on the initiative of the President – a vote is held in Congress (that is, a joint meeting of both chambers of the Parliament), with a three-fifths majority required if the proposal is to pass. In July 2008, a substantial overhaul of the French Fifth Republic constitution was approved by just one vote more than needed.\(^{184}\)

Describing arrangements in Finland, Dawn Oliver and Carlo Fusaro write that:

> when constitutional reform is proposed...special procedures need to be followed – normally a simple majority in Parliament, an intervening election, and then a two thirds majority for the change in the new Parliament.\(^{185}\)

Though there is diversity the literature on constitution-building suggests a widespread tendency for obtaining approval (or otherwise) through referendums. Referendums may be held in conformance with a specific constitutional provision (such as section 128 of the Australian Constitution\(^{186}\)); or because a government deems them necessary or desirable (as with the UK devolution referendums).

In the Australian Republic Referendum of 1999, though opinion polling had long suggested greater support for a republic than the continuation of the monarchy – and despite substantial media and financial support for the ‘yes’ campaign – the establishment of a republic was defeated by 54.87 per cent to 45.13 per cent. Possible reasons for the defeat of the republican cause included the precise package on offer, which split potential republicans. The wording of the question included specific reference to the possibility of abolishing the monarchy, rather than simply asking about the introduction of a republic, which may have caused more pause for thought amongst some voters.

The Scottish referendum held in September 1997 delivered, on a 60.2 percent turnout, a 74.3 percent ‘yes’ vote for the establishment of a Scottish Parliament; and a 63.5 percent ‘yes’ vote for the idea that a Scottish Parliament should have tax-raising powers. The Welsh referendum, held the following week, delivered, on a turnout of just over 50 percent, a 50.1 percent ‘yes’ vote for the establishment of a Welsh Assembly. These results were arguably assisted by the Labour leadership insisting on the holding of referendums prior to the introduction of devolution legislation, unlike previously, when referendums were held after legislation was passed. This decision was subject to some criticism from amongst supporters of change in Scotland and Wales. However, once the referendums were won the policy had a mandate which


\(^{185}\) Oliver and Fusaro (eds) *How Constitutions Change*, manuscript, Chapter 17.

helped facilitate its passage through Parliament, unlike on the previous occasion, when backbenchers were able to force amendments which reduced the chance of the referendums ending in ‘yes’ majorities.

In May 2005 a referendum was held on the recommendation for STV contained in the Final Report of the British Columbia Citizens’ Assembly. A double threshold had been set: a majority in 60 percent of electoral districts and of 60 percent of the overall vote. The first requirement was met, but not the second, with an overall ‘yes’ vote of 57.7 percent. A second referendum was held in 2009 in which only 38 percent of those voting supported STV.

A possible conclusion that can be drawn regarding the seeking of approval for constitution-building is that it is likely to involve referendums, although not inevitably. Certain specific decisions about referendums are important to the outcome. They include how the question is framed and whether or not to apply a super-majority requirement. Government support or cooperation is often important to the ratification of constitutional change, whatever procedure is used.
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