Mapping the Path towards Codifying - or Not Codifying - the
UK Constitution

CASE STUDIES ON CONSTITUTION BUILDING

Professor Robert Blackburn

July 2014
Mapping the Path towards Codifying - or Not Codifying - the UK Constitution

This collection of case studies forms part of the programme of research commissioned by the House of Commons Political and Constitutional Reform Committee from Professor Robert Blackburn, Director of the Centre for Political and Constitutional Studies at King's College London, for its inquiry into Mapping the Path towards Codifying – or Not Codifying – the UK Constitution, conducted with the support of the Nuffield Foundation and Joseph Rowntree Charitable Trust.

Editor

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Associated Publications

Andrew Blick, Mapping the Path towards Codifying - or Not Codifying - the UK Constitution: Literature Review (2011)

Andrew Blick, Mapping the Path towards Codifying - or Not Codifying - the UK Constitution: The Existing Constitution (2012)

Introduction

This collection of 23 case studies on constitution building considers some important issues of process in the preparation of a codified UK constitution, and a selection of precedents drawn from earlier constitution building exercises in the UK and other countries where there may be instructive lessons to be learnt for the preparation of a codified constitution.

The work as a whole is ancillary to the programme of research and analysis I have conducted at the formal request\(^1\) of the House of Commons Political and Constitutional Reform Committee to inform its inquiry into Mapping the Path towards Codifying - or Not Codifying - the UK Constitution, published in its Report under the title A New Magna Carta? (2014-15, HC 463) on 10 July 2014.

The contents of this Case Studies on Constitution Building include, either directly or indirectly by studying some precedent of constitution building where it was an element in the proceedings, an assessment of the various types of body which might be entrusted with, or contribute to, the task of preparing a draft codified constitution, such as a Royal Commission, the Law Commission, a Constitutional Convention, a Joint Parliamentary Committee and a Negotiating Council.

Special study is made of public engagement procedures in the belief that any attempt to codify the UK constitution must carry popular and media interest and support, which means finding imaginative ways of involving ordinary people and establishing what they actually think and want, beyond the consultation procedures likely to be dominated by lobby or special interest groups. To this end the contents also include studies of precedents abroad of popularly elected Assemblies, Conventions and Councils to harness popular opinion on constitutional reform, together with detailed analysis of new options in deliberative democracy procedures and public opinion polling.

For the studies of precedents at home and abroad, my request to each contributing author was to follow a broadly similar format, so far as appropriate, as follows:

(1) the substantive issue (new constitution or major constitutional amendment) with which the exercise engaged;

(2) an explanation of the political background and origin of the substantive issue with which the constitutional reform exercise engaged;

(3) who participated in the preparation and design of the reform package, including use of any commissions/committees, respective roles of ministers/executive and legislature, the contribution of parliamentary bodies, the role and use made of experts, any direct involvement of members of the public in the design process, the

\(^1\) 16 September 2010.
role played by the states in a federal system and by local government, the contribution of civil society, the use of public consultation and/or public hearing exercises;

(4) the working methods of the design process chosen by the government, on such matters as how the preparatory body reached its decisions, whether it operated in public, how it selected people or bodies to give evidence to it, for how long its preparatory work took, what measures were taken to reach compromise or agreement across parties or opposing opinions, and what practical problems and successes did its working methods produce;

(5) the formal procedures through which the legislative proposal for the new Constitution, or the constitutional amendment or reform, passed, including the use of a referendum (including its type, and the result), the respective roles of each Chamber in a bicameral legislature, any special legislative procedures;

(6) media coverage of the substantive issue and process, including the use and influence of opinion polls in news reporting on the subject;

(7) the outcome and effect of the reform process, and the extent to which it achieved what had been hoped of it by those who initiated it, and whether there were any unforeseen consequences; and finally,

(8) an assessment of the overall method used in preparing and implementing the constitutional change, and what it has to offer the United Kingdom in terms of guidance in any possible exercise in the preparation and adoption of a constitution.

Two case studies at the end of the collection offer thoughts on the ideology of the political parties towards constitutional reform generally, and how the idea of a written constitution fits into their political thinking.

I am grateful to all the contributing authors, listed on the following page and at the end of each case study, most of whom are colleagues at King's College London, and otherwise professional friends with whom I collaborate in the fields of comparative constitutional law, politics or history; and special thanks to Dr Andrew Blick for his invaluable assistance throughout.

Professor Robert Blackburn
King's College London
June 2014
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The Existing Process of Constitutional Reform

There is no uniform process for constitutional change in the UK, which is itself the result of not having a codified constitution with a specified process for innovation and amendment. Formal changes to the constitution take place through a normal Act of Parliament. What might be termed "informal" changes to the constitution occur through judicial principles of the common law derived from court decisions on the powers of government and the relationship between the individual and the state, and through the emergence of political conventions and agreed understandings on the conduct of government.

**Formal amendment by way Act of Parliament**

So far as an Act of Parliament dealing with constitutional law reform is concerned, the process and procedures are broadly similar to the passage of any other kind of legislation. So in parliamentary terms, this same process would be the only mandatory requirement under which any parliamentary measure sought to codify the constitution.

The current process is for the constitutional Bill to be presented to either House of Parliament for a First Reading, which is purely formal; then for a Second Reading debate in which the general principles of the Bill are debated and voted on; then followed by the committee stage in which its clauses are scrutinised and amendments proposed. The House of Lords takes its committee stage in the whole House, and traditionally so too does the House of Commons on Bills of first class constitutional importance. This has the advantage of involving all Members in scrutiny of the Bill, allowing for a broader ventilation and discussion of views on each clause of the measure. The rigour of this custom has been diluted in recent times by a greater use of programme resolutions and time allocation orders limiting the amount to be spent on parliamentary debate before the vote is put. It is quite likely that each House would decide to make use of it powers to appoint a smaller legislative committee for this Bill. In the House of Commons the new procedural reform empowering a Public Bill Committee (comprising sixteen to fifty members chosen for their special interest or expertise and the party composition of the House) to receive written evidence and take oral evidence, in a manner that a Committee of the whole House is unable to do, makes remission of certain parts of such a Bill where there are special complexities attractive, so long as the House as a whole genuinely approves of such a resolution.

In the second chamber, the Lords may unusually refer such a measure to a Select Committee, followed by a formal report by the Committee for the benefit of the House, giving additional time and scrutiny of its provisions and implications, particularly if the Bill was initially presented to it before the Commons. This

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2 This paper draws on an earlier article by Robert Blackburn, "Constitutional Amendment in the United Kingdom", Ch. 18 in X. Contiades, *Engineering Constitutional Change* (London: Routledge, 2012)
3 Examples in the first session of the 2010 Parliament included the European Union Bill, the Fixed-term Parliaments Bill, the Parliamentary Voting System and Constituencies Bill, and the Scotland Bill.
happened over the controversial Constitutional Reform Bill 2003-04, which in its original form sought to abolish the ancient office of Lord Chancellor without any proper prior consultation with the legal and judicial establishment.

The House of Lords has only limited legislative powers over constitutional Bills, being regarded as generally subordinate in all matters to the House of Commons. Under the Parliament Acts 1911 and 1949, the Lords may not veto a Bill of which it disapproves, and possesses only a power of delay of one year. So in theory if the House of Lords rejected the Bill in two successive annual sessions, but the government was determined to enact the legislation, the Speaker of the House of Commons may certify that the provisions of the Parliament Acts have been satisfied, and the Bill is presented directly to the Monarch for Royal Assent. This procedure is rarely used in practice, as the Lords generally acquiesce in the Commons’ insistence on its measures or reversals of its amendments, particularly if the Salisbury-Addison convention applies under which the Lords will not vote down a Bill whose policy was included in the governing party’s manifesto at the previous election.

However, passage of a Bill to codify the constitution would be unprecedented, and in practice the House of Lords would wield substantial political influence over the measure. For not only is it likely that the second chamber’s sense of its own role as a watchdog of the constitution, even if lacking teeth, overrides any conventions of restraint, but the government will be well aware that utilisation of the Parliament Acts would be self-defeating to the whole purpose of codification since, as discussed elsewhere, to be successful in its implementation it must carry broad support and acceptance.

Further variations on normal legislative procedures are applicable to Bills of constitutional importance. One is that if the content of the Bill sought to prolong the life of Parliament in any way (in other words, suspend general elections), such a measure is expressly excluded from the provisions of the Parliament Act 1911 and the second chamber has the absolute power to approve or veto such a provision. This same power would be included in a consolidation statute (the second draft illustrative blueprint in this Evidence), and would be part of the discussion on entrenchment procedures for a written constitution (the third blueprint). There are no requirements for special majority voting in either House over a legislative measure of any kind, not even of the most fundamental constitutional kind. Indeed, there are only three special voting procedures required in UK parliamentary law at all. Two of these

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6 The Bill was enacted in the following session, 2005.
7 This one year period is an approximation. The precise terms of the delay are that, “If any Public Bill... is passed by the House of Commons [in two successive sessions] (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection [for the second time] by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill: Provided that this provision shall not take effect unless [one year has elapsed] between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons [in the second of these sessions].”
8 For discussion, see Robert Blackburn and Andrew Kennon, Parliament: Functions, Practice and Procedures (Sweet and Maxwell 2003), pp. 708-711.
9 Section 2(1) Parliament Act 1911.
10 No such veto has ever been exercised, but general elections were suspended during the First World War by the Parliament and Registration Act 1916, the Parliament and Local Elections Act 1916, the Parliament and Local Elections Act 1917, and the Parliament and Local Elections (No. 2) Act 1917. See Robert Blackburn, The Meeting of Parliament (1990), chapter III.
requirements are laid down in the Standing Orders of the House of Commons, being that one hundred members must vote in favour of a Closure resolution, putting an end to a debate,11 and forty for a quorum in any division (vote).12 Under section 2 of the Fixed-term Parliaments Act 2011, an early general election within each five-year interval between elections may be called if two-thirds of the membership of the House of Commons votes in favour of such a resolution.

Referendums are not a general requirement for constitutional law reform in UK law, but, as it well known, a few have been held on an ad hoc basis in recent times, mostly consultative in terms of endorsing government policy and proposals for legislation, but some as part of a legislative process. Most of these have concerned the regional government of the country, and the UK’s relationship with Europe. The referendums in the 1970s involved consulting the electorate of Northern Ireland on whether it should remain part of the UK or join with the Republic of Ireland in 1973; on the UK’s continuing membership of the European Communities in 1975; and on Scottish and Welsh devolution in 1979 as a procedural requirement before the Scotland Act and Wales Act that year could come into effect (which in the event lapsed, because of insufficient support at the referendums). The Referendums (Scotland and Wales) Act 1997 later provided for further Scottish and Welsh referendums to endorse the new proposals for devolution under the Labour government headed by Tony Blair, which were forthcoming and led to the Scotland Act 1998 and the Government of Wales Act 1998. Later regional referendums were held on proposals for a London Mayor and Assembly in 1998, on the Northern Ireland Belfast Agreement in 1998, on a Regional Assembly in the North of England in 2003, and on further Welsh devolution in 2003. In 2010, a referendum was held on whether the present First-Past-the-Post method of electing members to the House of Commons should be replaced by the Alternative Vote, which returned a result in favour of the status quo. The European Union Act 2011 now requires an Act of Parliament and a referendum to be held before the UK government may agree to any treaty changes that represent an extension of the powers or competence of the EU or its institutions. As discussed elsewhere, the utility of a referendum for the purposes of codifying the constitution, therefore, would depend on the manner and nature of the codification. For implementing a constitution of basic law (similar to the third blueprint in this Evidence), it would surely be essential; and if EU treaty law were affected in ways that engaged the 2011 Act, one would be legally necessary for that purpose alone.

A constitution of basic law with some elements of reform might well affect the prerogatives of the Crown and position of the monarchy. Codifying the common law executive powers inherent in the royal prerogative, rendering them subject to parliamentary control and normal judicial review procedures, might well be one of the central political arguments behind codifying the constitution.13 So too, though controversial, this might be seen as an opportunity to further rationalise the rules of royal succession and church-state relations, by removing the Roman Catholic bar to the throne. The existing procedures on such matters are that where any Bill affects the royal prerogative, it is customary for the government minister or parliamentary member to seek the permission of the Monarch first, before presenting the Bill to

11 SO 37, Standing Orders of the House of Commons, Public Business, 201 (New Parliament), HC 539.
12 In practice this means 35 voting plus Speaker and four tellers. SO 41(1), Standing Orders of the House of Commons, Public Business, 201 (New Parliament), HC 539.
13 As was clearly the case with Gordon Brown's Governance of Britain initiative, during which debates on which he declared his support in principle for a written constitution (Commons Hansard, 10 June 2009, col. 798) and see Case Study W.
Parliament. The Monarch’s consent will then be conveyed to each House, when the Bill is presented for Second Reading debate. For example, when introducing the Constitutional Reform and Governance Bill (affecting matters relating to the civil service, treaty-making, and the peerage) on 24 March 2010, the responsible minister in the House of Lords said, “My Lords, I have it in command from Her Majesty the Queen to acquaint the House that Her Majesty, having been informed of the purport of the Constitutional Reform and Governance Bill, has consented to place her prerogative and interest, so far as they are affected by the Bill, at the disposal of Parliament for the purposes of the Bill.” This royal consent today is automatic, though it is always open to the Monarch to express her opinion privately to the Prime Minister of the day.

Amendments to the law governing succession to the Crown, as seen during passage of the Succession to the Crown Act 2013, are subject the requirement that other countries where the monarch serves as Head of State must be consulted and signify their agreement to the changes proposed by the UK government. These other fifteen countries, known as the “Commonwealth realms”, are Canada, Australia, New Zealand, Jamaica, Antigua and Barbuda, Bahamas, Barbados, Grenada, Belize, St Kitts and Nevis, St Lucia, Solomon Islands, Tuvalu, St Vincent and the Grenadines and Papua New Guinea. The requirement for this multi-national agreement stems from the Statute of Westminster 1931, which codified the principles agreed in the Imperial Conference declarations of 1926 and 1930 about the relationship between the UK and the self-governing dominions at that time. The Preamble to the Statute reads, “Any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom”. As this is not part of the text of the Act, this provision is not a legal rule as such, but a convention; one which in these circumstances is equivalent to an international treaty between all the self-governing nations retaining the monarch as Head of State. In effect, however, it is a legal requirement, because unless the UK wishes to see the Crown divided, so that different laws govern the royal succession in the different Commonwealth realms, leading to different Heads of State, it needs to secure the necessary changes in the constitutional law of each of the separate nations concerned. As each of the other fifteen realm have their own different processes for constitutional law reform, this is a laborious undertaking, but as seen in the case of the Succession to the Crown Act 2013 is generally conducted with diplomatic ease.

Ideas and the initiative for constitutional change emanate from a number of different sources, most notably political parties whether in office or opposition, independent policy think-tanks (such as the centre-left Institute for Public Policy Research, and the centre-right Centre for Policy Studies), parliamentary select committees (particularly, at present, the House of Lords Constitution Committee, the Commons Political and Constitutional Reform Committee, and the Joint

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17 This statute ends the system of male preference primogeniture and removes the legal provision that anyone who marries a Roman Catholic shall be ineligible to succeed to the Crown.
Parliamentary Committee on Human Rights), independent commissions (such as the Electoral Commission, and Equality and Human Rights Commission), and the writings of University professors. Frequently, government legislative policy has its roots in sound but initially radical sounding ideas that begin life on the margins of politics, particularly in the corridors of academe, which then slowly filter into the hearing and imagination of journalists, backbench Members of Parliament, party policy advisers, and eventually senior politicians and civil servants. A powerful momentum across the opposition parties behind engineering a particular constitutional change in advance of the major partner taking office, particularly in the form of a convention involving representatives from civil society, may provide the background for government action in the future.18

In the UK it is almost always the case that a constitutional proposal of major magnitude needs to be formulated and presented to Parliament by the government of the day. A Bill presented by an ordinary parliamentary member in the form of a Private Members’ Bill in the House of Commons stands no chance of success unless the member secures time through winning a place in the top six places in the annual ballot that takes place for prioritising such Bills in the limited time available,19 and any such Bill is easily obstructed by the government through mobilising its majority in the House or declining to make the additional parliamentary time it will need available for it. In any event, it is a prevalent idea that on important matters a government minister should take responsibility, be able to harness the resources of the civil service in the preparation of the legislation, and be accountable to Parliament for shaping the Bill in its original form.20 Private Members’ Bills, even if unsuccessful, may have a role to play in building pressure behind a particular reform, and contributing to its eventual adoption, in revised form, by the government.21

Major constitutional issues are frequently submitted by the government to some public body of inquiry, with a brief to bring forward recommendations. The range, nature, powers and composition of such bodies vary considerably, and are discussed in a separate section later in this report.22 Today, all such public bodies will be charged with collecting evidence and holding a public consultation exercise in some form or other, prior to their report.

So far as the government's own consultation and deliberative inquiries prior to legislation are concerned, there is a widespread view that, as under the existing state of affairs they are inadequate and, with respect to constitutional reform, politically manipulative and incoherent as a system of managing constitutional change. An increasingly overly flexible pattern of constitutional law reform has emerged since

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18 As in the case of the Scottish Constitutional Convention: see below.
20 There are a few examples of successful Private Members’ Bills on human rights and constitutional measures, such as the Abortion Act 1967 amending the law relating to the termination of pregnancies, and the National Audit Act 1983 extending the scope of public audit.
21 For example, several Private Members’ Bills in the early 1990s on the human rights of the disabled resisted by the government were followed a few years later by the government-sponsored Disability Discrimination Act 1995.
22 For example Royal Commissions, Speaker's Conferences, Independent Commissions, and Departmental Committees of Inquiry: see below.
1997, which is one of the key drivers for codifying the constitution.23 The Fixed-term Parliament Act 2011 may be cited as a prime example of bad practice, in which a major change was made to our political democracy, fixing the period between general elections at five years, without any popular consultation at all.24 On popular preferences about the voting system to the House of Commons, a reference to the people by way of a referendum was held in 2011, but confined to two non-proportional systems (FPTP and AV), thereby disallowing a full and free expression of opinion on what method people actually preferred. There is a government Code of Practice on Consultation that has existed since 2000, but which is applied erratically.25 Nonetheless, it can be confidently expected that any initiative by the government to codify the constitution, particularly if it is a documentary constitution, will - whatever the public body designing or drawing up the document, and at whatever point the dialogue takes place - be subject to extensive public engagement and deliberative techniques for embracing popular opinion and involvement. Indeed, this involvement would be critical to the success and acceptance of the document that was produced, and the process by which it was prepared would be one of the public benefits of the project altogether.

Non-legislative or "informal" methods of constitutional change

Whilst the great majority of important constitutional amendments take place by way of formal legislation through Parliament, as in the six cases considered above, yet significant amendments do occur by what might be termed “informal methods”, notably judicial decision-making in matters of public law and changes in the constitutional conventions regulating the system of government. As a recent Council of Europe report has said,

“Formal amendment is not the only form of constitutional change, and in some systems not even the most important. Leaving aside revolutionary or unlawful acts, the two most important ways of legitimate constitutional change are through judicial interpretation and through the evolvement of unwritten political conventions supplementing or contradicting the written text. How this functions in a given constitutional system influences the formal amendment.”

23 House of Lords Constitution Committee, "We do not accept that the government should be able to pick and choose which processes to apply when proposing significant constitutional change. We therefore recommend . . . the adoption of a clear and consistent process." (The Process of Constitutional Change, 2010-12, HL 177, 5.)
25 The Code requires that: (1) Formal consultation should take place at a stage when there is scope to influence the policy outcome. (2) Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible. (3) Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals. (4) Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach. (5) Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees’ buy-in to the process is to be obtained. (6) Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation. (7) Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience. (2008 ed.)
In the UK this is certainly true, though in comparison with other countries it is less significant with respect to judicial decisions (in the absence of a constitutional court and constitutional text to interpret), and more so with respect to conventions (in the absence of a documentary constitution dictating the structure and working of government).

**Judicial declarations of constitutional principle**

The scope for judicial creativity in constitutional affairs is further limited by the UK’s approach to legislative drafting which is performed in great detail, generally attempting to provide for as many eventualities as may fall within the statute’s scope as possible. Nonetheless, important principles of constitutional law have been created by the judgments of the courts. For instance, Carltona Ltd. v. Commissioner of Works established the doctrine that statutory discretionary powers conferred upon a minister may lawfully be carried out by his departmental officials on his behalf, without express authorisation. Another famous example is Council of Civil Service Union v. Minister for the Civil Service which not only authoritatively re-stated the grounds for judicial review of administrative action, but extended the scope of judicial review into the exercise of common law Crown prerogative powers, whereas previously this had been limited to statutory powers. It is in the field of civil liberties that the judiciary has initiated most changes. Entick v. Carrington is an ancient landmark, establishing that a person’s life, liberty and property can only be interfered with or forfeited if authorised by a power conferred by common law or statute, not under any general warrant signed by a minister. Christie v. Leachinsky laid down the doctrine that a person being arrested must be informed of the reason for his detention for it to be lawful, a principle codified into statute four decades later. A line of cases developing from Prince Albert v Strang (1849) 1Mac&G 25, including Argyll v Argyll [1967] Ch 302, established a doctrine of breach of confidence, enabling injunctions to be granted to suppress publication of private personal matters.

Leading constitutional law judgments are often in substance pronouncements on the relationship between the executive and judiciary, and how the courts construe their role in interpreting ministers’ powers or those of governmental bodies. Insofar as the courts are essentially the inventors of the common law which includes its own subservience to Acts of Parliament under the doctrine of parliamentary sovereignty, they may qualify the terms of that relationship, though in a manner that is consistent

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28 [1943] 2 All ER 560.
30 The power in question was that of regulating the position of civil servants, being in legal theory Crown servants, and whether or not they could belong to a trade union.
31 (1765) 19 Stat Tr 1029 which involved allegations of sedition.
33 Police and Criminal Evidence Act 1984, s. 28.
34 Respectively (1849) 1Mac&G 25 and [1967] Ch 302. In the former case, this was in relation to personal etchings made by the Prince Consort of other members of the royal family; and in the latter case, of marital secrets between a wife and husband.
35 See above p.000.
with its doctrine of precedent (stare decisis). In other words, the doctrine of parliamentary sovereignty as a dogma of the common law may be refined as time goes on.

**Fundamental rights and freedoms**

Only one parliamentary statute contains a code of constitutional principles, leaving it to the courts to develop and apply those principles in the cases that come before them. This is the Human Rights Act 1998 which incorporated the articles of the European Convention on Human Rights into the domestic law of the legal systems of the UK. However, the creativity of the courts, in common with most other Council of Europe nation states, is limited by being strongly influenced by the judgments and reasoning of the European Court of Human Rights. The judiciary’s approach to its own law-making capacity is often itself a matter of statutory interpretation. Thus section 2 of the Human Rights Act states that a court “must take into account” the judgments of the Strasbourg Court, but this leaves open the question of the precise degree of influence and intensity upon the UK’s national courts of that body of European jurisprudence. A leading judgment on the subject interpreted this section to mean, in the dicta of Lord Bingham, the senior law lord at the time, that any court should “in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court”.

**Establishing conventions**

An explanation of the special importance of conventions in the UK system of government has already been given. Because of their prominence in the working of the constitution, their nature, mode of coming into existence, establishment, and means by which they are enforced (or not), have been the subject of extensive study by professors of constitutional law and political science. The most authoritative

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36 In 1966, the House of Lords qualified the rigour of the doctrine of precedent in its application to itself as the final court of appeal, so that while it would normally follow its own earlier judgments, it would henceforth in exceptional circumstances depart from them “when it appears right to do so”: *Practice Statement (Judicial Precedent) [1966]* 3 All ER 77.
37 See for example *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) in which the court modified the common law doctrine of implied repeal where there are two conflicting statutes, so that where an earlier “constitutional statute” was involved, a later statutory provision would only prevail if it contained express words to the contrary. Law LJ defined a “constitutional statute” as one which conditions the legal relationship between citizen and State in some general, overarching manner, or enlarges or diminishes the scope of what we would not regard as fundamental rights. As examples, he cited Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which enlarged the franchise, the Human Rights Act 1998, the Scotland Act 1998, the Government of Wales Act 1998, as well as the European Communities Act 1972.
39 *R (Ullah) v Special Adjudicator* [2004] UKHL 26. For more recent judicial opinions on the precise level of influence of European Human Rights Court judgments, see the oral evidence session with Lord Judge (Lord Chief Justice) and Lord Phillips (President of the Supreme Court) before the Joint Parliamentary Committee on Human Rights, 15 November 2011.
40 See p.000.
41 See for example Geoffrey Marshall, *Constitutional Conventions* (Oxford University Press 1984). Two early influential jurists on the subject were Professor A. V. Dicey in *The Law of the Constitution* (Macmillan 1885), and Professor Sir Ivor Jennings in *The Law and the Constitution* (London 1933).
analytical test for establishing the existence of a new convention is widely regarded as being that provided by Sir Ivor Jennings, who said there were three questions to ask – what are the precedents; did the actors in the precedents believe they were bound by a rule; and is there a reason for the rule.

There are often difficulties in knowing precisely when a constitutional amendment by way of a convention has occurred, being either a change in the convention itself or the creation of a new one, because such rules often depend upon a series of precedents and evolve over a period of time, supported by changing political circumstances and ideas. Thus one of the most basic conventions of political accountability in the UK is that all government ministers must have a seat in Parliament. With respect to the Prime Minister, the convention is more specific, that he or she must be a member of the House of Commons. The last Prime Minister to be appointed from the House of Lords was the Marquess of Salisbury in 1900-02. Over the next fifty years, there were occasions when a peer in the House of Lords was considered for appointment, such as Lord Curzon in 1923 and Lord Halifax in 1940, and in each case their peerage was a undoubtedly a factor in another being appointed in preference to them. That a convention had been firmed up on the matter was only conclusively proved in 1963, when Lord Home was appointed Prime Minister, but immediately renounced his peerage (as he was able to do, following passage of the Peerage Act 1963) and arrangements were made for his election as a member of the House of Commons.

Declaration of a new convention

However conventions can be created through being declared, though they will require the support and acquiescence of all who are involved.

A clear example of this happening was the Imperial Conference declarations of 1926 and 1930, followed by the principles set down in the preamble of the Statute of Westminster 1931, that Commonwealth countries retaining the UK monarch as head of state must agree to any changes in the law on royal succession and to the royal style or titles.

Another successful declaration of this kind was the “Sewell convention” in 1998 following Scottish devolution, arising from the UK government and the Scottish executive publicly agreeing that the Westminster Parliament will not legislate on matters within the competence of the Scottish Parliament unless it has been previously agreed by the Scottish Parliament that it may do so.

An attempt in 2007-09 by the former Prime Minister Gordon Brown to declare a convention under which the House of Commons would need to signify its approval prior to any dissolution of Parliament floundered for want of the responsible minister, the Leader of the Commons, failing to secure cross-party agreement, or indeed interest in the proposal.

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42 Stanley Baldwin and Winston Churchill, respectively.
43 This was following the resignation through illness of his predecessor, Harold Macmillan.
44 The force of this convention is being followed today in plans to change the royal succession rules: see above p.000.
45 Lords Hansard, 21 July 1998, col. 791, when the minister Lord Sewel stated, “we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament”; and Cm 444, 1999, para. 13.
46 Mr Brown’s desire for such a convention was set out in the government Green Paper, The Governance of Britain, 2007, CM 7170, paras. 35-36; and in his statements to the House of Commons, Commons Hansard, 3 July 2007, cols. 815-816. For commentary, see Robert Blackburn, “The
Another means of constitutional amendment by way of convention is the production by the government or one of its departments of an administrative circular containing a code of conduct. Many such codes have emerged in recent years, two important ones being the Ministerial Code dealing with the conduct of government ministers, and the Cabinet Manual describing the entire working of UK government. Both these documents purport to be descriptive of the existing situation, and with each new edition will contain shifts in emphasis and practice. The code for ministers, originally called Questions of Procedure for Ministers, was first produced in 1945, but was not made public until 1992, as a result of which it has acquired added status as a document of authority, descriptive and prescriptive. Its present version sets out ten principles for ministers, covering such matters as the collective responsibility of ministers, requirements of accountability for their departments and executive agencies, and upholding the political impartiality of the civil service. The Cabinet Manual, prepared in draft by the Cabinet Office before the 2010 general election, and published in final form the following year, is also essentially an internal circular, but one which the media and public will de facto regard as an authority source of guidance on how government does and should operate.

A significant amendment to previous constitutional practice declared in the draft Cabinet Manual in 2010 was in stating that an incumbent Prime Minister following an inconclusive general election should perform a “caretaker” role, with restrictions on what policies and decisions he or she could take, pending inter-party talks that the Cabinet Office would offer to the parties.47 This subtly modified previous understandings about hung Parliament situations in which a Prime Minister had first opportunity to remain in office and attempt to form a coalition, with negotiations taking place at 10 Downing Street, but may resign straightaway if he feels unable to continue in office, allowing the leader of the next largest party to be appointed Prime Minister with or without any pact with one or more of the smaller parties.48 Earlier also, a prevalent theory maintained that the monarch might have some personal role to play in government formation, as had been the case in 1931,49 but the Manual now rightly places emphasis on royal non-intervention.50

Parliamentary resolution (Standing Order)

There are two further means of informal constitutional amendment that are of special significance in the UK. One is that several matters of considerable importance to the working of Parliament, which in foreign countries might well be included in their written constitution, are dealt with in the UK through simple resolutions of the House of Commons published as Standing Orders. Thus the election of the Speaker of the House of Commons, the rules of debate, the existence and regulation of its Select Committees, and the treatment of public petitions, are all matters regulated and

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amended through such resolutions of the House.\textsuperscript{51} A similar situation applies to the internal working of the House of Lords.\textsuperscript{52}

\textit{Amendment by prerogative Order in Council}

The other informal method to note is that amendments to the machinery of government and civil service may be made by the Prime Minister under the legal authority of the common law Crown prerogative. This means that departments of state, even the most important or longest in existence, may be modified by the Prime Minister without any formal parliamentary approval. Thus the justice functions of the Lord Chancellor’s Department and constitutional work of the Home Office were transferred to a newly-created Department of Constitutional Affairs in 2003, which then had its responsibilities revised and was re-titled the Ministry of Justice in 2007.\textsuperscript{53}

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[B]

The Use of Royal Commissions on Constitutional Affairs

Royal Commissions are ‘\textit{ad hoc}’ investigatory or advisory committees, established by Government initiative… without statutory powers to compel the attendance of witnesses or the production of documents’.\textsuperscript{54} There have been 150 Royal Commissions since 1900, varying significantly in subject matter, size and duration.\textsuperscript{55} A number of Royal Commissions have inquired into and made recommendations on constitutional reform issues: two Commissions considered the electoral system, in 1910 and again in 1918; three pondered the civil service; one has investigated abuses of the honours system, one inquired into tribunals of inquiry, one explored devolution – the famously misnamed Royal Commission on the Constitution – and one examined reform of the House of Lords.\textsuperscript{56}

However, there are no guidelines determining when it may be necessary to establish Royal Commissions in relation to proposed constitutional reform beyond a general sense that such bodies may be appropriate where there are ‘substantial matters’\textsuperscript{57} at stake, and where ‘the situation demands a detailed and independent investigation’.\textsuperscript{58}

\textsuperscript{51} For the current edition, see Standing Orders of the House of Commons (Public Business), 2010 (New Parliament), HC 539.
\textsuperscript{53} For a critique of the ‘near absolute power’ of the Prime Minister in this respect, with reform proposals, see House of Commons Public Administration Committee, Machinery of Government Changes, 2006-07, HC 672.
\textsuperscript{54} Gay & Sear, Investigatory Inquiries and the Tribunals of Inquiry (Evidence) Act 1921 (Standard Note SN/PC/02599, House of Commons Library, 3 September 2012) 16
\textsuperscript{55} A list of these Royal Commissions is at Butler & Butler, British Political Facts (2011 Palgrave Macmillan) 353-57
\textsuperscript{56} Brazier, Constitutional Reform: Reshaping the British Political System (3rd edn, 2008 OUP) 9
\textsuperscript{57} Bradley & Ewing, Constitutional and Administrative Law (15th edn, 2011 Pearson) 306
\textsuperscript{58} Brazier (n 3) 13
This case study will examine the working practices and impact of the three most recent Royal Commissions to inquire into constitutional reform: the Royal Commission on Local Government in England 1966-69, the Royal Commission on the Constitution 1969-73, and the Royal Commission on the Reform of the House of Lords 1999-2000. It will also assess whether there are any lessons that can be learned for the process of developing a codified constitution for the UK.

I. The Royal Commission on Local Government in England 1966-69

The Royal Commission on Local Government in England 1966-69 was established with the following wide-ranging terms of reference:

- to consider the structure of Local Government in England, outside Greater London, in relation to its existing functions; and to make recommendations for authorities and boundaries, and for functions and their division, having regard to the size and character of areas in which these can be most effectively exercised and the need to sustain a viable system of local democracy; and to report.

According to its Chairman this was ‘a classic case for Royal Commission inquiry’, as ‘neither Labour nor the Tories knew what they wanted for the future of British local government’. The Commission was composed of 11 members ‘drawn from both parties and none from local government, both elected and official, civil service, the universities, industry and journalism’. Many of the Commissioners had some knowledge or experience of local government, and only two ‘could be said to be neutral in local government terms’. While this composition might have provided a degree of expertise and diversity that would be valuable to the inquiry, there was only one woman Commissioner, Baroness Sharp.

(a) Working practices and public consultation

Evidence gathering

The Commission met for the first of its 181 meetings on 31 May 1966. It wrote to government departments and local authority associations to request written evidence on 21 June 1966 and issued ‘an open public invitation to submit evidence was (…) through the press’. In response, 2,156 witnesses including ‘a large number of individual local authorities, many professional organisations, private persons and a
wide variety of other witnesses’ submitted evidence.\textsuperscript{69} The Commission also took oral evidence in public ‘from government departments, the local authority associations, the AEC and NALGO’.\textsuperscript{70} The Commission published this evidence ‘as it was received’,\textsuperscript{71} which is certainly a positive practice that should be adopted by inquiry regarding the development of a codified constitution for the UK to facilitate public engagement and lend a degree of transparency to the inquiry’s proceedings.

However, the extent of public engagement with the Redcliffe-Maud Commission is questionable. Although the public were invited to submit evidence, of the 2,156 written submissions received by the Commission only ‘536 were [from] individual members of the public’.\textsuperscript{72}

\textit{Research}

An Assistant Commissioner was appointed to carry out a research programme to assist the inquiry,\textsuperscript{73} and outside organisations undertook ten further research studies, including a community attitudes survey.\textsuperscript{74} The Redcliffe-Maud Commission was the ‘first to have its own permanent self-appointed research team’,\textsuperscript{75} and this innovation might illustrate the ability of Royal Commissions to develop effective working practices.

\textit{Outcome and impact of the Report}

The Commission was unable to produce a unanimous report: a majority of ten Commissioners recommended the creation of 58 ‘unitary authorities’ and three ‘metropolitan areas’ for Manchester, Liverpool and Birmingham,\textsuperscript{76} while the dissenting Commissioner, Derek Senior, proposed a different scheme for the reorganisation of local government, based on City Regions.\textsuperscript{77}

The Commission’s failure to produce a unanimous report did not affect the immediate prospects for implementation of its main recommendations. The Labour Government ‘broadly accepted’ the majority’s proposals regarding the future structure of local government in England,\textsuperscript{78} and made a commitment to introduce a Bill to give effect to them in the 1971-72 Session of Parliament.\textsuperscript{79} However following its victory in the 1970 general election, the new Conservative Government published its own White Paper, \textit{Local Government in England: Government Proposals for Reorganisation},\textsuperscript{80} which made firm proposals based on a manifesto pledge to reform

\textsuperscript{69} ibid para 20 - a full list of witnesses is at Annex 8
\textsuperscript{70} ibid para 21
\textsuperscript{71} Stanyer (n 12) 114
\textsuperscript{72} Wood (n 9) 32-33
\textsuperscript{73} Redcliffe-Maud Commission Report (n 6) para 23
\textsuperscript{74} ibid – a list of these research studies is published at Annex 9 to the Report
\textsuperscript{75} Wood (n 9) 44
\textsuperscript{76} Redcliffe-Maud Commission Report (n 6) para 3-5
\textsuperscript{77} ibid Vol 2
\textsuperscript{78} Secretary of State for Local Government, Reform of Local Government in England (Cmnd 4276, February 1970) para 9
\textsuperscript{79} ibid para 88
\textsuperscript{80} Cmnd 4584, February 1971
local government on a two-tier model,\textsuperscript{81} and eventually led to the enactment of the Local Government Act 1972.

It may be that the Redcliffe-Maud Commission ‘served a valuable purpose in maintaining a reform momentum and in creating a new agenda for public debate’.\textsuperscript{82} However, there are important lessons to be learned from the fate of the Commission’s report. Had the main political parties been able to reach agreement as to the broad outline for or principles to guide the reform of local government in England, the impact of the change of government following the 1970 election may have been less significant. Political consensus may therefore have meant that instead of being rejected the Commission’s recommendations, based on evidence submitted by a broad range of interested parties and independent research, may have been implemented. Further, it illustrates the need carefully to a Commission’s reporting timetable. As it was published less than one year before a general election, the Redcliffe-Maud Report was at the mercy of a Government with neither the parliamentary time nor the guaranteed political authority required to implement its recommendations.

II. The Royal Commission on the Constitution, 1969-73

The Royal Commission on the Constitution was established:

to examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom; [and]


to consider, having regard to developments in local government organisation and in the administrative and other relationships between the various parts of the United Kingdom, and to the interests of the prosperity and good government of Our people under the Crown, whether any changes are desirable in those functions or otherwise in present constitutional and economic relationships; [and]


to consider, also, whether any changes are desirable in the constitutional and economic relationships between the United Kingdom and the Channel Islands and the Isle of Man.\textsuperscript{83}

The extremely broad drafting of these terms of reference required the Commissioners to determine the scope of their task before embarking on the substance of their inquiry. They noted that ‘[t]he width and diversity of our terms of reference (…) have made the mere identification of our task a major preoccupation’.\textsuperscript{84} The terms of reference could be interpreted in markedly different ways, ranging from a focus on ‘the case for transferring or devolving responsibility for the exercise of government functions from Parliament and the central government to new institutions of government in the various countries and regions of the United Kingdom’ to ‘a root and branch examination of the whole of the British constitution’.\textsuperscript{85}

\textsuperscript{81} Although it did adopt some of the principles established by the Redcliffe-Maud Commission: see Wood (n 9) 104-5
\textsuperscript{82} Wood (n 9) 60
\textsuperscript{83} Kilbrandon Commission Report (n 7) para 11
\textsuperscript{84} ibid para 12
\textsuperscript{85} ibid para 14
The course adopted by the majority of the Commissioners was, “broadly to identify the problems of government as a whole, in so far as they were reflected in the evidence and other information available to us, but to concentrate our work of detailed examination and our positive recommendations on those issues which were primarily geographical in character”.  

The experience of the Kilbrandon Commission highlights the need for adequately and carefully defined terms of reference. This would be particularly important for an inquiry relating to the development of a codified constitution for the UK. By its very subject matter such an inquiry would be wide ranging. A Royal Commission or other body asked to carry out that inquiry must be able to focus on the substance of it, rather than spending time determining what exactly it was able to inquire into.

The Commission consisted of 16 Commissioners. The Commission also appointed twelve Assistant Commissioners, drawn from the different regions of the UK: ‘four each from Scotland, Wales and Northern Ireland’. This then achieved a degree of representation relative to the subject matter of the Commission’s inquiry, but did not render the Commission broadly representative of society. Women being very poorly represented: all but one of the Commissioners and Assistant Commissioners were men.

(a) Working practices and public consultation

Evidence gathering

The Commission met on a total of 163 days. In order to gather evidence for its inquiry, the Commission ‘issued an open invitation through the press to submit evidence on any part of our terms of reference [and] later drew this invitation to the attention of bodies which seemed likely to have a particular interest in [its] work’. Some witnesses were invited to ‘supplement their formal written evidence by giving oral evidence in public, and others to discuss their evidence informally (…) in private’. Informal discussions were also held with ‘many organisations and individuals who had not submitted formal evidence but who appeared likely to be able to help’ with the Commission’s work. In all, the Commission took evidence:

in public and in private discussion, from 15 government departments, 32 local government bodies and associations, 62 other organisations (ranging from the Celtic League and the Cornish National Party through various professional, political and religious organisations to the Confederation of British Industry and the Scottish Trades Union Congress) and 95 private individuals.

Although this shows that there was comparatively little engagement with the public in terms of evidence gathering, the Kilbrandon Commission held public sessions in Edinburgh, Cardiff, Aberystwyth, Belfast, the Isle of Man, Jersey, Guernsey, Alderney and Sark, many of which were ‘well-attended.’ Most notably, some of the

86 ibid para 19
87 ibid para 40
88 ibid para 35
89 ibid para 33
90 ibid para 34 – a list of evidence received by the Commission is at Appendix A
proceedings in Scotland and Wales were televised. The Commission felt that this helped to bring its work 'to the attention of a wider public'.

Research

Following its predecessors example, the Kilbrandon Commission commissioned research when it was 'clearly essential to [the] enquiry and (...) likely to yield information not readily available from other sources'. These research projects included 'a survey of public attitudes to government in Great Britain, but for the most part the papers commissioned [were] background papers by experts rather than works of original research'. Additionally, the Commission sought and received 'informal advice (...) from a large number of academics and others with special qualifications’ relevant to its inquiry.

(b) Outcome and impact of the Report

The Kilbrandon Commission did not produce a unanimous report. The majority recommended a system of legislative devolution for Scotland and Wales with directly elected assemblies, and partly indirectly elected and partly appointed regional councils for England. Within the majority there was no consensus on the exact form that devolution should take.

Six members, including the Chairman favoured the devolution of legislative competence within a limited field to elected Scottish and Welsh assemblies. Two others supported such a scheme only for Scotland, for Wales preferring an assembly with merely deliberative and advisory functions. Yet a ninth member preferred the latter solution for both Wales and Scotland. A further solution, backed by two other Commissions was for a two-tier legislature for the whole of the United Kingdom.

The Memorandum of Dissent signed by two Commissioners ‘proposed a fully worked-out scheme for the establishment of democratically and directly elected Assemblies and Governments in Scotland, Wales, and five English regions’.

The Commission’s terms of reference affected its ability to achieve a unanimous report. Their broad drafting made it, "impossible even to agree on the kind of inquiry to be conducted, with the majority concentrating their work of detailed examination and their practical recommendations on issues primarily geographical in character, while the authors of the Memorandum of Dissent thought they should look at the system of government as a whole and consider whether it satisfied the needs and aspirations of people in all parts of the United Kingdom". This reinforces the argument that properly defined terms of reference may help to ensure that an inquiry is able to operate effectively and efficiently.

The Commission’s Report had no immediate impact: it ‘received a brief debate in the Commons in which Government and Opposition promised to consider it carefully,

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92 Kilbrandon Commission Report (n 7) para 35
93 ibid para 37
94 ibid para 38 – a list of research projects is at Appendix E
95 ibid
96 A detailed summary of the majority Report is at Cross & Mallen, Local Government and Politics (1978 Longman) 45
97 Watson (n 38) 292
98 Cross & Mallen (n 43) 46
99 Daintith, ‘Reports of committees: Kilbrandon: The ship that launched a thousand faces?’ (1974) 37 MLR 544, 545
and it was then forgotten. Neither the Labour nor the Conservative election manifestos for the February 1974 election advocated devolution. This is related to the broader political background of fluctuating support for Nationalist parties in Scotland and Wales. The Commission was established in the wake of a number of by-election victories for those parties in 1966-67. The Commission has been described as “a device selected by the Labour Government in order to show that the Government was in fact reacting to the wishes of the people, as expressed in the elections, but also in order to delay any positive action in the hope that the Nationalist electoral challenge would fade away”. However, by the time the Commission had reported ‘the National challenge seemed to have faded. The situation changed shortly again in 1974 when MPs representing nationalist parties ‘effectively held the balance of power in the House of Commons’, and devolution legislation was subsequently introduced into Parliament. The Scotland and Wales Bill 1976 would have created legislative devolution in Scotland and executive devolution in Wales, but was defeated in the House of Commons. A later attempt to achieve devolution through separate legislation for Scotland and Wales was ultimately rejected in referendums held in those countries in 1979.

The fate of these attempts to introduce devolution demonstrates that an inquiry into the development of a codified constitution for the UK would be best undertaken against a background of broad political consensus. A public perception that constitutional reform was being used to secure short-term electoral advantage would damage the legitimacy of any such reforms.

III. The Royal Commission on the Reform of the House of Lords 1999-2000

The Labour Party’s 1997 general election manifesto pledged to remove the right of hereditary peers to sit and vote in the House of Lords as a ‘first step towards a more democratic and representative chamber’. This ‘first step’ having been achieved by the House of Lords Act 1999, the Government established the Wakeham Commission to inquire into the options for long-term reform of the House of Lords. The Government believed that examination of this issue by a Royal Commission would ‘allow an open and transparent deliberative and consultative process involving full and wide debate of all the issues’. This was especially important in the absence of political consensus on this issue: “There is evidence that [the government] sought to explore the possibility of reaching an understanding with the opposition about the longer-term reform of the House of Lords; but the exercise revealed no basis for agreement with the opposition, and probably an absence of consensus within government as well. The decision to appoint a Royal Commission was therefore far more than some kind of smokescreen or displacement activity”.

100 Bogdanor, Devolution (1979 OUP) 151
101 Cross & Mallen (n 43) 25
102 ibid 26. A similar argument is at Bogdanor (n 47) 147
103 Cross & Mallen (n 43) 26
104 ibid
105 Bogdanor (n 47) 155-57
107 Prime Minister, Modernising Parliament: Reforming the House of Lords (Cm 4183 January 1999) Ch 1
The Wakeham Commission’s terms of reference were as follows:

“Having regard to the need to maintain the position of the House of Commons as the pre-eminent chamber of Parliament and taking particular account of the present nature of the constitutional settlement, including the newly devolved institutions, the impact of the Human Rights Act 1998 and developing relations with the European Union:

to consider and make recommendations on the role and functions of the second chamber;

to make recommendations on the method or combination of methods of composition required to constitute a second chamber fit for that role and those functions; [and]

to report by 31 December 1999.”

The Commission hoped to ‘produce a report that could command a reasonable degree of consensus across the political spectrum and that would therefore stand a good chance of being implemented in the near future’. The Commission was composed of 12 members, all of whom represented different groups or interests. All major political parties were represented in some way, and there was some representation of Scotland and Wales, the trade union movement, and the Church of England. The Wakeham Commission was perhaps more consciously representative than had been the Royal Commissions discussed above, especially as three of the Wakeham Commissioners were women.

(a) Working practices and public consultation

The Commission first met on 1 March 1999, and began ‘an extensive programme of background reading; organised an academic-led seminar to enhance our knowledge of the main issues; sought additional information from a range of sources; published a consultation paper; and set up a series of public hearings around the country’. The Commission ‘met formally on 29 occasions, including the public hearings and visits to regional centres. In addition there were numerous informal meetings and discussions, both among members of the Commission and with other interested parties’.

Consultation

The Commission was ‘particularly keen to seek views and opinions from people with a detailed understanding of the specific contributions which a reformed second chamber could make in various fields as well as from members of the public more generally’. Its consultation paper was ‘circulated widely within both Houses of

109 Wakeham Commission Report (n 8) para 1.1  
110 Shell, ‘Reforming the House of Lords: the report and overseas comparisons’ [2000] PL 193, 194  
111 Wakeham Commission Report (n 8) para 1.6  
112 ibid para 1.8  
113 ibid para 1.9
Parliament and the MEPs, members of the Northern Ireland Assembly and those active in the Regional Chambers and Regional Development Agencies. Copies were sent (...) to members of the Scottish Parliament and the National Assembly for Wales’.\footnote{ibid para 1.10} Academics, political commentators and those with interests in specific issues, as well as members of the public who had expressed an interest in the Commission’s work also received copies, and the consultation paper was available on the Commission’s website. In all, the Commission ‘distributed some 6,000 copies of the consultation paper to more than 4,500 individuals and organisations’.\footnote{ibid}

In response the Commission received 1,734 pieces of written evidence,\footnote{ibid para A.1} of which were submitted by members of the public.\footnote{ibid para A.2} Although this demonstrates a degree of public engagement with the Commission’s work, a significant proportion – 46\% - of the individuals and organisations submitting evidence were based in London and the South East,\footnote{ibid para A.3} showing that this engagement was not distributed evenly throughout the UK.

In common with other Royal Commissions, the evidence received by the Wakeham Commission was published. The CD-ROM used for this purpose contained ‘all the written evidence, background papers and transcripts of public hearings (...) including scrappy hand-written notes’.\footnote{Shell (n 57) 199} However, this evidence was not published in hard copy with the Report, and it seems that the evidence was not published in full online, which would have facilitated public access to it.

Private Meetings

The Commission held private meetings with a range of people involved in the political process, or representing groups or institutions potentially affected by reform to the House of Lords, including former Prime Ministers, members of the House of Commons Procedure Committee and representatives of a number of religious organisations.\footnote{Wakeham Commission Report (n 8) para 1.12-1.13}

Public Hearings

The Commission held public hearings in Scotland, Wales, Northern Ireland and several English regions. In total there were ‘21 sessions of public hearings in nine locations around the country, including seven sessions over two and a half days in London’.\footnote{ibid para 1.14} They were attended by 1,026 people,\footnote{ibid para A.4} and the Commission felt that they “stimulated considerable media interest throughout the United Kingdom and gave members of the audience the opportunity to register their views, both directly and by completing a brief questionnaire. In total some 900 copies of the questionnaire, which was also available on the Commission’s website, were completed”.\footnote{ibid para 1.14} The public hearings were valuable for the Commission’s inquiry, enabling it to ‘assess the relative strength of different arguments for and against particular
propositions, and to see how robust they were to vigorous cross-examination. (...) Our recommendations have been significantly influenced by the consultation exercise'.

(b) Outcome and impact of the Report

The Commission’s unanimous report recommended significant reforms to the House of Lords that would, if implemented, have produced a second chamber of around 550 members, a majority of which would be appointed, and a minority elected. The Commission proposed three options for the size and various methods of election of this elected minority.

The Wakeham Commission’s recommendations have not been implemented and further reform of the House of Lords has not been achieved in spite of attempts by all governments since the Commission reported. Between 2000 and 2010 successive Labour Governments published three White Papers on this issue and held votes in both the House of Commons and House of Lords on two occasions. The recent attempt by the Coalition Government to further reform the composition of the House of Lords failed amid political controversy and backbench rebellions. Thirteen years after the Commission reported, there seems to be no immediate prospect of further reform to the composition and powers of the House of Lords.

There are a number of possible explanations for the limited impact of the Wakeham Report, all of which may serve as lessons for any Royal Commission or other body established to inquire into the development of a codified constitution for the UK. The first of these is the limited time available for the Commission to complete its report. This may have affected the Commission’s ability fully to engage with the public. According to Lord Smith of Clifton:

There should have been widespread public consultation by the commission. That was the very least the topic demanded. The consultation exercise as undertaken by the commission--and I realise the time constraints on it--was hopelessly partial and inadequate. For example, as against a series of private meetings of assorted members of the political, legal and religious establishment, only 21 sessions in nine locations were held for the public. They were poorly publicised and attracted derisory numbers. Not surprisingly, some proposed sessions had to be cancelled or curtailed. It is likely that the commission met more people from the establishment than members of the public at large.

An inquiry into the development of a codified constitution for the UK should seek to ensure a high level of public engagement and participation. Accordingly such an inquiry would need adequate time in order properly to achieve such goals.

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124 ibid para 1.15
126 Wakeham Commission Report (n 8) Ch 12
127 Department for Constitutional Affairs, The House of Lords: Completing the Reform (Cm 5291 November 2001), Leader of the House of Commons, The House of Lords: Reform (Cm 7027 February 2007), and Ministry of Justice, An Elected Second Chamber: Further Reform of the House of Lords (Cm 7438 July 2008)
128 In February 2003 and in March 2007
129 The House of Lords Bill 2012-13 would have provided for a mainly elected House of Lords. The decision to withdraw the Bill is described in Bowers, House of Lords Reform Bill 2012-13: decision not to proceed (Standard Note SN/PC/06405, House of Commons Library, 25 September 2012)
130 HL Deb 7 March 2000, vol 610, col 1008
Further, the Commission was required to consider the long-term reform of the House of Lords in light of very recent and significant constitutional developments. According to Russell & Cornes it ‘had neither the resources, the time, nor the political backing to carry out such an investigation’. This meant that ‘the Royal Commission ducked many of the difficult issues, and made only tentative suggestions about what part the Lords might play in underpinning our new constitutional arrangements. The Commission was effectively forced by the circumstances and short deadline into delivering what should be regarded as an interim report’.132

Lord Wakeham was instrumental in ensuring that the Commission produced a unanimous report. According to one of the Commissioners, Baroness Dean, this ‘could not have been achieved without the experienced guide of our chairman, the noble Lord, Lord Wakeham. [He was] our "pathfinder". There were many occasions when we witnessed his guile, timing and cunning approach to the issue of getting the business done’.133 This unanimity should have lent the report great weight, increasing the likelihood of its implementation. However, achieving unanimity was not without cost. The decision to put forward different options instead of making a single recommendation regarding the proportion of elected members in a reformed House of Lords may have accorded scope to the politicians to further debate this issue, without implementing the recommendations and further reforming the second chamber. A Commission or other body inquiring into the development of a codified constitution for the UK should strive to reach clear conclusions so as to provide a focus for the ensuing political debate, and a decision as to whether or not to adopt its recommendations.

Finally, the fate of the Wakeham Report and the failure of subsequent attempts to reform the House of Lords further highlight the need for political consensus about and commitment to the constitutional reform under consideration, both within the Cabinet and between political parties. A lack of broad political support would enable a reluctant government to ‘park’ the issue, thus postponing any recommended reforms.134

**A Royal Commission as a vehicle for major constitutional reform: significant drawbacks**

Although there may be arguments in favour of establishing a Royal Commission to inquire into the development of a codified constitution for the UK, the use of such an institution for those purposes would have significant drawbacks.

The very title of ‘Royal Commission’ may lead to a perception that the process would not be wholly independent of government. This view might be reinforced by the fact that members of previous Royal Commissions have been appointed by

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132 Russell & Hazell, *Commentary on the Wakeham Report on Reform of the House of Lords* (February 2000 Constitution Unit) 3
133 HL Deb 7 March 2000, vol 610, col 938
134 Beatson, ‘Reforming an unwritten constitution’ (2010) 126 LQR 48, 63
135 Including that Royal Commissions are said to be expert and impartial, and operate in the public eye. Supporters of the creation of a Royal Commission to examine the development of a codified constitution include Bogdanor & Vogenauer, ‘Enacting a British constitution: some problems’ [2008] PL 38, 53
Governments through ‘opaque processes’. Further, Commissioners are usually experts. While this may of course result in high-quality recommendations, it may also create a suspicion that the institution is elitist, or that those experts have pre-conceived ideas regarding reform proposals. Such impressions would be damaging for a inquiry into the development of a codified constitution for the UK. This would be a fundamental constitutional reform and as such should be examined by an objective body that involved both the public and members of the political process.

The experiences of the three Royal Commissions discussed above demonstrate that as institutions Royal Commissions are not especially successful as vehicles for achieving constitutional reform. The reports of all three Commissions were not implemented, often because of the political priorities and concerns of the governments of the day, and because of an absence of political consensus and commitment to the reforms in question. Indeed, this record may lead many to view Royal Commissions as an “excuse for procrastination” [such that] even setting one up would raise questions about a Government’s commitment to reform.

Finally, any process for developing a codified constitution for the UK should seek to ensure widespread public engagement and participation. Experience suggests that Royal Commissions have not been especially successful at achieving this. This may be because the ‘historic formality surrounding [Royal Commission] proceedings and their more inquisitorial nature’ deter many members of the public from engaging with their processes. Further, the composition of Royal Commissions may not have encouraged public engagement. The Royal Commissions discussed above were not representative of society: for example, only five Commissioners or Assistant Commissioners out of a combined total of 53 were women. An institution that does not represent the society it serves is unlikely to generate the level of public engagement and trust that would be desirable to enhance the legitimacy of an inquiry into the development of a codified constitution for the UK.

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The Role and Working of the Law Commission

The official role of the Law Commission is to take and keep under review all the law with a view to its systematic development and reform. This is specifically stated to include the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments, and the simplification and modernisation of the law generally.

The primary function of the Commission, which has sister bodies in Scotland and Northern Ireland with a similar remit, is to bring forward proposals, whether on their

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137 Constitution Unit, Delivering Constitutional Reform (1996 Constitution Unit) para 199
138 ibid
139 ibid para 197
141 See Law Commission Act 1965, s.3.
own initiative or in response to suggestions from the government or any other source with which they agree, for their examination of some area of the law where there is a perceived need for reform; and then subject to their approval by the Lord Chancellor, to proceed to conduct such inquiries (or support some other body, whom they have recommended conduct the examination\textsuperscript{142}) leading to recommendations for reform of the law, accompanied by draft Bills for their implementation.

The Law Commissions Act 1965, as amended, stipulates two other related functions for the Commission. One is research based, being to gather such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions;\textsuperscript{143} the other is aimed at the desirability of improving the statute book generally, being the preparation of comprehensive programmes for the consolidation and revision of statute law.\textsuperscript{144}

The Law Commission, based in London, is responsible for the law in England and Wales and generally takes the lead on law reform affecting the whole of the United Kingdom, with a Scottish Law Commission established by the 1965 Act performing similar functions with respect to reform of the law of Scotland,\textsuperscript{145} and a separate Northern Ireland Law Commission dealing with the law in Northern Ireland, which has been in existence since 2007.\textsuperscript{146}

**Origins**

The origins of the Law Commission arose out of a book, *Law Reform Now* (1963), prepared and edited by Gerald Gardiner QC (subsequently, Lord Chancellor) and the legal academic Professor Andrew Martin. This included a study of the existing mechanisms in the UK for the process for law reform, and recommended the creation of an independent and impartial body of Law Commissioners, constituting a permanent, official and institutionalised process for bringing forward proposals for law reform operating outside the political process. The following year when, after the general election, Gardiner was appointed Lord Chancellor by the Prime Minister, Harold Wilson, he set about implementing this proposal. The new government in its first Queen's Speech expressed its intention to establish "the appointment of Law Commissions to advance reform of the law", and a white paper and subsequent Bill was published, becoming the Law Commissions Act 1965. Section 1 of the Act created the Law Commission "for the purpose of promoting the reform of the law". Lord Scarman, the first chairman of the Law Commission, later commented that, "The design in 1965 was startlingly original: it was a full-time statutory body charged with the review of all the law and endowed with a considerable, but not total independence of the government. The design included a right of initiative and of publication, which has enabled [it] to point the way the law should go even when thwarted by government or Parliament from securing that the law does actually go that way".\textsuperscript{147}

\textsuperscript{142} s.3(1)(b).
\textsuperscript{143} s.3(1)(f). In practice the Commission does not carry out comparative research as a separate discrete function, but as part of its ordinary normal work on any project.
\textsuperscript{144} s.3(1)(d).
\textsuperscript{145} Law Commission Act 1965, s.2.
\textsuperscript{146} Established under the terms of the Justice (Northern Ireland) Act 2002 (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010).
\textsuperscript{147} Rt. Hon. Lord Scarman “Law Reforms in a Democratic Society” Fourth Jawaharlal Nehru Memorial Lecture, 1979 Delhi, National (1985), p41. As has often been the case with legal and constitutional developments in the UK, the Law Commission was not the first law reform body of this nature. Thus the Law Reform Commission of Ontario has been established a few months earlier, and the Law
Membership and Staff of the Commission

The Law Commission comprises a Chairman and four Commissioners, all of which are appointed by the Lord Chancellor. The qualifications for the Chairman are set out in section 1(A) of the Law Commissions Act 1965\(^\text{148}\), which reads: "The person appointed to be the Chairman shall be a person who holds office as a judge of the High Court or Court of Appeal in England and Wales." Previous Chairs of the Commission have included Lord Scarman, Mr Justice Cooke, Mr Justice Michael Kerr, Lord Justice Ralph Gibson, Lord Justice Brooke, Lady Justice Arden, Lord Justice Carnwath CVO, Lord Justice Etherton, and Lord Justice Munby. The qualifications for Commissioners other than the Chairman are set out in section 1(2) of the Law Commissions Act 1965, which reads that, "The persons appointed to be the other Commissioners shall be persons appearing to the Lord Chancellor to be suitably qualified by the holding of judicial office or by experience as a person having a general qualification\(^\text{149}\) ... or as a teacher of law in a university." The Commission's support staff include a Chief Executive and others who are generally permanent Ministry of Justice civil servants, although there are fixed or short-term term contracts for some lawyers, research assistants and economists. Commissioners are bound by a code of best practice, which draws heavily from the Treasury model code for best practice for board members of public bodies including public service values.

The law reform work of the Commission is conducted by law reform teams, determined by the areas of law under review. Teams are not fixed in any sense, and may be subject to change or review depending on the nature of work undertaken by the Commission. Currently the Commission arranges legal staff into five teams, being (1) commercial and common law; (2) criminal law; (3) property, family and trust law; (4) public law; and (5) statute law repeals. Any proposed project in the field of codification of UK constitutional law, therefore, would become the responsibility of the Public Law team, which generally comprise a Law Commissioner who is the specialist in that area of law, a team manager, and in recent practice four or five team lawyers and research assistants. The precise number of lawyers and research assistants appointed is generally needs based.

Other temporary staff may support a project undertaken by the Commission as necessary. For the legislative writing of draft Bills to be attached to a Commission report recommending reform, individuals are seconded to the Law Commission through an agreement with the Office of Parliamentary Counsel. Specialist consultants may also be appointed for specific purposes, such as to write a particular paper or to advise on the contents of a paper or oversee research at the Commission. From time to time the Law Commission has commissioned outside bodies to lead empirical research relating to a particular law reform project, and funds may be provided from the Ministry of Justice or other government sources for this. Exceptionally, a sub-committee of the project team may be established for a particular project, a precedent for which was the body established for the Commission's project on codification of the criminal law chaired by Professor J. C. Smith CBE.

Commission of India was set up in 1955. The Fourth Annual Report of the Commission in 1968-69 provided a summary of sister Commissions then in existence around the world: see Law Com No 27, Appendix 4.
\(^{148}\) Note: this was added by Tribunals, Courts and Enforcement Act 2007 c. 15 Pt 2 s.60(2) (September 19, 2007)
\(^{149}\) As prescribed in the Courts and Legal Services Act 1990, s.71.
Relationship with government departments and other Law Commissions

The work of the Commission regularly engages with government departments including but not limited to the Ministry of Justice, Home Office, Treasury, Department of Health, Department for Business, Innovation and Skills, Department for the Environment, and Department for Communities and Local Government. The Commission relies heavily on the Ministry of Justice for its budget and to some extent its staff. In practice Law Commission matters within the Ministry of Justice are handled by a "sponsorship team" headed by a senior civil servant in the Ministry's Law and Access to Justice Group.

There are annual meetings of the three UK Law Commissions, the Law Commission in London, the Scottish Law Commission and the Northern Ireland Law Commission (with the Law Reform Commission of Ireland and the Jersey Law Commission). Other meetings are held as necessary, and the UK Commissions are under a statutory duty to act in consultation with one another where respective spheres of law are affected.

Selection of the Commission's subjects of work

There are two principal routes by which the Law Commission undertakes law reform projects. First, the Commission is under a duty to prepare a periodic programme for its work and submit it to the Lord Chancellor for approval, prior to it being laid before Parliament. Its current Programme is its Eleventh, which was published on July of 2011, and its Twelfth Programme of Law Reform is currently under consideration. Each of the three Commissions also makes an annual report on its work to the Lord Chancellor, which is laid before Parliament with such comments (if any) as he thinks fit.

Secondly, a government department can refer a matter directly to the Law Commission. Such a reference usually occurs between Programmes of Law Reform when the government wishes the Commission to consider an issue. In practice whether the Commission takes on a reference, and the terms of the reference, are negotiated between the relevant government department and the Commission. The Wales Bill, at time of writing, includes a provision to amend the Act to allow the Welsh government to refer projects to the Law Commission. Both the Scottish and Northern Ireland Law Commissions have similar systems for Programmes of Law Reform and references to ministers, but with due allowance for devolved responsibilities.

The Law Commissions Act 1965 was amended in 2009 in relation to the England and Wales Commission alone to provide for a protocol to be agreed between the Law Commission and the government. Before a project is included in a Programme of Law Reform the protocol in effect requires a department to commit itself to providing

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150 See above, Law Commissions Act 1965, s.3.
151 Law Comm. No 330.
152 Law Commissions Act 1965, s.3(3).
153 Law Commissions Act 1965, s.3(1)(e).
155 The same statutory provisions govern the Scottish Law Commissions as the Law Commission; for the Northern Ireland Law Commission see Justice (Northern Ireland) Act 2002, s.51.
156 Law Commissions Act 1965, s.3(b).
sufficient staff to liaise with the Commission, and to give an undertaking that there is a "serious intention to take forward law reform in this area". It is assumed such a commitment would exist before a department makes a reference.

There are a number of established on-going channels through which the Commission might draw ideas, notably the three branches of the legal profession players - the Society of Legal Scholars and Socio-Legal Studies Association (the professional bodies of legal academics), the Law Society (the professional body representing Solicitors) and the Bar Council (the professional body representing Barristers) - with each of whom it holds annual meetings for an exchange of views on current issues and problems relevant to law reform. Engagement with other bodies is left to individual Commissioners or team managers who will have regular contacts with bodies or persons with expertise or a special interest in their field of work. Most projects undertaken have a set of stakeholders who have been selected by Commissioners or other project team members.

There is a case for the Law Commission paying closer attention to reform proposals emanating from parliamentary proceedings, particularly Select Committee reports given their growing level of importance and significance since 2010 following the introduction of elected members and chairmen in the House of Commons. However, as with most backbench initiatives, such proposals would be doomed if they failed to be endorsed by the government. As Professor Stephen Cretney has written in his essay on the Commissions' work, “The Programmes: Milestones or Millstones”, the Commission may have as its primary role the proposal of programmes for reform, but ultimately the Government must decide whether or not a review of the law will be undertaken. In other words, “the Commission is to have the initiative; but the Government is to have a veto.”

In considering and selecting the subjects for their programme of work, there are a number of factors the Commission will consider and take into account. These include their views on whether the present law in the area is unsatisfactory, the benefits of reform in this area, the suitability of the Commission conducting a review of the law in this area, and whether the Commission has the relevant expertise (or access to the relevant expertise) to undertake a project in the proposed area. One factor is paramount, however, and this is that a project must virtually always possess, and be conducted with the support of, the relevant government department. This is enshrined in the Protocol between the Law Commission and the government, and in practice governs the conduct of the other two UK Commissions.

In addition to the Law Commission's law reform work, there is a rolling two to four year programme of statute law revision, culminating in a series of Statute Law (Revision) Acts that repeal obsolete provisions.

The Law Commission's statutory responsibilities in relation to consolidation of the law are in practice led by the Parliamentary Counsel seconded to the Commission. The level of resources that the Commission is able to devote to consolidation varies. Consolidation is always conducted in cooperation with the government department with the relevant policy responsibility.

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158 See further section 4 of the Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission: (2010) Law Com No 321
Prior to the commencement of a project, either as part of the Programme of Law Reform or in a separate document, the parameters of the project including timeframe, terms of reference, resource requirements are agreed by the Commissioners.

A key stage between the approval of a law reform topic and the final report and indeed recommendations for reform is the period of consultation with members of the public. Consultation papers are open publications, which are given wide circulation to the public. This allows for many societies, lobby groups and pressure groups and members of the public affected to comment on proposed changes to the law. This is a key stage to ensure both the quality of the law reform proposals and their later acceptability. Traditionally consultation papers were written as large self-contained documents addressing all aspects of a particular reform in law. However in recent years, there has been a shift to more extensive consultation processes including the issue of ‘scoping’ or ‘discussion papers’ seeking comments and criticism from the public on a particular subject or inquiry of law reform. Practice varies according to the subject matter of the project, but most consultation exercises will include direct engagement with stakeholders through conferences, seminars, workshops and other meetings. Research studies on specific subjects may also be commissioned by the Law Commission to inform their work, usually from law academics or practitioners.

Once the Commissioners sign off a final report, it is laid before Parliament and published. If there is not unanimous agreement amongst Commissioners, a dissenting view may be published. Economic impact assessments accompany each report produced by the Commission. It is then for the relevant government department and the Cabinet’s legislation committee’s support to determine if, when and how the Commission's report and accompanying draft Bill is to be implemented and presented to Parliament for approval.159 Each of the three Commissions also makes an annual report of its work which is laid before the relevant legislature.160

**Suitability of the Law Commission for Codifying the UK Constitution**

There are good grounds for regarding the preparation of a codified UK constitution as a suitable subject for the Commission's programme of law reform, so long as the draft documentary constitution it was intended to prepare was to be in the nature of a Bill restating existing law and practice - what has been referred to in the programme of research to which this case study is ancillary as a "Constitutional Consolidation Act" (second illustrative blueprint, or model B).

The Law Commission would be well situated to the task for assessing the strengths and weaknesses of mapping the constitution, being a respected impartial and independent body and source of legal expertise, with a wealth of experience in terms of law reform. Since its creation, the Commission has successfully prepared over 200 consolidation Acts of Parliament. Furthermore, in meetings and in correspondence with the Commission, it has indicated its willingness and ability to do so.

In his letter to the author (reproduced on the following page), the Chairman Sir David Lloyd Jones has said, "on a technical level, the task of bringing together in one


160 Law Commissions Act 19665, s.3(3); Justice (Northern Ireland) Act 2002, s.52.
statute, and modernising the language of, various provisions of existing statute law relating to constitutional matters is one for which, in principle, the Commission would be well suited.” He has also indicated that the task of codifying conventions for the legislation, which would be a novel undertaking for the Commission, is also one for which the Commission is able and willing to undertake, subject to certain conditions (referred to in his letter).

In conclusion, in my view the Law Commission would be a suitable body to undertake codification\(^\text{161}\) of the UK constitution, on the following terms:

1. The project involved a restatement of existing law and practice, with no more substantive change than some modernisation in the language used in earlier statutes.

2. The adoption of the project in the Commission’s programme of work followed a specific request from the Lord Chancellor, with the support of the Cabinet, following preliminary discussions between him and the Commissioners on their willingness to take on the work and confidence in their ability to do so.

3. There was a clear indication of cross-party agreement on the aims, nature and process or and for project, with negligible public or political controversy about it as a policy objective.

4. The government agreed to provide sufficient resources to enable the Commission to conduct the work to the standard required, including for the recruitment of consultants or a sub-committee for the purpose if needed.

5. Being an exercise in UK wide law, the project as a whole was agreed jointly with the Scottish and Northern Ireland Law Commission and conducted on a tripartite basis, with the Law Commission in London taking the lead role.

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\(^{161}\) On the terminology of "codification" and "consolidation", technically the exercise of putting into one document all the existing rules relating to the constitution would be codification, rather than "consolidation", because consolidation refers to collecting in one document pre-existing statutory material, and such a project would involve the incorporation of principles of the common law (such as the inherent authority of the royal prerogative) and the law and custom of Parliament (such as standing orders issued under the inherent powers of each House) and above all non-legal conventions of the constitution (such as the existence of the office of Prime Minister and manner of his appointment). If the intention behind the document were to restate the law without significant change, and to adopt normal parlance rather than technical definitions, then, it is submitted, consolidation is nonetheless an appropriate term to use (and is so used for the purposes of the illustrative blueprint called a Constitutional Consolidation Act prepared by Robert Blackburn, published in the main programme of research to which is case study is ancillary).

\(^{162}\) Thanks to Julia Gibby for assistance and to Richard Percival for comments on an earlier draft.
19 June 2014

Dear Professor Blackburn,

Mapping the path to codifying – or not codifying – the UK’s constitution

I understand that the Political and Constitutional Reform Committee is shortly to publish the fruits of your work for consultation, and that one option you will be exploring is the consolidation of the existing constitution, possibly with Law Commission involvement. I thought it would be helpful if I were to write to you at this juncture to indicate my view of the Law Commission’s possible future involvement in this project.

On a technical level, the task of bringing together in one statute, and modernising the language of, various provisions of existing statute law relating to constitutional matters is one for which, in principle, the Commission would be well suited. I can equally see how a similar process could be applied to constitutional conventions. I would only add two caveats. First, it would only be appropriate for the Commission to undertake such a task if there was a clear political consensus in favour of engaging in it as a technical exercise. Secondly, such a task, particularly if there were to be a requirement to conduct it speedily, would require appropriate additional resources for the Commission.

The United Kingdom-wide nature of such a project would make involvement of the Scottish and Northern Irish Law Commissions desirable. I cannot speak for them, but am sending a copy of this letter to their chairmen.

I am writing in similar terms to Graham Allen MP.

Yours sincerely,

David Lloyd Jones

www.lawcom.gov.uk
The Making of the Devolved Scottish Constitution
(Unofficial Constitutional Convention)

Background to the initiative

Historically Scotland was an independent state governed by its own Parliament. In 1707 a union of Scotland and England (incorporating Wales) was finalised (preceded by a union of crowns in 1603). A new state of Great Britain was established with a single Parliament, into which Ireland was later incorporated (now Northern Ireland remains part of the United Kingdom, while the Republic of Ireland is an independent state). The terms of the union provided for various distinctive features of Scotland, such as its legal system and established church, to be preserved. Hence the UK is sometimes referred to as a ‘union’ rather than ‘unitary’ state.

Long before the introduction of devolution Scotland had its own administrative arrangements, located in the UK central government, with a Scottish Office formed in 1885. A home rule movement began to develop in Scotland from the late nineteenth century. The Scottish National Party (SNP) was set up in 1934. In 1948 a Scottish National Assembly devised a proposal for a devolved Scottish Parliament, leading to the Scottish Covenant Campaign.

Rising electoral popularity for the SNP from the 1960s prompted both the Conservative and Labour parties to reassess their policies towards Scottish government. The Royal Commission on the Constitution set up by the Labour government in 1969 reported in 1973. Its recommendations included for a devolved assembly for Scotland. The Labour government returned to power in 1974 held a referendum in 1979 on its proposals for such a body. The referendum produced a majority in favour, but did not reach the requirement that 40 per cent of Scottish voters support it. The ‘yes’ campaigned suffered from internal divisions, including an unwillingness on the part of the Labour Party to work with others (Mitchell, 1999, p.656). During 1979-1997, the Conservative Party held power at UK level. While previously it had become sympathetic to devolution for Scotland its position changed once more, to a position of opposition to devolution. The Conservative Party had a shrinking base of support in Scotland. Some of its policies, including the early introduction of the local government Community Charge (or ‘Poll Tax’) in the late 1980s, ahead of its being initiated across the rest of the UK, were highly controversial.

The Scottish Constitutional Convention

The Campaign for a Scottish Assembly was formed in 1980 on the first anniversary of the 1979 referendum (Mitchell, 1998, p.482). In 1987, following the General Election of that year, the Labour Party introduced a Scottish devolution bill into Parliament, though it had no chance of passing into law. In July 1988 a constitutional steering committee set up by the Campaign for a Scottish Assembly issued a report entitled ‘A Claim of Right for Scotland’. The committee itself comprised prominent public figures in Scotland and was chaired by Professor Sir Robert Grieve. It sat from January to June 1988. The ‘Claim of Right’ report recommended the formation of a Scottish Constitutional Convention. A cross-party meeting took place in January 1989...
to consider how to proceed. The SNP took part in initial discussion but then withdrew, objecting to the principle of proceeding by consensus; while the Conservative Party had already indicated that it did not wish to participate.

The first official meeting of the Scottish Constitutional Convention took place on 30 March 1989. It adopted the ‘Claim of Right for Scotland’. This text stated that the Scottish Constitutional Convention acknowledged ‘the sovereign right of the Scottish people to determine the form of Government best suited to their needs’, and pledged its signatories to hold the interests of the Scottish people foremost in their actions. The ‘Claim’ further guaranteed that the Convention would agree a scheme for a Scottish Assembly or Scottish Parliament; and would promote the proposal amongst the Scottish people. Finally it would ‘assert the right’ of the people of Scotland to have the scheme put into practice.

Participants in the Convention included the major Scottish churches, the Scottish Women’s Forum, representatives of ethnic minorities and the Federation of Small Businesses. Various special interest groups and trades unions were affiliated. Political parties taking part were the Labour Party, the Scottish Liberal Democrats, the Scottish Green Party, the Orkney and Shetland Movement and the Scottish Democratic Left. The Scottish Trades Union Congress took part, as did various regional, district and island councils and the Campaign for a Scottish Parliament. While the SNP and Conservative Party did not participate, individual members of those parties did, as well as lending their public support to the Convention. Funding for the Convention came from the Joseph Rowntree Reform Trust, with other contributions from the Campaign for a Scottish Parliament, from local government, and various other sources. The Convention had two joint chairs: Lord (Harry) Ewing and Sir David Steel MP. A Convention Executive Committee was chaired by Canon Kenyon Wright. Secretarial support was supplied by the Convention of Scottish Local Authorities. The practice of the Convention was to proceed by consensus, not by voting.

Working groups were set up on powers, finance, making the parliament representative and the islands. They reported to the Executive Committee. The Executive presented reports to the Convention for consideration at its full meetings. A detailed proposal for a Scottish Parliament was devised based on the outcome of these meetings and agreed in September 1990. The report containing these plans, ‘Towards Scotland’s Parliament’ was launched in November of the same year.

Attention was then given specifically to procedures and practices of the putative parliament; and the electoral system and gender balance. Proposals in these areas were agreed by the Convention in February 1992. In November of the following year a Constitutional Commission was established by the Convention. It was appointed by the Executive Committee and reported to it, but was independent of the Convention. It had eleven members. Its chair was the writer Joyce McMillan. The Commission was asked to consider electoral systems and gender balance; and constitutional issues associated with local government and the UK Parliament. It produced a report which was discussed by the Convention in December 1994. There then followed a period of discussion within and between the various groups involved in the Convention. The agreement they reached was embodied in a final report of November 1995, ‘Scotland’s Parliament, Scotland’s Right’. It carried out further consultation and dissemination activities thereafter.
Policies agreed by the Convention

The Convention sought an Act of the UK Parliament that would embody its proposals for a Scottish Parliament. A Scottish Parliament should possess responsibility – either solely or jointly – for those powers that were not retained at UK level. The Parliament would consequently have powers over the legal system, social welfare and leisure, health, business and the economy, education, regulation policy, and local government. The powers which it would explicitly not possess would be immigration and nationality policy, social security, foreign affairs and defence, and central taxation and economic policy. Where responsibilities were shared between UK and Scottish parliaments, the principle of subsidiarity would determine which took the decision in a particular case. The Convention supported that the Parliament should have a limited power to vary income tax within a narrow band (3p in either direction from the basic rate), but it intended that it should not have other fiscal powers, such as the ability to set the tax levels.

The Parliament would seek to promote Scottish interests at European Union level. It would seek to enhance the autonomy of Scottish local government. It would have special powers over quangos. The Parliament would be expected to introduce new protections for fundamental rights. The Convention sought a declaration from the UK Parliament that it would not interfere with the Scottish Parliament without the consent of the Scottish people and Parliament, as a safeguard against the concept of supremacy of the UK Parliament.

The Scottish Parliament would have 129 members. 73 would be elected in existing constituency boundaries for the UK Parliament. 56 additional members would be drawn from larger regional constituencies on party lists. The top-up members would ensure a greater degree of proportionality between total votes cast for parties and seats won in the Parliament. The political parties in the Convention pledged to selecting the same number of women and men in winnable seats. The Scottish Parliament was devised to operate differently from the UK Parliament. It would run for fixed terms. Its members would be expected to treat their parliamentary responsibilities as a full-time task. The Convention proposed Standing Orders for the Parliament based on principles of being accountable, being accessible, and being open.

The Labour Party manifesto for the 1997 UK General Election proposed a Scottish Parliament with full law making powers and limited financial powers. It promised specifically to base the plan on the Scottish Constitutional Convention; and noted that its introduction would be subject to a referendum with two separate questions, one on whether to set up the Parliament, another on whether it should have any fiscal authority. Following its election victory Labour held a referendum which produced a ‘yes’ vote for both propositions. Devolution was introduced through the Scotland Act 1998.

Analysis of the process: (a) Participation in the Convention

A key feature of the Convention was that it enabled different groups and political parties to collaborate. Philip Schlesinger credits the ‘patient work’ of the Convention as preparing the ground for the introduction of devolution, including through bringing together key political parties and civil society groups (Schlesinger, 2008, p.60). The wide base on which the Convention rested is often portrayed as a strength, particularly when comparisons are drawn with the earlier effort towards introducing
devolution in Scotland in the 1970s, which lacked an equivalent body (Wright, 1997). Yet two important parties, the Conservatives and the SNP, were not formally involved; and the attainment of the Convention objectives was dependent upon the Conservative Party being defeated in a General Election (Lynch, 1996). Nonetheless Michael Keating notes that any kind of cross-party cooperation in British politics at this point was noteworthy (Keating 1998). But this inclusive approach did not necessarily mean that individuals with relevant knowledge were incorporated into the process. James Mitchell observes that none of the members of the Constitutional Commission set up by the Convention after the 1992 General Election, comprising Labour, the Liberal Democrats and other members, possessed constitutional expertise (Mitchell, 1999).

Of particular significance, it is argued participation in the Convention enabled Labour, then the major political force in Scotland, gradually to shift its position on devolution, crucially over the electoral system to be used for a Scottish Parliament. Labour had previously favoured first-past-the-post (Mitchell, 1998). The acceptance by Labour of a more proportional voting system has been portrayed as a significant shift for the party (Keating, 1998). The presence of certain Labour representatives in the Convention was helpful to its chances of achieving its objectives. Nevil Johnson notes that a number of Labour politicians who participated in the Convention were later placed at senior levels in the Labour government which implemented devolution after taking office in 1997 (Johnson, 2001).

As well as Labour being influenced by the Convention, the presence of Labour within it clearly had an impact on the Convention. Early in its work the Convention depicted four choices it would consider: an elected assembly to oversee the functions exercised by the Scotland Office; a Scottish Parliament with wider powers, including to vary taxes; a federal approach, in which Scotland, Wales and English regions could choose to have certain powers, with others retained at UK level; and Scottish independence. But the second system was always favoured, according as it did most closely to the existing policy of the Labour Party, the most powerful group within the Convention (Kellas, 1990).

The maintenance of inter-party collaboration could produce strains. After the 1992 General Election, some Liberal Democrats questioned the impact on their popularity with voters of their cooperation with Labour within the Convention (Mitchell, 1998). Indeed during this period there seems to have been a loss of momentum by the Convention. Following the 1992 poll, other groups became more active and the Convention less so. It was not revived until the following year. The different groups included Common Cause, Democracy for Scotland and Scotland United. Taking a grassroots approach they sought to bypass the more elite level Convention and achieve a mass campaign (Lynch, 1996). Cross party cooperation did not always hold. The decision made by Labour that devolution would be subject to a referendum was announced by the party unilaterally in June 1996. The party chose a double question, asking whether there should be a Scottish Parliament, and whether it should have tax varying powers, enabling it to counteract the effect of Conservative claims that devolution would mean higher taxes in Scotland (Mitchell, 1999). The Labour leadership failed to consult Convention associates, or even Scottish Labour, over this decision. There was a backlash against this statement, making it clear that tampering with the devolution proposal would come at a cost (Keating, 1998). Here was evidence that the Convention had been successful in entrenching support for devolution.
Beyond the political parties, the participation of other players was significant as well. The social influence of the churches in Scotland was greater than in England, making their involvement in the Convention important (Keating, 1998). Women’s groups had an impact. With the backing of trades unionists and Labour activists they promoted the idea of equal representation within the Convention (Bradbury and Mitchell, 2001). A Scottish Women’s Coordination Group (SWCG) was formed which lobbied the Convention and the parties. The SWCG achieved a broad membership of party activists and civil society participants. It facilitated a deal between Labour and the Liberal Democrats over equal selection, endorsed by the Convention (Brown et al., 2002). The Liberal Democrats resisted the idea that equal gender representation should be enshrined in legislation, on the grounds it represented inappropriate interference (Keating, 1998). The Convention stopped short of formally building gender equality into the proposed electoral system, but the Labour and Liberal Democrat parties made a cross-party agreement that they would do so through changing their party rules (Labour honoured the agreement, the Liberal Democrats did not) (Miller, 1999, p.308).

Analysis of the process: (b) Impact and significance of the Convention

The Convention received significant ongoing media attention within Scotland, including from broadsheet newspapers, which played a ‘largely supportive agenda-setting role’, and the broadcast media. At the same time it was ‘Little known outside Scotland’ (Schlesinger, 2008, pp.60-1). There was a tail-off in coverage in the aftermath of the 1992 General Election (Mitchell, 1998). Yet the final report of 1995 received prominent attention, perhaps belying the extent to which it contained fresh content (Mitchell, 1999). But Peter Lynch noted in 1996 that ‘The Convention has not increased popular support for devolution, or [sic] made any noticeable dent in support for [Scottish] independence’ (Lynch, 1996, p.15).

Academics have sought to assess the significance of the Scottish Constitutional Convention from a variety of perspectives. Some analysis places the Convention in a wider international and historical context. Philip Schlesinger states that ‘As an expression of civil society, [the Convention] could draw both on the legacy of the Scottish Enlightenment and find inspiration in civic movements intent on promoting political change and democratisation in East-Central Europe’ (Schlesinger, 2008, p.60). Peter Lynch advances a number of possible theoretical interpretations of the Convention. The first is ‘positive’, emphasising its achievements in obtaining consensus around a package agreed between divergent groups. Second, a ‘sceptical’ account might see the Convention more as a response to the Scottish National Party, or even as an attempt at political management by Labour. Third, it can be interpreted from the perspective of ‘partisan’, party political considerations. Fourth, the role of pressure groups seeking to achieve goals can be taken into account. They include women’s groups and local government, which was active in the Convention (Lynch, 1996).

A key impact ascribed in some accounts to the Convention is that it was effective in forcing the issue of Scottish constitutional arrangements onto the political agenda. In 1990 James Kellas wrote: ‘Discussion of the constitutional options is taking place in Scotland largely because of the existence of the Scottish Constitutional Convention…The proceedings of the Convention have forced each of the political parties to frame a policy on the constitution, with detailed arguments on devolution, federalism, proportional representation, and so on’ (Kellas, 1990, p.427).
The Convention is sometimes depicted as having a substantial impact upon the specific system of devolution introduced to Scotland, even to the point that it was accepted with little critical assessment of its content (Bogdanor, 1999). There is a correlation between specific Convention proposals such as the size of the Parliament, its tax-varying powers, and the electoral system, and the provisions of the Scotland Act. Philip Schlesinger argues that in certain features of the Scottish Parliament, such as its commitment to gender balance and a more consensual approach than that employed in the Westminster Parliament, ‘the continuing influence of the Constitutional Convention is still perceptible’ (Schlesinger, 2008, p.69). As discussed above, an important influence of the Convention was upon the Labour Party itself. The Convention could be seen as binding Labour to the rapid implementation of a more far-reaching devolution proposal than it had previously attempted (Lynch, 1996).

But the Convention was not the only body considering the constitutional future of Scotland and the possibility of devolution. James Mitchell describes other places in which work was taking place in the post-1992 period, including within the Labour Party and think tanks such as the Constitution Unit and Institute for Public Policy Research. He notes that the Constitution Unit work was particularly substantial. Mitchell questions how significant was the Convention in influencing the proposals put before the Scottish electorate in the white paper published by the Labour government in 1997 (Mitchell, 1999). The proposals for devolution ultimately implemented differed from those of the Convention in that only the powers reserved to the centre were defined in legislation, not both reserved and devolved powers, as suggested by the Convention (Keating, 1998). Mitchell portrays the 1990s devolution programme more as a better-drafted version of that from the late 1970s than as a response to the Convention (Mitchell, 1999).

Aside from its specific role in the advent of devolution, the Convention promoted a particular constitutional conception of Scotland. Philip Schlesinger argues that through depicting sovereignty as vested in the Scottish people rather than the UK Parliament, the Convention was deliberately drawing a contrast between Scottish and English constitutional thought (Schlesinger, 2008, p.60). Mitchell portrays the Claim of Right as deploying nationalist rhetoric as a means of justifying reform of the UK constitution, creating a basis for change without involving others in the UK (Mitchell, 1998). The Scottish National Party deploys the concept of popular sovereignty as central to its argument that the Scottish people have the right to determine their constitutional future, including through leaving the union if they choose. Nationalists argue that, in signing up to the ‘Claim of Right’, Labour and Liberal Democrat MPs acknowledged this principle of self-determination (MacCormick, 2000). However, the devolution legislation of the late 1990s did not share the approach of the ‘Claim of Right’ in that it explicitly sought to preserve the supremacy of the UK Parliament, asserting that its right to legislate in any area was retained (Keating, 1998).

Analysis of the process: (c) The content of the Convention proposals

A variety of comments have been made on the content of the Convention proposals. Peter Lynch argued in 1996 that the work of the Convention was composed more of general principles than specific recommendations (Lynch, 1996). An innovation attributed to the Convention was the German-style electoral system it proposed (Bradbury and Mitchell, 2001, p.258). Writing in 1997 Douglas Sinclair portrayed an enhanced role for local government as one of the most desirable components of the
Convention plan for Scottish devolution. But at the same time the position of local
government would not be constitutionally entrenched (Sinclair, 1997). A policy shift
took place over the course of the Convention, away from assigned tax revenues and
towards a block grant system, perhaps attributable to a change in Labour leadership,
with the new leadership intent on reducing the financial autonomy available to a

In some accounts it is held that the Convention did not address certain matters
effectively. Mitchell writes: ‘The Constitutional Convention was ill equipped and not
designed to deal with many of the technical and difficult issues which had to be addressed’ (Mitchell, 1999, p.664). Two authors write that the role of the Secretary of
State for Scotland after the introduction of devolution was not dealt with by the
Convention; and that the ‘parochial concerns’ of the Convention were such that it had
concentrated on the Scottish Parliament, and not institutional relations between it and
Whitehall/Westminster (Bradbury and Mitchell, 2001, p.270). It did not deal with the
West Lothian Question, which relates to the ability, after devolution, of MPs
representing Scottish constituencies in the UK Parliament to continue to vote on
devolved matters, while MPs representing other constituencies would not be able to
vote on matters devolved to Scotland (Mitchell, 1999). While the Liberal Democrats
supported a reduction in the number of MPs returned from Scotland, Labour and other
participants in the Convention did not agree (Lynch, 1996). Lynch has argued that the
1995 report by the Convention did not add to the existing detail of proposals for the
Parliament (though it did introduce new material on the issue of representation)
(Lynch, 1996). Similarly Mitchell argues that the final report of the Convention was

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The Welsh Assembly Powers and Electoral Arrangements (Independent Commission)

Background to the initiative

Historically Wales has had a constitutional existence less distinct from England than
that of Ireland/Northern Ireland and Scotland. It was conquered militarily and then,
through acts of Parliament of 1536 and 1543, incorporated into England. A Secretary
of State for Wales was created in 1964 (since 1951 there had been a more junior
Minister for Welsh Affairs). In 1973 the Royal Commission on the Constitution,
chaired by this point by Lord Kilbrandon, recommended the introduction of a
devolved assembly for Wales (and Scotland), directly elected under the Single
Transferrable Vote system. In 1979 a referendum was held in Wales on the
establishment of a directly elected devolved body possessing executive but not
legislative powers. The proposal was defeated. Then from 1979 to 1997, the UK,
including Wales, was governed by a Conservative government while the Conservative
Party was not the largest party amongst Welsh MPs, probably increasing the salience
of the view that Wales should have some form of self-government.
The Labour government elected in 1997 held another referendum on devolution in Wales in 1998, which was passed by a narrow majority (50.3 per cent to 49.7 per cent), followed by the introduction of the Government of Wales Act 1998 to give effect to devolution. Devolution for Wales was not preceded by a cross-party and civil society convention along the lines of the Scottish Constitutional Convention, rather it was the product of internal Labour Party policy-making. Under the system of devolution initially introduced executive, not legislative, power was devolved from UK level. There was a single corporate body, the Assembly, rather than a distinct legislature and executive. However, on its own initiative the Assembly decided in 2002 (by unanimous vote) to introduce in practice a distinction between a ‘Welsh Assembly Government’ and the Welsh Assembly. The Assembly had 60 members, 40 elected under the First Past the Post system in constituencies that were the same as those for Westminster parliamentary elections; and, to ensure a greater degree of proportionality, 20 members from 5 regions, drawn from party lists. This system is known as the Additional Member System (AMS). The first Assembly elections took place in 1999.

Establishing the Commission

In October 2000 the Welsh Labour and Liberal Democrat parties formed a coalition. They produced a document setting out the terms of their agreement. It included a pledge to set up an ‘independent Commission’ that would consider the ‘powers and electoral arrangements of the National Assembly’ to ensure that it served the ‘best interests of the people of Wales’. This commitment, favoured in particular by the Liberal Democrats, specified that the commission would consider the powers that were devolved and the extension of proportionality in the make-up of the Assembly (Welsh Assembly Government, 2000).

In accordance with this commitment the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, or Richard Commission (after its chair, the Labour peer Lord Richard), was set up by the Welsh Assembly. On 20 June 2002 the Assembly voted in plenary to approve its terms of reference (this information and following references to the Commission derived from: Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, 2004).

The Commission was charged with considering whether there was enough clarity in the powers of the Assembly to permit efficient policy-making; and whether the breadth and depth of the powers of the Assembly were sufficient to ‘permit integrated and consistent policy-making on issues where there is a clear and separate Welsh agenda’. By breadth was meant the ‘range’ of areas within the remit of the Assembly; by depth was meant its ability to ‘effect change’ within those areas.

Attention was to be given to the mechanisms of the UK government for policy-making regarding Wales, and the means by which the Assembly could have an input into it. The Commission was to determine whether they were ‘clear and effective’ and whether they make good any defects identified as part of the consideration of the Assembly powers stipulated above. The possibility that the division of responsibilities between the UK government and the Assembly imposed ‘inappropriate constraints on Whitehall policy-making’, both in areas where the Assembly had control and where it did not, was to be investigated. The Commission was required to consider possible financial consequences of any proposals it made.
On electoral arrangements, the terms of reference stipulated that there should be an investigation of whether the Assembly was sufficiently large to allow its members to ‘operate effectively’ and did not place excessive strain on them. Another issue that the Commission was required to address was whether the means by which the Assembly was elected ‘including the degree of proportionality’ meant that ‘all significant interests in Wales’ were represented in an adequate and accurate manner. The Commission was required to consider whether any changes to the powers of the Assembly that it recommended necessitated changes in the size of the Assembly or the way in which it was elected.

The Commission was required to report by the end of 2003 (ultimately it reported in spring 2004). It was not to be subject to influence from the Assembly or Assembly Government. Within its terms of reference the Commission could decide its ‘own agenda and priorities’. While the Commission had control over what its procedures were, it was required by its terms of reference to ‘invite oral and/or written evidence from any who wish to provide it’. This evidence was to be accepted either in Welsh or in English. The Commission was to meet in public unless those providing evidence requested not to do so or, exceptionally, the Commission decided not to do so. The periodic publication of evidence and accounts of proceedings was required. The Commission did not have the power to compel an individual to provide evidence. No was it able to insist or to insist on seeing documents, except those available under freedom of information regimes. Staff support would be provided by a Secretariat composed of Assembly civil servants on secondment. Its eventual cost was near to £1 million (McAllister, 2005).

The work and recommendations of the Commission

In July 2002 Lord Richard was appointed Chair of the Commission by the Welsh First Minister. Four Commissioners were jointly nominated by the four party leaders in the Welsh Assembly. After a process of open competition and interviews a further five commissioners were appointed. In operating, the Commission sought to take into account that it was reviewing a system of government that had only been operational for four years. It attempted to distinguish more fundamental problems from those associated with it being a new set of arrangements. It decided to interpret its remit widely, taking into account – but not evaluating the performance of – the way in which the Assembly and Assembly Government as a whole functioned. In its work it recognised the interconnected nature of the different issues it was addressing.

The Commission held 115 evidence session and 3 seminars; and two consultation papers were issued. It held 9 public meetings across Wales; and made research visits to Scotland and Westminster, as well as observing the Welsh Assembly in action in different forms; and meeting with the Speaker of the Northern Ireland Assembly. More than 300 written submissions were received. Reports produced by the House of Commons Welsh Affairs Committee and the House of Lords Select Committee on the Constitution fed into the deliberations of the Commission.

The Commission produced a 308-page report in spring 2004. By this time, the coalition government which held power when it was established had been replaced by a single party Labour government. The final chapters of this publication set out a ‘vision’ for Wales; and a set of recommendations. The Commission argued that as the ‘democratically elected representative body for the whole of Wales’ the Assembly should be able to develop policies within clearly established fields; and to implement them in conjunction with the UK level government and other relevant groups. The
Assembly Government should have the power to determine its own agenda; and should be accountable via the Assembly to the Welsh population.

Following on from this overall principle, the Commission recommended that a legislative Assembly for Wales should be established. Its introduction would require a ‘Wales Bill’ to amend the existing Government of Wales Act 1998 and provide the Assembly with primary legislative powers. The Bill would set out which matters were reserved; while everything that was not reserved would be considered to be devolved. This differed from the existing position in which the only powers that were devolved were those specifically deemed to be so. Powers could be transferred to the Welsh executive even if legislative powers in the same area were not devolved to the Assembly. Around four to six government bills would be introduced to the Assembly each year. In the period before a full legislative body was established, the Commission recommended that the delegation of powers should be expanded as far as possible within the existing system.

The Commission argued that it was desirable for a legislative Assembly to have tax-varying powers. If it was to dispose of its primary legislative powers properly the number of Assembly members should increase to 80. A structural alteration was required with the establishment of a separate executive and legislature. The existing voting system was not viable if the size of the Assembly was increased to 80. The most preferable different system was the Single Transferable Vote. The proposals should be implemented by 2011 at the latest.

Analysis of the process: (a) A constitutional convention?

In a sense the Richard Commission was the constitutional convention that Wales did not have in advance of the introduction of devolution (Osmond, 2011). However rather than starting anew, as a constitutional convention might be expected to do, it was dealing with arrangements that were already established – and indeed developing. Furthermore the commission was instigated by a coalition of parties which possessed power under the already-established system of devolution. The commission was directed towards particular features of devolution arrangements, in accordance with an agreement between those parties. However, it was careful to consider structures and their operation as a whole as part of its investigation of certain more specific issues.

The commission can therefore be seen as performing a legitimising role for an important constitutional change which was designed at elite level (McAllister and Stirbu, 2008). Its composition is significant in this respect. Richard Rawlings argues that in including a mixture of individuals nominated by the four main parties in Wales and those chosen through the appointments system the report gained ‘rhetorical power’ (Rawlings, 2004, p.12). The chair, Lord Richard, was a high profile Labour politician. A former Leader of the House of Lords and MP, he had been an EEC commissioner and ambassador to the United Nations. The membership of the Commission included within it academic expertise, experience of business, farming, work as a local authority chief executive, politics at various levels and as a senior parliamentary official. That such a diverse group could produce an unanimous report (subject to an ambiguous general reservation entered by a single member) has also been identified as a strength of the Commission (McAllister, 2005). But arguably this agreement was achieved at the cost of some details not being fully drawn out in the text (Rawlings, 2004).
Also relevant to the legitimacy of the commission was that it actively sought input from beyond narrower circles of political interest and influence. The public evidence sessions across Wales provided the opportunity for public input. Written evidence came from a wide range of sources, including political parties, pressure groups, official bodies, local government, and numerous members of the general public. The report has been depicted as genuinely based on the evidence it received (Trench, 2005b). Opinion research was considered. The Commission found that in 2003 a full Welsh Parliament was the most popular option amongst the public (as opposed to Welsh independence, an Assembly as presently constituted, or no elected body); support for which had almost doubled since 1997. Some possible tensions in public opinion were uncovered. Most people supported proportional representation, but also preferred having only one elected representative; and while criticism of the Assembly was prevalent, there was support for providing it with more powers.

Analysis of the process: (b) Public reaction to the report

In response to the publication of the report, Plaid Cymru, the Welsh nationalist party, welcomed the proposal for primary law-making powers for the Assembly but stated that the commission could have been more radical. The Welsh Conservatives agreed with the idea of a formal distinction between the executive and legislature; but said that any further powers for the Assembly - which the party opposed – should be subject to a referendum in Wales. The Welsh Liberal Democrats were supportive of the report.

Welsh Labour was officially non-committal, announcing that its response would be determined by consultation with its members with a final decision to be taken at a special conference in September 2004 (‘It’s not enough says Plaid, while Tories demand a referendum’, Western Mail, 1 April 2004). The (Labour) Secretary of State for Wales called the report a ‘comprehensive piece of work containing plenty of food for thought’ but noted that its recommendations needed support from the Labour governments in Wales and Westminster if they were to be implemented (McAllister and Stirbu, 2008, p.215). Some Welsh Labour members of the UK Parliament were hostile to the idea of more powers for the Assembly; and the introduction of a different electoral system was perceived by some within Welsh Labour as a threat (McAllister, 2005). In its coverage of the report, the Guardian emphasised divisions in Welsh Labour (‘Report proposes greater power for Welsh Assembly’, Guardian, 1 April 2004); as did The Times (‘Report calls for more power for Welsh Assembly, 1 April, 2004).

Academic analysis was largely supportive of the Commission report. Charlie Jeffery wrote that it was a ‘comprehensive document informed by an extensive consultation of the general public, experts and other interested parties. It is strongly evidence-led with its recommendations clearly following the weight of the evidence put to it’ (Jeffrey, 2005, p.22). The report was compared favourably with the Scottish Constitutional Convention for the quality of analysis on which it rested (Trench, 2005b). However one commentator argued that it had failed to address the financial issues that would become crucial to the future development of Welsh devolution (Bristow, 2005).

Analysis of the process: (c) Impact of the Commission

The impact the commission could make was contingent upon external political developments in two ways. First, it was the product of a coalition agreement at Welsh government level, but by the time it reported the coalition had been replaced by a single party Labour government. Labour was divided over devolution and its extension; and the STV system was more a Liberal Democrat than Labour objective. Furthermore, the power to introduce and pass the legislation the report called for lay not at Welsh devolved level but with the UK (Labour) government and Parliament (Jeffery, 2004). The attitude taken at this level was therefore crucial. In this sense the response to the Commission fell to the Labour Party at Welsh and UK levels, and its internal deliberations.

In 2005, the year following the publication of the Richard report, the Secretary of State for Wales published a white paper, *Better Governance for Wales*. But it was not presented specifically a response to Richard, and in as far as it referred to it, tended to treat it as one set of views amongst others, rather than a definitive voice. For instance, it noted that the problems experienced by Assembly committees in seeking to hold ministers to account was a concern to many ‘commentators’ including Assembly Members, Assembly Ministers, and the Commission (Secretary of State for Wales, 2005, p.7).

One analysis of the UK government white paper response to Richard noted concern at the extent to which it did not ‘address the proposals of the Richard Commission’. The white paper made proposals ‘in isolation from the Richard recommendations’ rather than engaging with them, or even discussing them in detail. This response argued that the white paper came about because the Welsh Labour Party had left to the UK Secretary of State the responsibility for responding to Richard (Trench, 2005b, p.3).

The white paper proposed legislative change to bring about a formal distinction between the Assembly and the Welsh Assembly Government. In so doing it was acknowledging a change that had in practice already occurred. The document also announced that future primary legislation relating to Wales would provide the fullest possible discretion to the Assembly for the making of provisions using the powers it possessed for secondary legislation. It proposed introducing an Act of Parliament that would create a new procedure whereby the UK Parliament could transfer to the Assembly the power to amend legislation or issue new legislation on specified matters within the areas of responsibility in which the Assembly already operated. The Assembly could eventually be given wider powers to produce primary legislation throughout devolved areas, but this change would be subject to a referendum in Wales.

These proposals were included in the *Government of Wales Act 2006*. Initially the Assembly was able to introduce ‘measures’ dealing with specific ‘matters’ that had been transferred to it, within a set of more general ‘fields’. In 2011 a referendum was held under the terms of the 2006 act, approving the introduction of full legislative powers. The Assembly could now introduce laws known as ‘Acts of the National Assembly for Wales’ relating to issues which fell within a series of more widely drawn ‘subjects’. However, the system remains one in which the powers devolved

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164 Government of Wales Act 2006 pt III; and sch 5.
165 Government of Wales Act 2006 pt IV; and sch 7.
are those specified as such, rather than the system envisaged by the Richard Commission (and similar to that in force in Scotland) whereby those powers which are not specified as reserved are considered to be devolved, a more decentralising formulation than that in force. Tax varying powers were not proposed in the white paper nor included in the 2006 act. The white paper also endorsed the existing AMS system for Assembly elections, rather than STV as proposed by the Commission. It proposed a less significant change, implemented by the 2006 act\(^\text{166}\), that individuals be able only to stand either in a constituency or on a party list, but not both (Secretary of State for Wales, 2005). The expansion in the number of Assembly members called for by the Commission was not acted upon\(^\text{167}\).

While the specifics of some of the main recommendations of the Richard Commission may not have been taken up, two authors have proposed other ways of assessing the significance of the Commission. Richard, they hold, can be seen as ‘a catalyst for a more mature constitutional debate’, which had previously been dominated by party-political concerns, or whether or not those taking part agreed with devolution (McAllister and Stirbu, 2008, pp.212-13). They conclude that while the 2005 white paper and the Government of Wales Act 2006 suffered from a lack of ‘ambition’ and from political compromise, the new system that was established represented movement towards ‘greater legislative autonomy’ and was in this sense in accordance with the ‘principal trajectory’ of the Richard Commission. Moreover, Richard could provide a model against which the existing arrangements could be assessed, and on a basis of which future possible changes considered (McAllister and Stirbu, 2008, p.221). Another observer wrote at the time of the publication of the Commission report: ‘whatever happens in the short term, Richard as a reservoir of understanding and ideas will take on a life of its own’. As a ‘standing rebuke to those who would seek to slow the devolutionary process, it provides its own dynamic’ (Rawlings, 2005, p.48). Writing more recently, the Commission has been portrayed as contributing to ‘a maturing political culture’ in Wales, in which previous divisions and mistrust between different communities, often involving linguistic matters, were lessening, and a national identity developing (Osmond, 2011, p.13).

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[F]

A Northern Ireland Bill of Rights
(Human Rights Commission)

Background to the initiative

Northern Ireland is historically a divided community, with two main groups: a Loyalist, Protestant community which wishes Northern Ireland to continue to be part of the UK; and a Republican, Roman Catholic community which favours breaking with the UK and joining the Republic of Ireland. Roman Catholics are in the minority in Northern Ireland; while Protestants would be in the minority within the Republic of

\(^{166}\) Government of Wales Act 2006 s 7(6)(c).

\(^{167}\) See: Government of Wales Act 2006 s 2.
Ireland. The dispute between them has often been of a violent nature. It has also involved disputes over rights of various kinds. Consequently, the protection of rights is important to both communities; and to attempts to resolve the conflict. A Northern Ireland Bill of Rights was proposed in a UK government White Paper in 1973. In a 1977 report the Northern Ireland Standing Advisory Commission on Human Rights supported incorporating the European Convention on Human Rights, creating a UK Bill of Rights. The Commission noted that there might be grounds for supplementing the Bill of Rights with additional rights applying in Northern Ireland. A Northern Ireland Bill of Rights was proposed again in the Anglo-Irish Agreement of 1985; and the so-called Framework Documents of 1995.

The favoured position of UK governments has been for Northern Ireland to govern itself as far as possible. However, for security reasons devolution has not always been deemed possible and direct rule from London has been imposed. An historic moment in the peace process and the attainment of a degree of reconciliation between communities came with the multi-party Belfast (or ‘Good Friday’) Agreement of 1998 (s.6 (3)). It provided for a mechanism by which the people of Northern Ireland could determine their constitutional future; and for devolution to be reintroduced.

The mutual acknowledgement of human rights was integral to this Agreement, which also made stipulations regarding their institutional and legal realisation. It contained a commitment (s.1 (2)) to the ‘protection and vindication of the human rights of all’. The Agreement bound the UK government to take steps to incorporate the European Convention on Human Rights into domestic law, with the courts able to overrule the Northern Ireland Assembly if violating the Convention (s.6 (2)).

The Agreement also provided for the establishment of a Northern Ireland Human Rights Commission (NIHRC). It would have members reflecting the balance of groups in the Northern Ireland community. As a successor to the already-existing Standing Advisory Commission on Human Rights, it would be given a wider role than this predecessor group. The functions of the NIHRC would include reviewing how adequate and effective were practices and laws; making recommendations to the government; promoting public awareness of human rights and making information available; and if appropriate assisting individuals in bringing court proceedings, or bringing court proceedings itself (s.6 (5)).

The Commission would also be invited to (s.6 (4)): ‘consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights’. These rights would reflect the specific circumstances prevailing in Northern Ireland. The Commission would take into account international experiences and measures. The extra rights would help realise the ‘principles of mutual respect for the identity and ethos of both communities and parity of esteem’. Taken in conjunction with the ECHR they would comprise a Bill of Rights for Northern Ireland. The issues the Commission would be required to consider included the formulation of a ‘general obligation on government and public bodies fully to respect…the identity and ethos of both communities in Northern Ireland’. The Commission would also seek to produce a ‘clear formulation of the rights not to be discriminated against and to equality of opportunity’ in both the private and public sectors.

The Belfast Agreement was endorsed by a referendum in Northern Ireland (and a simultaneous referendum in the Republic). The Commission was established by the Northern Ireland Act 1998 (ss. 68-72), which gave effect in UK law to various aspects of the Agreement. It was required to have a Commissioner and other
Commissioners appointed by the Secretary of State. The Secretary of State was obliged to ensure that its membership was as far as possible representative of the Northern Ireland community.

The Act stated that the Secretary of State would request the Commission to provide advice on a Northern Ireland Bill of Rights as set out in the Agreement (s.69 (7)). A letter making this request was sent in March 1999. It used terms of reference derived from the Belfast Agreement. In 2003 a joint declaration by the Republic of Ireland and UK governments stated that following consultation on a Bill of Rights the British government would introduce legislation to the UK Parliament ‘where required to give effect to rights supplementary to the ECHR to reflect the particular circumstances of Northern Ireland’ (House of Commons Northern Ireland Affairs Committee, 2010).

The work of the Commission

The Commission decided to interpret its task widely; and undertook a substantial consultation and public awareness programme. It received more than 650 formal evidence submissions from various individuals and groups. A consultation paper was published in 2001, with a summary of responses received issued in 2003. A further consultation was produced in 2004. Three public opinion surveys were commissioned; 11 discussion pamphlets issued; and nine working groups, comprising nearly 200 individuals drawn from outside the Commission, were set up to consider specific issues.

The Commission held numerous engagement events. It mounted an advertising campaign to promote awareness of human rights. Special consultations were held with children and young people, and victims. A working paper updating on progress was published in 2005. Working in parallel to this activity a Human Rights Consortium was created in 2000, which carried out various consultation and engagement activities of its own.

From the beginning of 2006 to late 2008, 54 gatherings of the Commission’s Bill of Rights Working Group took place. The Commission also met over this time frame with representatives of particular political parties in the Northern Ireland Assembly; as well as of Westminster political parties; and representatives of human rights organisations. The Commission worked with the Northern Ireland Office; and with the government of the Republic and the Irish Human Rights Commission. In accordance with the St. Andrews Agreement of 2006 a Northern Ireland Bill of Rights Forum, consisting of 28 members, was set up. The four main Northern Ireland parties each had three representatives; and the Alliance Party had two. Other seats were filled by the Churches, trades unions, business, and various minority, vulnerable groups and interest groups. The purpose of the Forum was to submit recommendations to the Commission. It produced its final report in March 2008; and the Commission provided its Advice to the Secretary of State in December of the same year. Two of the nine members of the Commission dissented from the Advice.

The Advice of the Commission

The Commission did not produce a full text of a Bill of Rights. Instead it provided guidance on how to produce such a document. It produced a preamble, founded in the principles of the Universal Declaration of Human Rights of 1948; the European Convention on Human Rights of 1950; the Belfast Agreement of 1998; the St
Andrews Agreement of 2006; and various other international instruments of human rights.

The Commission recommended that the Bill of Rights should include those ECHR rights provided for by the UK Human Rights Act 1998, and other rights supplementary to the ECHR that the special position in Northern Ireland made necessary. The rights that would be included in a Northern Ireland Bill of Rights would be:

- The Right to Life;
- Freedom from torture, inhuman or degrading treatment;
- The prohibition of slavery and forced labour;
- The right to liberty and security;
- The right to a fair trial and to no punishment without law;
- The right to respect for private and family life;
- Freedom of thought, conscience and religion;
- Freedom of expression;
- Freedom of assembly and association;
- The right to marriage or civil partnership;
- The right to equality and the prohibition of discrimination;
- The right to free elections;
- The right to protection of property;
- The right to education;
- Freedom of movement;
- Freedom from violence, exploitation and harassment;
- The right to identity and culture;
- Language rights;
- The rights of victims;
- The right to civil and administrative justice;
- The right to health;
- The right to an adequate standard of living;
- The right to accommodation;
- The right to work;
- Environmental rights;
- Social security rights; and
- Children’s rights.

The Commission proposed that the Human Rights Act 1998 be retained with the rights contained in its Schedule 1 re-enacted in a distinct piece of legislation applying to Northern Ireland which would also include the additional rights. The legislation would be called the Northern Ireland Bill of Rights Act. The Act would contain provision making it possible for supplementary rights to be subject to certain reasonable limitations. Derogation from any rights would be possible only in circumstances of a state of emergency proclaimed by the UK Parliament. The Act would stipulate that the UK Parliament could amend it only with cross-community approval in the Northern Ireland Assembly.

The Act would require public authorities to act in a way that was compatible with the rights, take the rights into account in its actions, and promote them. Individuals or organisations with an interest would be able to initiate legal action on the grounds that
a public authority had not acted in accordance with the Act. Courts would be required to interpret common law and legislation as far as possible as to be compatible with the rights in the Act. The Supplementary Rights would have the same status in Northern Ireland as ECHR rights, which are binding upon public authorities either based in Northern Ireland or performing actions in Northern Ireland, or in relation to Northern Ireland. All rights would be justiciable. Those rights that were subject to progressive realisation would have a minimum core of justiciability.

Analysis of the process: (a) Agreement and dissent

A fundamental area of debate related to this process was whether a Bill of Rights specific to Northern Ireland was needed at all. One observer has argued that a Bill of Rights could potentially help the Belfast Agreement to deliver a meaningful peace settlement, through empowering individuals, enhancing democracy, constraining governments, expressing rights, providing political and legal stability, and supporting the common good (Kavanagh, 2004). Counter arguments advanced were that rights should be enjoyed by all, not just those in Northern Ireland, and that to create unevenness in rights provision within the UK, as a Northern Ireland Bill of Rights might do, was undesirable (House of Commons Northern Ireland Affairs Committee, 2010).

Opinion research commissioned by the NIHRC suggested public support within Northern Ireland for a Bill of Rights. Significant cross-community majorities regularly supported the idea. In 2004, 65 per cent of Protestants thought a Bill of Right was essential or desirable, and 73 per cent of Catholics. Both communities showed support for the inclusion of economic and social rights within it; and protection for the rights of the respective communities. 63 per cent of Protestants and 73 per cent of Catholics believed that the Commission should provide advice to the UK government on a Northern Ireland Bill of Rights, even if the political parties did not agree on it (Northern Ireland Human Rights Commission, 2004).

But certain more specific issues, such as how abortion should or should not be dealt with, could be highly controversial (House of Commons Northern Ireland Affairs Committee, 2010). There was also disagreement about the overall approach taken by the NIHRC in producing the Advice. Aileen Kavanagh has noted that the reference in the Belfast Agreement to the NIHRC as advising ‘on the scope for defining rights’ is vague. There was a debate about whether it authorised the Commission to set about devising a fully-blow Bill of Rights, or gave it a more narrow remit (Kavanagh, 2004). The dissenting two members of the Commission – Jonathan Bell and Daphne (Lady) Trimble, respectively of the Ulster Unionist Party and the Democratic Unionist Party – disagreed with the path followed by the Commission. Trimble has explained that she objected to the Advice because the Commission had improperly extended its remit. She felt that there was a failure to fulfil the requirement for mutual respect of the identity and ethos of both communities. She subsequently complained that the NIHRC refused to allow her note of dissent to be published in the report, and even that the Commission attempted to restrict a statement of the fact that there was dissent. However the Commission insisted that its conduct regarding dissent was in accordance with its standing orders (House of Commons Northern Ireland Affairs Committee, 2010).

Criticisms of the Advice included that made by Austen Morgan, a barrister and member of a Conservative Party commission on a bill of rights and responsibilities, set up when the party was in opposition in 2007. He held, amongst other things, that it
confused international and domestic law, extended too far in its provision of rights, did not define the particular circumstances of Northern Ireland, did not provide what would be generally construed by lawyers as advice, and had objectives normally sought by political means. He objected to the proposal for social and economic rights, and felt that the Advice proposed in inappropriate separation of Northern Ireland human rights provision from that of the UK. Morgan believed that there was confusion in the Advice regarding the position of public authorities and non-state agents (House of Commons Northern Ireland Affairs Committee, 2010).

But the work of the Commission was also praised. Amnesty International broadly welcomed the Advice and praised the methodology of the NIHRC as appropriate to performing the task at hand. Amnesty expressed concern that the government response to the Advice would not create sufficiently extensive rights provision (Amnesty International, 2010).

**Analysis of the process: (b) Response from the UK government and Opposition**

It was in the nature of the process that, regardless of what took place in Northern Ireland, the introduction of any Bill of Rights was dependent on action by the then-Labour UK government, and the UK Parliament. The Northern Ireland Office took nearly a year to issue a consultation in response to the Advice. The latter paper appeared in November 2009 (Northern Ireland Office, 2009). This document argued that over half the rights in the Advice were equally appropriate to people in England, Wales and Scotland as in Northern Ireland. Their introduction solely to Northern Ireland would be either not practically workable, or would create inequality within the UK. The UK government did however identify 32 rights proposed in the Advice which it argued reflected the particular position in Northern Ireland and the principle of mutual respect for the ethos and values of the respective communities in Northern Ireland. They fell into the categories of ‘equality, representation and participation in public life…identity, culture and language…sectarianism and segregation…victims and the legacy of the conflict…and…criminal justice’ (p.21).

The government stressed that the purpose of a Northern Ireland Bill of Rights as conceived of in the Belfast Agreement was to ‘contribute to reconciliation, tolerance and mutual trust’. On the one hand, no group should possess the ability to veto fundamental rights. But on the other hand, new rights would need to be justified by a ‘particularly compelling case’ (p.22) if they lacked full agreement. The paper also noted that a Bill of Rights should not make detailed stipulations about public policy. Governments in the UK and Northern Ireland, accountable to their respective legislatures, would remain responsible for decisions about policy and spending, with a Bill of Rights simply setting out general principles. The UK government was clear that a Bill of Rights ‘should not cut across or undermine the roles of the Executive and the legislature, for example by expanding the role of the courts’ in an inappropriate way (p.22).

Another requirement set out by the Northern Ireland Office in its response to the Advice was that the ‘fundamental changes’ which were affected by the Human Rights Act 1998 (HRA), which incorporated the European Convention on Human Rights into domestic UK law, should not in any way be negated by a Northern Ireland Bill of Rights. The HRA was a ‘foundational document’ and the government was reluctant to move away from a single framework for the enforcement of human rights across the UK (p.22). Finally the government stressed that, though the Belfast Agreement required that a Northern Ireland Bill of Rights should be legislated for by the UK
Parliament rather than a devolved assembly, more than half of the rights referred to in the Advice involved areas which were devolved to Northern Ireland. The UK government was determined not to preempt the proper responsibilities of the Northern Ireland Executive.

While the response of the UK Labour government to the advice from the NIHRC was perhaps less than enthusiastic, the main opposition party, the Conservative Party, which went on to become the senior partner in the Coalition formed with the Liberal Democrats in May 2010, was more overtly hostile. The Conservatives had recently formed an alliance with the Ulster Unionist Party (UUP), which was itself not supportive of the proposal. The shadow Attorney General, Dominic Grieve, spoke in January 2009 at a joint Conservative Party-UUP event claiming that the proposals made his ‘hair stand on end’. Grieve linked his criticism to a supposed problematic ‘rights culture’ that had developed in the UK as a whole. Rights, he claimed, were being exploited. The Conservatives would not implement the NIHRC proposals but would introduce a UK Bill of Rights which would be designed in such a way as to prevent these abuses. Grieve suggested that the Bill could be adopted at devolved level in Northern Ireland, with appropriate alterations or extensions. (‘Rights culture is out of control’, 9 January 2009).

Given the attitudes of both the Labour government and the Conservative Party it is not surprising that progress towards a Northern Ireland Bill of Rights has been minimal since the time that the Advice was issued. As noted the government response took almost a year to emerge, and then in the form of another consultation. The NIHR had hoped that that the Northern Ireland Office would start a consultation in spring 2009, rather than at the end of the year. Initially the consultation was intended to be open for 12 weeks. This period was then extended by four more weeks, taking it up to the end of March. With a Dissolution of the UK Parliament due in May, this timetable mean that the production of a bill before the coming General Election, as desired by the NIHR, was impossible (House of Commons Northern Ireland Affairs Committee, 2010). The NIHR itself and various supportive groups have, however, continued to promote the case for a Northern Ireland Bill of Rights (Northern Ireland Human Rights Commission, 2012).

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The Australian Republican Proposal
(Constitutional Commission and Referendum)

Australia’s Constitution168 establishes that the Queen of the United Kingdom is the Head of State of Australia.169 The Preamble to the 1900 Act proclaims the creation of a ‘Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland’, and section 61 of the Constitution states: ‘The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as

168 Commonwealth of Australia Act 1900, s9
169 For general information on the Australian Constitution see Harris, Essential Constitutional Law (2nd edn, Cavendish 2004)
the Queen’s representative’. Any attempt to remove the Queen as Head of State would have to comply with the procedures for constitutional alteration set out in section 128 of the Constitution. A bill seeking to amend the Constitution must be passed by an absolute majority of both Houses of Parliament,\(^\text{170}\) and put to the electorate in the States and Territories in a referendum. The reform must be approved by both a majority of voters in a majority of States\(^\text{171}\) and a majority of voters across the country. These amendment procedures are onerous: of the 44 referendums held since 1901, only eight have achieved the majority required for constitutional amendment.\(^\text{172}\) Australia’s last national referendum was held in 1999 on the question of whether to establish an Australian Republic with an indigenous President as Head of State. This case study examines the processes preceding and the conduct of the 1999 referendum, and identifies lessons that may inform an attempt to adopt a codified constitution in the UK.

**The 1998 Constitutional Convention**

**Background and terms of reference**

The question of whether Australia should become a republic was ‘one of the political issues of the 1990s’.\(^\text{173}\) By the time that the Constitutional Convention to examine this issue was created in 1997 the major political parties had publicly supported either the creation of an Australian republic or the establishment of an independent body to inquire into the matter.\(^\text{174}\)

The Constitutional Convention took place between 2 - 13 February 1998 and investigated:

- whether or not Australia should become a republic;
- which republic model should be put the electorate to consider against the status quo; and
- in what timeframe and under what circumstances might any change be considered.\(^\text{175}\)

The Howard Government made a commitment to hold a referendum and amend the Constitution if clear support for a particular republican model emerged. The referendum would take place:

before the end of 1999. If the people then decided to change our present Constitution, the new arrangements would be in place for the centenary of the inauguration of the Australian nation and the opening of the new millennium on 1 January 2001.\(^\text{176}\)

**Composition: a diverse body of elected and appointed members**

\(^{170}\) An alternative procedure applies in the event that either House fails to pass the bill or if the Houses cannot agree on the bill in the same form.

\(^{171}\) Votes in the Territories are not considered for the purposes of establishing this first majority.

\(^{172}\) Information on Australia’s referendums is available at:＜http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm＞

\(^{173}\) Williams, ‘Why Australia kept the Queen’ (2000) 63 Sask L Rev 477, 482


\(^{175}\) ibid

\(^{176}\) Howard, Foreword to *The Convention Report* (n 7)
The Constitutional Convention was composed of 152 delegates, half of which were elected and half appointed. This composition was guided by an ‘overriding objective’ of achieving representation of ‘a broad cross-section of the Australian community’.\(^\text{177}\)

1. Elected members

Elections to the Constitutional Convention were governed by the Constitutional Convention (Election) Act 1997. Delegate places were allocated among the eight States and Territories ‘broadly in proportion with the number of seats for each across both Houses of the Commonwealth Parliament’.\(^\text{178}\) Unlike other federal elections, voting in the Convention election was voluntary\(^\text{179}\) and by post. The ‘above the line’ or ‘below the line’ voting system was based on that used for Senate elections.\(^\text{180}\) This allows electors to vote either for a group of candidates or an ungrouped candidate standing alone without expressing a preference (an ‘above the line’ vote), or for individual candidates by expressing a preference (a ‘below the line’ vote). Candidates obtaining a certain quota of the vote were elected.\(^\text{181}\)

The election was conducted by the Australian Electoral Commission (‘AEC’).\(^\text{182}\) In this capacity, the AEC provided voting materials to all electors, including a ballot paper, information explaining how to vote, a full list of candidates, and a short statement from all candidates,\(^\text{183}\) which were posted to electors between 3 - 14 November 1997. In addition, the AEC provided a national telephone inquiry line which received 227,763 calls, and an interpreter service which received 10,102 calls on 15 dedicated language lines during the election period.\(^\text{184}\) The AEC also undertook a ‘community awareness programme’ among ‘non-English speaking background communities’,\(^\text{185}\) involving the direct mailing of information to ‘community groups, organisations, individuals and the ethnic media’.\(^\text{186}\)

The Government also published and distributed information to the public before the Convention election. Its leaflet, *Republic – Yes or No?*, contained contributions from the main organisations in favour of and against a republic and sought to ‘describe, in plain English, how the existing constitutional system operates, identifying the arguments for and against change’.\(^\text{187}\) This was published in English and eight other languages. 6.75 million copies of the leaflet were distributed in newspapers throughout Australia between 8-19 November 1997, with further copies distributed ‘nationally to schools, municipal libraries, parliamentarians’ electoral offices, and over 1600 indigenous organisations through a direct mailout’.\(^\text{188}\)

Polls for the Convention election closed at 6pm on 9 December 1997. Among the almost 12 million Australians eligible to vote turnout was 46.92%.\(^\text{189}\)

\(^{177}\) *The Convention Report* (n 7) Ch 4

\(^{178}\) ibid. The allocation of delegates was set out in CCEA 1997, s7

\(^{179}\) CCEA 1997, s11

\(^{180}\) CCEA 1997, s70

\(^{181}\) CCEA 1997, s101(4)

\(^{182}\) CCEA 1997, s13


\(^{184}\) ibid 6

\(^{185}\) ibid

\(^{186}\) ibid

\(^{187}\) *The Convention Report* (n 7) Ch 8

\(^{188}\) ibid

\(^{189}\) *Election Report* (n 16) 62
2. Appointed members

Of the 76 appointed delegates, 40 were members of the State and Federal Parliaments. The 20 Commonwealth parliamentary appointees ‘broadly reflected the balance of representation of the parties across both Houses of the Commonwealth Parliament’. 190 Among the 20 State and Territory appointees, each of the six States were represented by the State Premier, the Opposition leader and a third parliamentarian nominated by the State Premier. The Northern Territory and the Australian Capital Territory were each represented by their Chief Ministers. 191

The remaining 36 appointed delegates were selected to ensure that:

- a wide diversity of skills and experience was represented and that groups which might not have been adequately represented in election outcomes were afforded the opportunity to participate. The appointments included representation of Aboriginal and Torres Strait Islanders. Gender balance was also important, and 18 women were among the 36 appointees. Appointments were spread across all of the States and Territories, and at least one delegate from each was a young person aged between 18 and 25. 192
- The inclusion of these appointed members made the Convention ‘more widely representative of the Australian community than any of its predecessors’. 193

Working practices of the Constitutional Convention

The procedures governing the Constitutional Convention were developed before its first meeting. A suggested order of proceedings and rules for debate was circulated to all delegates, and the proposals were revised in light of delegate comments. The procedures were endorsed by delegates on the first morning of the Convention.

Debates on two general issues took place on days 1 - 8 of the Convention. The first of these was whether Australia should become a republic. All delegates were given the opportunity to make an address on this general question and 132 did so. These ‘general addresses’ could cover ‘any of the wide range of issues associated with the question’. Additionally, delegates considered options for republican models of government. Resolutions considered during the initial debates were treated as provisional and revisited ‘in a final debate when all resolutions could be considered together as a package’.

The Convention also used working groups to develop ‘provisional resolutions for consideration in the initial debate’. Each working group reported to the Convention, after which delegates spoke in turn on each issue, and voted on working group resolutions and amendments moved from the floor. This mechanism enabled the identification of proposals for referral to the Resolutions Group for further consideration: if a provisional resolution or amendment received the support of 25% of delegates voting it would be referred to the Resolutions Group, which consisted of

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190 The Convention Report (n 7) Ch 4
191 ibid
192 ibid
193 Sinclair, ‘Introduction by the Chairman’, The Convention Report (n 7) Ch 1
194 Unless otherwise indicated, information in this section is taken from The Convention Report (n 7) Ch 5
195 Delegates could register to join whichever working groups they chose
12 members plus a Chair. It ‘filtered the wide range of provisional resolutions to expose the key issues for decision’ and made ‘important proposals about how the proceedings should be structured at key stages’.

The Convention adopted a specific process for considering republican models of government. Suggested models were submitted to the Chairman and then circulated to delegates, with models attracting the support of 10 or more delegates to be debated and voted on on Day 9. Four of the ten models submitted to the Chairman received the required level of support for debate on Day 9, during which delegates voted for one of those models, or for ‘no model’. The least popular was eliminated and the voting process repeated until a single model with the greatest support remained. The Convention then debated suggested amendments to the remaining model and took a final vote.

The final debate was structured according to the following resolutions developed by the Resolutions Group:

- Whether the Convention supported, in principle, Australia becoming a republic;
- Endorsement of proposals relating to the timing of any change, the preamble, and other matters;
- Whether the Convention supported the republican model chosen, as opposed to no change;
- A recommendation that the chosen model be put to the people in a referendum.

Public submissions to the Convention

The "Republic – Yes or No?" leaflet invited public submissions for consideration by the Convention. Over 1000 submissions were received before the end of the Convention on 13 February 1998.\(^\text{196}\)

Report of the Constitutional Convention\(^\text{197}\)

The Convention was in favour of Australia becoming a republic and supported a ‘Bipartisan Appointment of the President Model’.\(^\text{198}\) The Convention called for this model to be put to the public in a referendum in 1999. If the public voted in favour of the change, the new republic should come into effect by 1 January 2001. The Convention recommended that the Government carry out a public education programme prior to the referendum.

Assessing the Constitutional Convention: Lessons for the UK

1. Composition: the need for diversity

The Constitutional Convention’s mixed composition received a varied critical reception. Some argued that the Convention election was:

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\(^{196}\) A list of these submissions is published in Volume 2 of The Convention Report (n 7)

\(^{197}\) Published as Ch 7 to The Convention Report (n 7)

\(^{198}\) According to this model a parliamentary committee would consider nominations for President and report to the Prime Minister, providing a short-list of candidates. The Prime Minister would then present a single nomination for President to a Joint Sitting of both Houses of the Federal Parliament, which would approve the nomination by a 2/3 majority
an opportunity to attract the interest of voters, both when delegates were elected and when the Convention was held. It gave an incentive to Australians to understand the issues involved and to have a say in the substantive proposals to be put to referendum, through the election of delegates who represented their own views. A convention could break down or, at least, blur party political divisions over the Constitution, through the participation of delegates who were not party-aligned. A successful convention could give voters a sense of ownership of the result.  

Further, the election may have ‘broadened the range of people normally involved in the development of proposals for constitutional change’. However, some questioned the ability of elected delegates to assess the issues objectively. According to Winterton ‘[m]ost elected delegates understandably felt obliged to adhere to the platform on which they had been elected’. 

The appointed delegates however ‘enhanced the quality of the Convention’s deliberations because many of them were genuinely open to persuasion’. The inclusion of these delegates also helped ensure that the Convention was a more diverse body than those usually determining the political agenda. According to Steketee, the Convention:

looked and sounded different from a parliamentary sitting. It was a more representative group than the federal Parliament, with more women, more young people and more ethnic and indigenous groups giving it a more contemporary look.

Critics of the inclusion of appointed delegates highlighted the lack of ‘transparent criteria’ for the appointment of the 36 non-parliamentary delegates by the Government. This was particularly concerning in light of Williams’ arguments regarding the impact of this group of delegates:

the people appointed by the government were supportive of either the current monarchical system or of very minimal change. (...) The appointed delegates were successful in skewing the Convention toward a more conservative outcome.

Gibbs questioned the very aim of using appointed delegates to achieve diversity in the Convention’s composition, arguing:

The idea that the Convention should include representatives of various sections of society (the young, women, indigenous people, etc) was surely misguided. No doubt a constitutional convention should include representatives of all schools of political and constitutional thought, but the representation of sectional interests is more likely to divert attention from the constitutional issues than to assist in resolving them.

In the UK context, a body established to examine the case for the adoption of a codified constitution should seek to ensure diversity among its membership, consistently with the aims of the Australian Constitutional Convention. This is especially important in light of a recognisable need to encourage political

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199 Saunders, ‘How important was the Convention?’ (1998) 21 UNSWLJ 868, 869
200 ibid 870
202 ibid
204 Saunders (n 32) 871
205 Williams (n 6) 486
participation and ownership of constitutional change. A more diverse body may perceived by the public as having greater legitimacy, thereby increasingly its potential to engage the public in the constitutional reform process.

If a Constitutional Convention with a mixed membership were created to inquire into the adoption of a codified constitution, it may be valuable to ensure that elected members did not constitute an overall majority in order to avoid the risk that pre-conceived ideas or party politics might dominate the process. Any appointments should also be made on the basis of transparent criteria with cross party support. Such measures would help to enhance the perceived independence and legitimacy of the body, thus emphasising the objective nature of its assessment and conclusions.

2. Process: procedural autonomy, clear terms of reference and adequate time

Commentators have highlighted a number of defects in the process followed by the Constitutional Convention. Some argued that the Convention suffered from only ‘limited (...) procedural autonomy’.

Three rules related to decision-making stood out: first, the right of the Convention to elect its own presiding officer; to determine its own agenda of business; and to determine its own rules of procedure. (...) only the third of these decision rules was in the power of the body of delegates.

A body inquiring into constitutional reform in the UK should benefit from either a clear framework agreed prior to the commencing of its work, or greater procedural autonomy to determine its own processes. This would underline the independence of such a body, therefore lending authority to its conclusions and recommendations.

It would also be important to ensure that the subject of the inquiry was carefully defined, so as to ensure that deliberations were focused on only relevant issues. In the context of the Australian Constitutional Convention, Winterton argued that the Convention was unable to focus solely on determining the best republican model to put to the electorate, with ‘much time (...) occupied with debating the general question whether Australia should retain the monarchy’. This may have been exacerbated by the ‘absence of pre-designed workable models for popular election of a head of state and codification of the powers of the office’.

Ensuring clearly and closely defined terms of reference for a UK body’s work would therefore ensure that the process was focused on the core issues.

A final process issue relates to the timing of the election and the meeting of the Convention. The brief period between these events may have affected voters, many of whom ‘appeared not to understand the issues, or even the idea of the Convention itself’, and delegates, who had little time to ‘reflect on the issues, to develop clear and well-conceived resolutions and to test their ideas with others of like mind before the Convention began’. While a balance must be struck between the need to maintain momentum in the constitutional reform process and the need to ensure that

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207 See for example JCHR, A Bill of Rights for the UK? (2007-08, HL 165-I, HC 150-I) para. 303
209 ibid 878
210 Winterton (n 34) 865
211 Saunders (n 32) 871
212 Polls closed on 9 December 1997 and the Convention met for the first time on 2 February 1998
213 Saunders (n 32) 871
214 ibid. A similar point was also made by Winterton (n 34) 866
delegates are fully aware of relevant issues, sufficient time should be built into the process to ensure that delegates are able to approach their task in an informed manner.

The 1999 Referendum

Preliminary measures

In accordance with the recommendation of the Constitutional Convention and the requirements of section 128 of the Australian Constitution, two bills were introduced into the Federal Parliament on 10 June 1999. The Constitutional Alteration (Establishment of Republic) Bill and the Presidential Nominations Committee Bill sought to ‘give effect to the republic model developed by the Constitutional Convention’.  

The Joint Select Committee on the Republic Referendum undertook some public consultation and engagement during its scrutiny of these bills. It received 122 original written submissions and held public hearings in eleven different locations, as well as holding two roundtable discussions with leading constitutional lawyers. The Committee noted the Government’s planned ‘neutral education campaign [to] explain the existing system of government, the 1998 Constitutional Convention’s preferred republic model and the referendum process’, and highlighted its importance, arguing that it was ‘vital that Australians be adequately equipped to make an informed choice at the referendum’. The Committee recommended that:

1. the information requirements of Australians in remote locations, those with limited English skills, and younger voters be specifically catered for by the education campaign associated with the proposed referendum in November 1999, and that sufficient resources be allocated for this purpose.

A second Constitution Alteration bill was introduced into Parliament on 11 August 1999. The Constitution Alteration (Preamble) Bill sought to insert a new preamble into the Australian Constitution. The Federal Parliament passed both Constitution Amendment Bills with the required majorities on 12 August 1999, paving the way for the referendum to take place on 6 November 1999.

Conduct of the referendum

An extensive public information campaign undertaken prior to the referendum date aimed to ‘ensure all eligible electors were informed and understood what was required of them to fully participate in the referendum and to advise them of the range of services to which they had access.’ The campaign included the following measures:

1. AEC advertising campaign

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216 Ibid paras. 1.13 & 1.14
217 Ibid para. 1.23
218 Ibid para. 7.17
219 Ibid para. 7.18, Recommendation 14
221 Information in this section is taken from The Referendum Report (n 53)
This was carried out nationally and at State and Territory level, and concentrated on the key message of ‘Yes/No’, reflecting the core choice on the ballot papers. The national campaign included six television commercials, eight radio commercials and seven press adverts. Attempts were made to reach the widest possible audience: the campaign was translated into 17 ethnic languages in the press, 25 languages on radio (plus an additional 20 indigenous languages), and 11 languages on television.

2. Public relations activities
3. Publications explaining the conduct of the referendum
4. The Yes/No case pamphlet
   This 72-page booklet was sent to every elector, and contained ‘arguments for and against the two proposed constitutional changes and a complete copy of the Australian Constitution showing the proposed amendments.’ It was delivered between 27 September and 22 October 1999, ensuring that electors had at least two weeks to consider the issues.
5. National Telephone Enquiry Service
   This service received 447,344 enquiries throughout its operating period.
6. Telephone Interpreting Service
   15 language-specific telephone lines were provided, as well as an additional line for electors who did not speak any of those languages. This service received 10,098 calls during the referendum period and proved to be a ‘very effective means of ensuring that people from non-English speaking backgrounds, especially those with limited English language ability, have access to electoral information’.
7. Internet pages
8. Activities in respect of Special Target Groups
   An information programme was implemented to inform and engage Aboriginal and Torres Strait Islanders, and various measures were taken to assist electors with disabilities.
9. Government sponsored information campaign
   The Government implemented a neutral public education programme detailing ‘the proposed republic model, the existing constitutional arrangements, the role of State constitutions and the referendum process’. National advertising campaigns representing both sides of the debate received government funding.

Outcome of the referendum

12,392,040 electors were eligible to vote on referendum polling day. In accordance with electoral law voting in the referendum was compulsory and turnout was accordingly high, at 95.1%. Both proposals for alteration of the constitution were rejected by the Australian public. The republic proposal was defeated nationally and in all six States and the Northern Territory, although there was a majority ‘yes’ vote in the Australian Capital Territory. The preamble proposal was defeated nationally and in all States and Territories.

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222 Information in this section is taken from The Referendum Report (n 53)
223 The national vote was: Yes - 45.13%; No – 54.87%
224 The national vote was: Yes – 39.34%; No – 60.66%
Assessing the 1999 Referendum: Lessons for the UK

1. The need for public education and political leadership

One reason for the public’s rejection of the referendum model may have been a ‘growing perception among many Australians that the whole constitutional reform process was dominated by politicians to the exclusion of community views and aspirations’.225 This was illustrated by the late decision to hold a referendum on a preamble for the Constitution. The preamble proposal was subject to no detailed public or parliamentary consultation and was instead ‘revised according to a deal between the Government and the Democrats, who held the balance of power in the Senate, before being rushed through Parliament’.226

This sense of alienation between politicians and the public highlights the need for greater public education about constitutional reform. In the Australian context Beazley argued:

Australians simply will not accept a proposal for constitutional change which they perceive as being imposed upon them from on high. Unless all Australians are equipped with enough information to make an informed judgement, attempts to amend our Constitution – even if only to reflect the reality of everyday politics – will continue to falter.227

The republic referendum may have been lost in part because of a lack of understanding of the Australian system of government among the general public: those in favour of a republic ‘had the task not only of informing Australians about the merits of the proposed model, but also of providing enough information about the current system to allow changes to be evaluated’.228 This dual responsibility may have undermined the ability of the ‘yes’ campaign to make its case as effectively as possible.

Harris has argued that ‘the success of any large-scale constitutional reform initiative will largely depend upon how well-informed the public is’.229 Better education may enable greater and more informed public participation. As Beazley states, ‘People would be less likely to take the view that they are being mislead by some undefined or nefarious intention to change the fundamental features of [a] democracy if they had some sense of ownership of the issue’.230 It seems clear therefore that the public needs to be informed about and feel involved in the process of constitutional reform if the reform proposal is to have any chance of success.

Coupled with the need for public education, and perhaps paradoxically in light of the need to avoid the impression of dominance of the process by politicians, significant constitutional reform requires strong political leadership. Public support may be harder to achieve if there is no ‘broad consensus and support among elites’231 for a reform proposal. The success of constitutional reform is therefore likely to depend on ‘consensus support right across the political spectrum and support from the

225 Williams (n 6) 493
226 ibid 491
228 Williams (n 6) 497
229 Harris, A New Constitution for Australia (2002, Cavendish) 263
230 Beazley (n 60) 6
231 Galligan, ‘Rethinking the Australian republic’ (2001) 3 U Notre Dame Austl L Rev 45, 47
Any attempt to adopt a codified constitution in the UK would benefit from commitments to such a reform from the major political parties before public approval for the reform is sought.

Political leadership might fulfil an additional requirement for successful large-scale constitutional reform. According to McGarvie, the public need to be given sound reasons for supporting and approving constitutional changes. The change must be ‘seen to rise above mundane considerations’ and create ‘positive public feeling and sentiment – that it would be something very good for the community to accomplish’. This need to capture the public imagination would seem especially relevant if attempting to adopt a codified constitution in the absence of some “constitutional moment” and where the proposed changes may not promise an immediate and discernible advantage for the British public and their stable democratic society.

2. The finality of referendums and the need for effective public involvement

Referendums themselves present disadvantages as a means of achieving constitutional reform. Munro highlighted many of these:

- the answer you receive depends on the question you ask; (...) issues are not always best resolved by being forced into binary forms; and (...) results are also affected by circumstances and timing, the popularity or otherwise of governments, and other matters extraneous to the issue.

Further, referendums only allow for piecemeal reform on specific issues. If a reform is rejected in a referendum, as happened in Australia in 1999, further constructive debate on the issue is likely to be precluded for a significant period of time.

There is therefore a strong case for ensuring that the public are involved to the greatest extent possible in any attempt to adopt a codified constitution for the UK. As well as a programme of education to facilitate such participation, it is arguable that the public should be given a choice at various stages of the reform process, before holding a determinative referendum. One option for securing greater public involvement may be to hold a plebiscite on the desirability of the constitutional reform in principle. This would have the advantage of establishing whether there was broad public support for the reform before embarking on more detailed processes, but risks preventing the reform from taking place at all. This risk would be heightened in the absence of an effective public education campaign that explained the issues involved.

A second option in the context would be for an all-party parliamentary committee to investigate and develop different possible models for the reform, with the public

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233 ibid 17
234 Munro, ‘More daylight, less magic: the Australian referendum on the monarchy’ [2000] PL 3, 5
235 See for example Harris (n 62) 265, arguing that instead of piecemeal reform, it may be beneficial to propose wholesale constitutional reform to the public
236 Supporters of this in the Australian context include Beazley (n 60) 6, and Patmore, ‘Choosing the republic: the legal and constitutional steps in Australia and Canada’ (2005-2006) 31 Queen’s LJ 770, 790-91
237 Supporters of this in the Australian context include McGarvie (n 65) 21-22 and Harris (n 62) 259-60
voting for their preferred option in a plebiscite. A constitutional convention or other independent body could then be convened to determine the detail of the model chosen by the people, leading to the final referendum on whether to adopt the proposed reform. Although lengthier, such a process would be valuable in the context of an attempt to adopt a codified constitution in the UK. It would provide opportunities for public education about and involvement in the constitutional reform, and if political consensus for the principle of the reform had been achieved, the public’s specific approval of the chosen model would give added legitimacy to the process.

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The Australian Proposal for a Human Rights Code

The Australian Constitution contains no comprehensive protection for human rights. It does protect the following limited number of specific rights:

- Trial by jury for trials on indictment in relation to Commonwealth offences: section 80
- Freedom of religion: section 116
- Equal treatment as between residents of States: section 117
- Acquisition of property by the Commonwealth only on just terms: section 51(xxxi)

The Australian High Court has supplemented this protection through the recognition of certain implied rights. Both the right to freedom of political communication, recognised in Australian Capital Television Pty Ltd v Commonwealth (No 2), and the right to vote in federal elections, recognised in Roach v Electoral Commissioner, have been found to arise from the concept of representative government guaranteed in the Australian Constitution. The High Court has also suggested that a right to freedom from arbitrary executive detention may arise from the doctrine of separation of powers, which is also enshrined in the Constitution.

Although controversial, this approach has been welcomed:

The reality is that there is a growing judicial recognition that the legal protection afforded to fundamental rights by the bare text of the Constitution (and by statutory and common law) is inadequate.

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238 This step has been recommended for a future republic referendum in Australia by Beazley (n 60) 6 and McGarvie (n 65) 21-22
239 Supported by Harris (n 62) 259-60 and Patmore (n 69)
240 Commonwealth of Australia Constitution Act 1900, s9
241 (1992) 177 CLR 106
242 (2007) 233 CLR 162
243 Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1
244 Jones, ‘Fundamental rights in Australia and Britain: domestic and international aspects’, in Gearty & Tomkins (eds), Understanding Human Rights (Mansell 1996) 102. For a more recent discussion of the limited nature of the express and implied rights protected by the Commonwealth constitution see McGinty, ‘A human rights act for Australia’ (2010) 12 U Notre Dame Austl L Rev 1, 6-10
Some additional protection for rights may be achieved through the work of the Senate Standing Committee for the Scrutiny of Bills which ‘assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety’. This Committee reports to the Senate on whether a bill, inter alia, “trespasses unduly on personal rights and liberties”; and may draw any concerns to the attention of the Senate.

Human rights law in Australia has been described as ‘haphazard and incomplete’, and ‘shaped by both the politics of federalism and a dedication to legalism as the appropriate mode of legal reasoning’. This has resulted in a ‘culture wary of the discourse of rights’, reinforced by an abiding attachment to Dicey’s concept of absolute parliamentary sovereignty and concerns about the impact of greater rights protection on federal-state powers and the transfer of power from the democratic legislature to the unelected judiciary. Such a background might explain the rejection of constitutional amendments in 1944 and 1988 which would have extended protection for certain rights, and the failures of successive attempts to achieve statutory human rights protection.

Discussion of whether Australia should adopt comprehensive protection for human rights was revived during the constitutional reform debates of the late 1990s, and in 2007 the Australian Labor Party made commitments in their manifesto to ‘initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians’, and to: establish a process of consultation which will ensure that all Australians will be given the chance to have their say on this important question for our democracy. Labor will engage with Australians in deciding which democratic, industrial and community rights recognised in international treaties and conventions ratified by Australia should be protected. Any proposal for legislative change in this area must maintain sovereignty of the Parliament and shall not be based on the United States Bill of Rights.

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246 Ibid

247 Discussion and analysis of the parliamentary protection of human rights at federal level may be found in Williams & Burton, ‘Australia’s exclusive parliamentary model of rights protection’ (2013) 34 Stat LR 58, 60-63


249 Ibid


252 On the 1944 referendum see Williams, Human Rights under the Australian Constitution (OUP 1999) 252. On the 1988 referendum see for example Lee, ‘Reforming the Australian Constitution – the frozen continent refuses to thaw’ [1988] PL 535

253 A description of attempts to introduce statutory bills of rights in 1973, 1983 and 1985 is at Williams, Human Rights under the Australian Constitution (n 13) 252-55

254 Galligan & Larking, ‘Rights protection: the Bill of Rights debate and rights protection in Australia’s States and Territories’ (2007) 28 Adel L Rev 177, 184. The authors discuss the increasing support for greater legal protection for human rights and the positions of the political parties at 179-82

Although not a manifesto commitment to introduce a statutory bill of rights, this did lead to the launch in 2008 of the National Human Rights Consultation (‘NHRC’). The Committee (‘NHRCC’) established to carry out this consultation was asked to:

- conduct a nationwide Consultation with the aim of finding out which human rights and responsibilities should be protected and promoted in Australia, whether human rights are sufficiently protected and promoted, and how Australia could better protect and promote human rights.

**The National Human Rights Consultation, 2008-2009**

The NHRCC was composed of four members, chaired by Fr Frank Brennan. The Committee’s terms of reference required it to consult on the following three questions:

1. Which human rights (including corresponding responsibilities) should be protected and promoted?
2. Are these human rights currently sufficiently protected and promoted?
3. How could Australia better protect and promote human rights?

The terms of reference also contained requirements for community consultation. The Committee would:

- consult broadly with the community, particularly those who live in rural and regional areas (…)
- undertake a range of awareness raising activities to enhance participation in the consultation by a wide cross section of Australia’s diverse community (…)
- seek out the diverse range of views held by the community in relation to the protection and promotion of human rights (…)
- [and] identify key issues raised by the community in relation to the protection and promotion of human rights.

The Committee was asked to report on ‘the issues raised and the options identified for the Government to consider to enhance the protection and promotion of human rights’, including the advantages and disadvantages and level of community support for each option.

**The NHRCC’s working practices: emphasising public consultation**

The NHRCC aimed to ‘seek out the views and experiences of the broadest possible range of community members interested in human rights – the mainstream public as well as vulnerable and marginalised groups’. In this respect it was ‘particularly concerned to hear from Indigenous Australians, the homeless, people with disabilities, people with mental illness, refugees, new migrants, prisoners, and individuals and organisations involved in the protection and promotion of rights’. The Committee also sought the views of ‘lawyers, academics, parliamentarians, judges, senior public servants and senior police’.

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257 *The NHRCC Report* (n 12) xiii
258 ibid Appendix A, 383
259 ibid
260 ibid
261 ibid 4
262 ibid
263 ibid
The consultation process was officially launched on 4 February 2009.\textsuperscript{264} In order to meet its aims, the Committee employed the following wide variety of methods of public engagement.

1. **Written submissions**

Written submissions could be lodged from the launch date until 15 June 2009 by post, email or using an online submission form.\textsuperscript{265} The Committee received a total of 35,014 written submissions.\textsuperscript{266} While a ‘substantial number of the submissions received appeared to have been facilitated by campaigns run by lobby groups’,\textsuperscript{267} this was the ‘largest number ever for a national consultation in Australia’.\textsuperscript{268}

2. **Community roundtables**

The NHRCC held 66 roundtables in 52 locations throughout Australia between February and June 2009.\textsuperscript{269} Around 6,310 people registered to attend the events, and ‘many more attended without registration’.\textsuperscript{270} Each roundtable was chaired by a Committee member and ran for 2 hours. The roundtables varied in size between about 25 and 250 participants depending on the size of the community. They involved an introduction and overview of the Consultation by the Committee member, followed by discussion and responses to the terms of reference by participants, which were recorded and provided to the secretariat for later analysis. The NHRCC believed that these events were successful in engaging the public: ‘Throughout Australia participants were generally appreciative of having the opportunity to participate in a national debate on human rights’.\textsuperscript{271}

3. **Consultation website and Facebook pages**

A website provided information about the Consultation, updates on the Committee’s work, and notice and summaries of roundtables and other events hosted by the NHRCC.\textsuperscript{272} A Facebook page also provided background information about the Consultation, and links to the NHRC website and online forum.

4. **Online forum**

This ran from 19 May – 26 June 2009 and aimed to ‘gather public responses to the three primary questions set out in the Committee’s terms of reference and to facilitate public debate on [the question of] “Does Australia need a charter or bill of rights?”’.\textsuperscript{273} Online debates were led by the Committee Chair and facilitated by academics. The forum received 12,622 visits from 8,932 people and a separate online

\begin{footnotesize}
\begin{enumerate}
\item ibid 5
\item ibid
\item ibid
\item ibid
\item ibid 6
\item ibid, xiii
\item ibid 7. A list of these locations is at Appendix G
\item ibid
\item ibid 9
\item ibid
\item ibid 9-10
\end{enumerate}
\end{footnotesize}
discussion hosted by the Australian Youth Forum received 45 posts and 600 votes from young people.274

5. Additional meetings

The NHRCC held additional meetings with a broad range of individuals and organisations, including politicians, judges, people in immigration detention on Christmas Island, community groups, and NGOs.275

6. Public hearings

At the conclusion of the consultation process public hearings took place at Parliament House over three days in early July 2009, allowing the Committee to hear further from ‘some of those who had made submissions to discuss aspects of human rights emerging from the community roundtables and submissions’.276 Over 70 speakers took part, and the hearings were subsequently televised.277 Although informative, these public hearings may not have been as effective a method of public engagement as had been the community roundtables. The meetings were:

conducted in a typical “town hall” fashion, with a panel of experts at the front of the conference room. Certainly, participants were learning as much as the NHRCC members in attendance. But the audience was given only limited opportunities to express points or ask questions of the panel. Within the constraints of time, the NHRCC members made themselves available for direct dialogue with participants, who asked many questions about the process and the topics.278

7. Phone survey and focus group research

The NHRCC commissioned Colmar Brunton Social Research to undertake more focused research to inform its work. This phase of the Consultation was designed to:

allow the Committee to gain an appreciation of the level of interest in and knowledge of and attitudes about human rights and their protection among a random sample of Australians who had not attended the community roundtables or made a submission.279

Fifteen small focus groups took place, one metropolitan and one regional in each State and Territory.280 These groups were used to identify and develop more targeted questions for use in the subsequent national telephone survey of 1,200 people.281

8. Devolved consultation

274 ibid 10
275 ibid 10-11
276 ibid 11
277 ibid 12. A list of speakers is at Appendix F
278 Carson & Lubensky, ‘Raising expectations of democratic participation: an analysis of the National Human Rights Consultation’ (2010) 33 UNSWLJ 34, 51
279 The NHRCC Report (n 12) 12
280 Except for in the Australian Capital Territory, where no focus group was held
281 The full results of this research are published in Appendix B to The NHRCC Report (n 12)
This, too, was carried out by Colmar Brunton Social Research, and aimed to ‘cast light on the experiences of marginalised and vulnerable groups – individuals who are thought to be especially at risk of having their rights threatened or violated’. Taking place in June and July 2009, this nine small-group and individual discussions, and nine interviews of representatives of NGOs working with relevant groups, including ‘homeless people; people with mental illness and physical disabilities; recently arrived refugees and people recently released from immigration detention; ex-prisoners; the aged; and people with drug or alcohol dependencies’.

9. Social and economic cost-benefit analysis

The Allen Consulting Group carried out a cost-benefit analysis of various options for the protection and promotion of human rights in Australia.

10. Advice from the Solicitor-General

The NHRCC received legal advice from the Solicitor-General, which focused on the constitutional implications of introducing a federal human rights act.

11. Broader community discussion

The Committee highlighted the ‘strong interest in the “human rights debate” that was demonstrated throughout the Consultation process’, reflected in the publication of several books during the consultation period, as well as significant media interest.

The NHRCC Report

The NHRCC reported on 30 September 2009, stating that ‘after 10 months of listening to the people of Australia, the Committee was left in no doubt that the protection and promotion of human rights [was] a matter of national importance’. The Committee recommended a variety of measures that would have made significant changes to the system of human rights protection in Australia.

The Committee was clear that the ‘highest priority’ should be accorded to education as a means of improving rights protection in Australia, and set out certain steps to be taken by the Federal Government to achieve that aim. The NHRCC adopted something of a “twin-track” approach for the remainder of its recommendations. It endorsed a number of measures that could be adopted in the absence of federal statutory protection for human rights, including, inter alia, an ‘audit of all federal legislation, policies and practices to determine their compliance with Australia’s international human rights obligations’, a requirement for a

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282 The NHRCC Report (n 12) 13
283 ibid. The results of this research are at Appendix C
284 ibid. The results of this research are at Appendix D
285 ibid. This advice is published at Appendix E
286 ibid
287 ibid 14
288 The initial reporting date of 31 July 2009 had been extended as a ‘result of the overwhelming response to the call for public submissions’: The NHRCC Report (n 12) 4
289 ibid xiii
290 ibid 353-54 (Recommendations 1 & 2)
291 ibid 356 (Recommendation 4)
statement of compatibility to be made in respect of all bills, and the creation of a Joint Committee on Human Rights. However, the NHRCC’s clear recommendation was that Australia should ‘adopt a federal Human Rights Act’ which should be ‘based on the “dialogue” model’.


In response to the NHRCC recommendations the Federal Government announced a package of measures aimed at improving rights protection in Australia in April 2010. The National Human Rights Framework was designed to ‘reflect the key recommendations made by the Consultation Committee, including the need for greater human rights education’. However, the proposal for an Australian Human Rights Act was rejected on grounds that:

many Australians remain concerned about the possible consequences of such an Act. The Government believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community. The Government is committed to positive and practical change to promote and protect human rights. Advancing the cause of human rights in Australia would not be served by an approach that is divisive or creates an atmosphere of uncertainty or suspicion in the community.

Among the measures included in the National Human Rights Framework was a commitment to implement a ‘comprehensive suite of education initiatives to ensure all Australians are able to access information on human rights [including a] human rights education program for primary and secondary schools, the community and for the Commonwealth public sector’. The Government also undertook to provide for ‘increased parliamentary scrutiny of our laws against Australia’s human rights obligations’, a commitment given effect by the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).

The 2011 Act entered into force on 4 January 2012. It requires all bills introduced into Parliament to be accompanied by a statement of compatibility and creates a Joint Committee on Human Rights to examine bills and Acts for compatibility with human rights and report to Parliament. The Act may give ‘grounds for cautious optimism’ to those who ‘would like to see a more systematic approach to human rights protection in Australia’, as it is ‘one of the few pieces of Commonwealth legislation to explicitly and comprehensively integrate human rights

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292 ibid 357 (Recommendation 6)
293 ibid (Recommendation 7)
294 ibid 378 (Recommendation 18)
295 ibid 371 (Recommendation 19) The details of the Human Rights Act proposed by the NHRCC are in Recommendations 26-31
296 Attorney-General’s Department, Australia’s Human Rights Framework (April 2010) (‘Human Rights Framework’)
297 ibid 1
298 ibid
299 ibid 5
300 ibid 8
301 HRPSA 2011 (Cth), s2(1)
302 HRPSA 2011 (Cth), s8(1) & (2). The system of statements of compatibility is discussed at Kinley & Ernst ‘Exile on Main Street: Australia’s legislative agenda for human rights’ [2012] EHRLR 58, 67-68
303 HRPSA 2011 (Cth), s5. The JCHR is discussed at Kinley & Ernst (n 63) 62-67
304 HRPSA 2011 (Cth), s7
considerations into Australia’s legal framework’. However, a ‘key weakness’ of the Act may prove to be its failure to create a role for the courts in the protection of human rights, resulting in ‘no external check and balance on the operation of the scheme and Parliament’s compliance with it’.

Assessing Australia’s latest attempt to enhance protection for human rights: lessons for the UK

The NHRCC: composition and consultation

1. Composition: the need for objectivity and independence

The NHRCC had a small membership of four. Allan criticised the Committee’s composition, on the grounds that ‘looked to the impartial observer to be a very one-sided pro-bill of rights committee’, noting that ‘there was not a single known bill of rights sceptic or opponent appointed to the NHRCC’. If a small committee of experts was established to lead consultation and make recommendations regarding the adoption of a codified constitution in the UK, there would be a need to ensure either that a balance of views was represented in its composition, or that its members were able genuinely to approach the issues without pre-determined conclusions. This would help to reinforce the independence and objectivity of such a committee, which would be especially important if the inquiry sought to achieve a significant level of public involvement: ‘a process inviting public engagement (…) is best run by a body independent of government that is seen to have no vested interest in the outcome’.

2. Consultation methods: wide-ranging, inclusive and flexible

The NHRCC undoubtedly carried out a wide-ranging consultation exercise, employing a number of different avenues for public engagement and involvement. The Committee’s work in this regard has been described as a ‘formidable exercise in public consultation’, and Carson & Lubensky concluded that the ‘NHRCC (…) should be congratulated for conducting a process which has given many Australians the opportunity to articulate views on human rights issues’. This is not to say that the Committee’s working methods were without problems. For example, Smith argued that the Committee’s ‘astonishingly wide’ terms of reference, coupled with its decision specifically to consult marginalised and vulnerable groups, had the

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305 Kinley & Ernst (n 63) 59. The authors acknowledge that the success and impact of the Act will depend on ‘sufficient political will’ at 69
307 Allan (n 17) 179
308 ibid 181
309 This in itself might cause problems in practice, as the recent experience of the Commission on a Bill of Rights demonstrates: see for example Travis & Wintour, ‘Deadlock likely on commission pondering a British bill of rights’ The Guardian (London, 18 March 2011)
312 Carson & Lubensky, ‘Raising expectations of democratic participation: an analysis of the National Human Rights Consultation’ (2010) 33 UNSWLJ 34, 57
313 Smith (n 72) 174
potential to ‘give rise to heightened (and quite possibly unrealistic) aspirations’, particularly concerning economic and social rights.\textsuperscript{314} Further, Allan argued that claims regarding the level of public participation were misleading, as the conclusion that most submissions received by the NHRCC were in favour of a bill of rights:

wholly ignore[d] selection bias (…) and how skewed towards input from special interest lobby groups these submissions were. (…) [The Consultation] did not manage to hear from even 0.02 per cent of the Australian population, less than 1 in 500.\textsuperscript{315}

While there may be some merit in these claims, it remains the case that the level of public participation in the NHRC was far higher than in the recent Commission on a Bill of Rights consultation process in the UK.\textsuperscript{316}

The wide-ranging and flexible approach to consultation adopted by the NHRCC should be emulated by any inquiry into the adoption of a codified constitution for the UK. The broad range of methods used by the Committee is likely to have done much to encourage public engagement and involvement in the Consultation process. The NHRCC was concerned to ensure that all sections of the community were able to participate in the Consultation, and this was facilitated by ensuring that all materials were available online, holding community roundtables throughout the country, and using targeted consultative methods to ensure that the views of relatively powerless groups were given privileged status in the process’.\textsuperscript{317} Ensuring that a wide range of voices was heard during the consultation helped to avoid the process being dominated by politicians, academics and lobby groups. The NHRCC’s approach could therefore facilitate a sense of ownership of and involvement in the process by the public. This may in turn affect the extent to which the public accept and support any resulting recommendations and reforms.

A further benefit of the Committee’s use of a range of public engagement methods was that it was able to access a wide spectrum of information and views when formulating its report and recommendations. Ensuring that recommendations relating to major constitutional reform are made after considering a variety of viewpoints may help to increase the authority of those recommendations, and ensure that they are considered carefully by those in political office. Certainly the NHRCC’s approach seems to have produced a thorough and comprehensive report:

The report is a genuine attempt to construct a pathway to the better protection of human rights in Australia. It seems to me to do so in a way which is broadly acceptable to the majority whilst meeting most of the concerns raised by a significant minority of those engaged in the consultation. The report appears to be a thorough discussion of the relevant issues and competing arguments and views.\textsuperscript{318}

Not only was the NHRCC’s approach to public engagement wide-ranging, it was also flexible. Although the Committee’s terms of reference ‘stipulated the extent of public engagement in detail’, it was able to ‘adopt procedures that suited its

\textsuperscript{314} ibid 175

\textsuperscript{315} Allan (n 17) 181


\textsuperscript{317} Donald (n 71) 462

\textsuperscript{318} McMurdo, ‘An Australian Human Rights Act: quixotic impossible dream or inevitable natural progression?’ (2009-2010) 13 S Cross U L Rev 37, 40
evolving investigative needs’.\(^{319}\) For example, following a number of roundtable events the Committee ‘augmented their data-gathering when they realised early that they were falling short, and that their community efforts were being distorted (with the best of intentions) by activist groups’.\(^{320}\) The ‘openness and reflection’ of the NHRCC meant that it ‘recognised deficiencies in the process that it initially laid out’,\(^{321}\) and was able to take steps to ensure that it could gather the views of the widest range of Australians to inform its work.

Any attempt to adopt a codified constitution in the UK should seek to emulate the approach taken by the NHRCC, with some caveats. Public engagement might be enhanced by ensuring that any consultation period is ‘preceded by a period of civil activism’ to enable civil society groups to ‘influence the design of the process and prepare to involve their own constituencies’.\(^{322}\) This is vitally important, as ‘where this momentum is lacking and the impetus is top-down (…), the chances of achieving meaningful participation within a limited timeframe are much reduced’.\(^{323}\) To ensure that public participation in the constitutional reform process is meaningful, there is also a need for an effective programme of public education. At a minimum, this should involve ‘the provision of impartial and accessible information (in appropriate formats and languages) and a commitment by all parties to correct misperceptions’.\(^{324}\) This is especially important in light of the Hansard Society’s findings in 2008 that ‘[a]round half of the public have never heard of or know hardly anything at all about the constitutional arrangements governing Britain’\(^{325}\)

**The NHRCC recommendations and the Federal Government response**

1. Increasing opportunities for reform: a range of reform options and political commitment

The NHRCC’s “twin-track” recommendations meant that while the Consultation process did not result in comprehensive statutory provision for human rights, steps were taken to enhance the protection of human rights in Australia. This approach gave ‘the Australian government an opportunity to introduce some or all of the key features of the [HRA model supported by the NHRCC] without risking the political divisions (…) likely to impede any attempt to introduce a HRA’.\(^{326}\) It might therefore be valuable for any report on the adoption of a codified constitution for the UK to take a flexible approach, perhaps making recommendations on the core issue of whether to adopt a codified constitution and in what form, but also highlighting the specific issues justifying those recommendations. Suggesting different reform options might lead to some valuable reform in the most pressing areas, even if prevailing political circumstances prevented large-scale constitutional reform.

It cannot be ignored that the Australian Federal Government was able to choose not to follow the NHRCC’s preferred reform option of comprehensive statutory provision for human rights.

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\(^{319}\) Carson & Lubensky (n 73) 37  
\(^{320}\) ibid 56  
\(^{321}\) ibid 52  
\(^{322}\) Donald (n 71) 464  
\(^{323}\) ibid  
\(^{324}\) ibid 462-63  
\(^{326}\) Santow, ‘The Act that dare not speak its name: the National Human Rights Consultation Report’s parallel roads to human rights reform’ (2010) 33 UNSWLJ 8, 32
protection for human rights. In the UK, an ‘unambiguous procedural commitment to act on the results of public consultation within parameters that [are] clearly stated and justified’ would be valuable. Further, the principle of ‘transparency must extend to the final outcome, with a clear rationale for the inclusion of specific provisions’. This is especially important, as ‘if a government disregards the outcome of public consultation, both the process and any subsequent government action risk being viewed as illegitimate’. There would be a clear need for the decision to adopt a codified constitution in the UK to be perceived as legitimate by the public and the media. Political commitments to act in accordance with the outcomes of public consultation and participation, and clear reasons to justify specific decisions would help to support this.

2. Achieving constitutional reform: the need for political leadership and consensus

The success or failure of significant constitutional reform is likely to depend on effective political leadership and consensus: ‘in the absence of some powerful if not charismatic champion of the cause that is represented (…) experience tends to suggest that the prospects for success are considerably diminished’. The absence of such leadership and consensus following publication of The NHRCC Report may have been a factor in the decision not to adopt a Human Rights Act for Australia. There appears to have been dissent and division both among senior Labor Party figures and within the Federal Cabinet on this issue. In addition, the opposition Coalition Party was unwaveringly hostile to such a reform. Against this background, and in the face of significant media hostility to the concept of federal statutory protection for human rights, ‘What was missing in the Australian debates was the presence of a political champion of the measure’.

The Australian experience suggests that before embarking on processes of inquiry and public engagement, every effort should be made to secure cross party support for the principle of the adoption of a codified constitution for the UK, and a commitment to act on recommendations made following public consultation. Strong and effective political leadership and broad political consensus would help improve the chances for successful constitutional reform, and enhance the legitimacy of such measures.

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327 Donald (n 71) 463
328 ibid
329 ibid
330 Smith (n 72) 174
331 Allan (n 17) 186-87. Opposition within the Federal Cabinet was also noted in Babie & Rochow, ‘Feels like déjà vu: an Australian bill of rights and religious freedom’ [2010] BYU L Rev 821, at 854
332 Kirby (n 11) 269-70
New Zealand's Electoral Reform Process
(Royal Commission and Referendum)

1 The substantive issue with which the exercise engaged

In 1993, New Zealand voters approved the adoption of a new voting system at a binding referendum. The options put at the referendum were:

- I vote for the present First-Past-The-Post system as provided in the Electoral Act 1956.
- I vote for the proposed Mixed Member Proportional system as provided in the Electoral Act 1993

The MMP system was endorsed by 53.9% of voters. 46.1% voted for FPP. Turnout at the referendum, held at the same time as a general election, was 85.2%.

The MMP system has been used in Germany for federal parliamentary elections for over 60 years. The Scottish Parliament and Welsh Assembly use a variant of MMP, known as AMS.

MMP is classified by political scientists as a two-tier compensatory proportional representation voting system. Each voter has two votes. Under this model, approximately half of the legislature is elected to represent single member constituencies using FPP. The remaining half of the legislature is elected to represent a political party from a nationwide list in proportion to that party’s share of the popular vote.

2 The political background and origin of the substantive issue with which the constitutional reform exercise engaged

The adoption of MMP had its genesis in the 1970s with growing public dissatisfaction with the FPP system and its tendency to distort the popular vote in the composition of the unicameral legislature.

In 1978 and 1981, the National Party formed a majority government, even though the Labour Party had won the popular vote. Moreover, the electoral success of third parties was not being realised into parliamentary representation. In 1978, Social Credit won 16.1% of the popular vote and one seat in the legislature; in 1981, that increased to 20.7% and two seats. Other third parties fared similarly: in 1984 the New Zealand Party won 12.3% of the popular vote, and no seats (while Social Credit retained its two seats with a popular vote of 7.6%). In 1990, the NewLabour Party won one seat with 5.2% of the popular vote while the Green Party, which had won 6.9% of the popular vote, secured no seats.

From the 1970s the public’s trust in politicians declined markedly. Between 1975 and 1992, trust in Parliament and politicians as measured by the Heylen Research Centre’s Full Trust and Confidence Poll fell from 32% to 4%. This was partially based on a perception that parties (particularly during the neo-liberal economic reforms of the 1980s) were no longer honouring their manifesto commitments or acting in the best interests of the people.

The direct stimulus for the electoral reform decision was a 1981 manifesto promise made by the Labour Party that it would establish a Royal Commission to
consider the question of electoral reform and make recommendations for change. In 1984, the Labour Party won the general election and so was in a position to put this into effect under the direction of Geoffrey Palmer, the deputy Prime Minister and Minister of Justice, and former Professor of constitutional law.

3 Who participated in the preparation and design of the reform package?

The Royal Commission on the Electoral System was established in February 1985 and made its recommendations in a report entitled *Towards a Better Democracy* in December 1986. The Commission was chaired by the Hon John Wallace, a High Court judge. The other members were John Darwin, a former government statistician, Kenneth Keith, a Professor of constitutional law (now a member of the ICJ), Richard Mulgan, a political scientist, and Whetumarama Wereta, a statistician and policy analyst, who was the only woman and only Maori (indigenous people of New Zealand) representative on the Commission. Two specialist research officers, a political scientist and an economist, were appointed to assist the Commission.

Aside from establishing the Commission, the government played no further role in the work of the Commission. No member of Parliament was appointed to the Commission, in order to preserve its impartiality. Whetumarama Wereta was the only member of the Commission to have a known political affiliation – to the Labour Party.

The Commission took a multi-faceted approach to the consideration of the ten terms of reference set for it: these are set out at the end of this case study. According to the Commission, it had initially considered engaging in research and discussion papers, coupled with discussion seminars. This approach was abandoned due to time constraints.

The Commission made a general call for submissions in newspapers and television on the terms of reference (804 were received) as well as specific approaches to select organisations with particular knowledge and experience. All those who made submissions were able to support their submissions with a personal appearance before the Commission in one of three of New Zealand’s major cities. Representatives of political parties were invited to make initial and closing submissions to the Commission at the public hearings. The Commission also sought the views of current and past Members of Parliament, as well as current MPs selected to meet the Commission by the three parties then represented in the Parliament.

In addition, the Commission took particular care to hear the views of the Maori people (Maori representation being one of the terms of reference, and Maori parliamentary representation being guaranteed through the device of reserved seats for Maori). Special arrangements were made through the NZ Maori Council for special “hui” (a gathering or meeting) to be held at five locations in New Zealand. The Commission also met the MPs representing the Maori electorates.

Members of the Commission undertook field research by visiting the then West Germany, the Republic of Ireland, Australia, Canada and the United Kingdom. Expert reports on the historical development of the New Zealand electoral system and Maori representation were also commissioned. Finally, government departments whose work touched on the electoral system made submissions to the Commission and assisted it with its inquiries.
4 What were the working methods of the design process chosen by the government?

After nearly two years of hearing submissions from the public and other bodies, meeting political actors, conducting its own field research and receiving specialist historical reports, the Commission issued its report.

The Commission had adopted ten criteria by which to assess the most suitable electoral system for New Zealand (the second, and in its view, the most important of the terms of reference for it to consider). These were:

- Fairness between political parties
- Effective representation of minority and special interest groups
- Effective Maori representation
- Political integration
- Effective representation of constituents
- Effective voter participation
- Effective government
- Effective Parliament
- Effective parties
- Legitimacy

In light of these criteria, the Commission recommended the adoption of the MMP system with a 4% threshold for party list representation and an increase in the size of the Parliament from 99 to 120 members. It was also of the view that separate guaranteed representation for Maori should be abandoned. The Commission proposed that MMP should not be adopted unless it was endorsed by the public at a nationwide referendum, preferably to be held before or by 1987, the date of the next general election.

The Commission’s report received a lukewarm response from both the Labour and National parties, neither of which, outside a few individual MPs, had an interest in electoral reform of this type and which were possibly not expecting such a radical proposal. However, during the 1987 campaign, the Labour Prime Minister was challenged to say whether a referendum on MMP would indeed be held. The Prime Minister replied that the referendum would take place and furthermore, that it would be a binding one. This promise is widely regarded to have come about through the Prime Minister’s misreading of his speech notes – perhaps the most serendipitous accident in history for the proponents of electoral reform.

The Labour Party won the election but did not conduct the Prime Minister’s promised referendum as it was not party policy to do so. Instead it referred the question to a parliamentary committee which recommended the adoption of the SM system. At the 1990 election, attention again returned to the question of electoral reform. The National Party, perhaps seeking to capitalise on Labour’s failure to hold the referendum, and to be seen as honouring its promises, said in its election manifesto that it would hold a binding referendum on electoral law matters by the end of 1992.

The National Party won the election, and a referendum, albeit indicative rather than binding, was duly held in 1992. The referendum was in two parts. The first question asked voters whether they wished to retain FPP or change to another system. Turnout was 55%. An overwhelming 85% voted for change. In the second part, regardless of their answer to the first question, voters were asked which was their preferred alternative to FPP: MMP, STV, SM (all considered in depth by the Royal
Commission) and AV, in use in Australia for elections to the lower House of the federal legislature). A very large majority of 70.5% of voters expressed a preference for MMP.

The referendum took place against a backdrop of anti-government feeling and increased public dissatisfaction with politicians. The result was largely seen as a way for the public to exact some control over their political masters.

The government then committed to holding a second, binding, referendum in 1993. At this referendum, voters were asked to make a straight decision between MMP and FFP. MMP emerged again as the preferred choice, winning 53.9% of the vote to 46.1% for FFP. Preparations began in earnest for the first MMP election in 1996.

5 An account of the formal procedures through which the legislative proposal for the new constitution, or the constitutional amendment or reform, passed

Although New Zealand has a history of asking constitutionally significant questions by referendum, both the 1992 and 1993 referendums were conducted pursuant to specific enabling legislation. The public were able to make submissions on both pieces of legislation.

A referendum was legally required for the adoption of MMP because certain sections of the Electoral Act 1956 were entrenched and could not be changed without being approved by a simple majority referendum vote or a majority of 75% of the members of Parliament. An external campaign for a super-majority requirement for the adoption of MMP by its opponents did not gain serious traction.

The Electoral Referendum Act 1991 provided for the holding of the referendum, the form of the ballot and the order in which the options would appear, the appointment of scrutineers and the declaration of the result. No limits were imposed on the amount that could be spent promoting any of the five electoral systems under consideration, although advertising and literature had to be imprinted with the name and address of the promoter.

The government also established an independent panel known as the Electoral Referendum Panel chaired by the Chief Ombudsman to provide the public with information about the four alternatives to FPP. Its task was hampered by a lack of clarity as to how the non-MMP options would operate in practice.

Following the vote for change, the Parliament again enacted specific enabling legislation for the second, binding, referendum. The Electoral Referendum Act 1993 again provided for the conduct of the referendum, the form of the ballot, the declaration of the vote and various electoral offences.

An independent panel, again known as the Electoral Referendum Panel, was established by the government to conduct a public information campaign on the key differences between MMP and FPP. This time, the specifics of MMP (as it would be introduced) were made known so the panel’s task was somewhat more straightforward.

At the same time, the Parliament also enacted a new Electoral Act 1993 (to replace the Electoral Act 1956) which would form the basis for MMP, should it be chosen over FFP. The Act provided that it would come into effect in 1994 following a declaration from the Chief Electoral Officer that the proposal favouring MMP had been carried at the 1993 referendum. The Electoral Act implemented the Royal Commission’s recommendations to a large degree, save that it raised the threshold for
party representation to 5%, and preserved the separate Maori seats. The Electoral Act also established an electoral management body, to be known as the Electoral Commission. Finally, the Electoral Act provided that a parliamentary committee would conduct a review of MMP after two parliamentary terms, including whether there should be a referendum on changes to the electoral system. This latter provision was misreported and was widely understood by the public to be a promise to hold another referendum on MMP. (A referendum was finally held in 2011. MMP was endorsed by the public with 54% in favour of retaining it.)

6 Media coverage of the substantive issue and process, including the use and influence of opinion polls in news reporting on the subject.

Unfortunately very little archival media information on the two referendums is available. However, it is beyond doubt that the question of electoral reform and the double referendum dominated much of New Zealand public debate for some years. Opinion polls charting the battle between MMP and FPP were conducted constantly. The Electoral Referendum Panels’ information campaigns were required to be impartial and unbiased, and were limited to presenting the facts of the various options in such a way that no comment was permitted on the advantages and disadvantages (however perceived) of the various options.

As well as the independent information campaigns, the partisan aspects of the electoral reform debate were shaped by two key pressure groups: the Electoral Reform Coalition, which was pro-MMP and formed in 1987 in order to promote the recommendations of the Royal Commission, and the Campaign for Better Government, which supported FPP and was formed in 1993. It has been estimated that the Electoral Reform Coalition spent at least $NZ250 000 and the Campaign for Better Government (which was backed by a wealthy businessman) approximately 5 times that amount, including up to NZ$500 000 on television advertising in the last week alone.

7 Outcome and effect of the reform.

The Royal Commission predicted that the adoption of MMP would bring greater diversity of representation to the New Zealand Parliament. This has certainly come to pass, with not only an increase in the number of political parties in the legislature, but also increases in the numbers of women, Maori, Pacific Island, other ethnic minority and LGBT members. Most of this increase has been achieved through strategic placements on the party list. MMP was predicted to usher in a new era of coalition or minority government. Again, this has become the norm in New Zealand politics: there have been no single party majority governments under MMP. The convention of collective ministerial responsibility has been relaxed to accommodate this. It was also predicted that MMP would see a lessening in the dominance of the executive over the legislature. The executive has become more accountable to Parliament. This shifting dynamic is also seen in the work of select committees who now perform a considerable scrutiny and revision role with respect to Bills. In addition, the legislative process has become both more complex and the amount of legislation passed has declined. For example, between 1980 and 1996, the average number of Acts enacted each year was 173. In 2002, it was 86, and in 2008, 112.
Some supporters of MMP also believed that the breakdown of single party government would lead to a more consensual style of politics. These people have been disappointed. While there has been more negotiation over policy positions and the legislative programme between coalition partners and minority government supporters, New Zealand politics remains adversarial in nature. There is also a significant minority of the public who remain unhappy at the influence wielded by minor parties.

The role of the Governor-General as the Sovereign’s representative has also taken on more significance in terms of the reserve power to appoint a Prime Minister, although it has to be acknowledged that this increase in power is more potential than real.

In terms of the impact of MMP on voters, the New Zealand public consistently report feeling more empowered at elections – even where their electorate vote may be wasted by virtue of being in a safe seat, they can still influence the overall result through their party vote. The decline in voter turnout was also boosted immediately after the adoption of MMP but has since declined to below pre-MMP levels. Turnout was 74% at the 2011 general election.

One unforeseen consequence of the adoption of MMP was the tricky question of how to deal with list MPs who defected from their party to join another or become an independent representative. This clearly distorted the proportionality of Parliament, and the wishes of the electorate as expressed on election day. The Electoral Act 1993, which had largely copied over the provisions of the Electoral Act 1956 with the necessary adaptions for MMP, had not addressed this situation. After the governing coalition formed after the 1996 election broke down and a number of MPs defected from their parties, anti-defection legislation (the Electoral (Integrity) Amendment Act 2001) was enacted. This attempted to force the defecting list MP to leave Parliament and be replaced by the next candidate on the party list. An attempt a few years later to use the legislation by the ACT Party against one of its members resulted in a lengthy court case that went all the way to the Supreme Court. The legislation was subject to a sunset clause. It expired in 2006 and has not been re-enacted. Party defections appear to have settled down after the initial transition phase.

A further consequence of MMP (albeit perhaps not unforeseen) is that the formula for determining the electorate seats is partially dependent on the number of Maori electorate seats. These in turn are decided according to the number on the Maori electoral roll. As these increase, as they have from five in 1996 to seven in 2008 and 2011, the number of party list seats has declined to accommodate this increase – this is necessary because the South Island must have 16 seats by law. Because of this complex interlinkage between the Maori seats, the general seats, the party list seats and the fact that the size of Parliament is capped under the Electoral Act 1993 at 120 members, the number of party seats is declining so that there are now 50 list seats to 70 electorate seats, compared to the 60:60 split envisaged by the Royal Commission. This affects the impact of the party vote.

8 Assessment of the overall method used in preparing and implementing the constitutional change, and what it has to offer to the United Kingdom

The New Zealand experience of electoral reform, although sourced in public alienation from the political process, is notable for the smooth way in which the possible change was investigated, reported, and then presented to and voted on by the general public.
Particularly relevant to the success of electoral reform was the way in which political actors largely stood back from the process of reform, no doubt because they were at the heart of the groundswell for change. The government neither influenced the recommendations of the Commission nor did it seek (apart from the comments of individual MPs) to influence the public debate on reform options.

In addition, the adoption of clear principles by which to guide the assessment of voting systems by the Royal Commission, twinned with its grounding in New Zealand’s political, social and constitutional history, meant that the report was effectively unimpeachable. The involvement of the people, both in terms of the Commission’s invitations to submit and the way in which the Commission made itself available to hear the views of the New Zealand public, also in my view contributed to the standing of the report and its recommendations.

The use of a referendum to gain the final approval of the people was also an important factor in ensuring the legitimacy and acceptance of the new electoral system, even though it would have been possible to effect the change via the ordinary legislative process.

The Royal Commission’s Terms of Reference

The Commission's terms of reference were to receive representations upon, to inquire into, to investigate, and report upon the following matters:

1. Whether any changes to the law and practice governing the conduct of Parliamentary elections are necessary or desirable;
2. Whether the existing system of Parliamentary representation (whereby in respect of each electoral district the candidate with the highest number of votes is elected as the Member of Parliament for that district) should continue or whether all or a specified number of Members of Parliament should be elected under an alternative system or alternative systems, such as proportional representation or preferential voting;
3. Whether the number of Members of Parliament should be increased, and, if so, how many additional Members of Parliament should there be;
4. Whether the existing formulae and procedures for determining the number and boundaries of electoral districts should be changed….;
5. The nature and basis of Maori representation in Parliament;
6. The term of Parliament;
7. To what extent referenda should be used to determine controversial issues, the appropriateness of provisions governing the conduct of referenda, and whether referenda should be legislatively binding;
8. Whether the present limits on election expenses are appropriate and whether any limits on such expenses should be extended to political parties and to the amount of individual or total donations candidates or parties received and whether such expenses should be defrayed wholly or in part by State grants and the conditions, if any, which should apply to such grants;
9. Any other questions relating to the electoral system which you may see fit to inquire into, investigate, and report upon.

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Belgium’s Constitutional Revision of 1993

The reform of the Belgian constitution that took place in the spring and summer of 1993 sought to convert Belgium from a unitary into a federal state. This process of dissociation, of the centre willingly and peacefully surrendering its sovereignty, was and remains all but unique. However, this radical change was achieved using the following long-established procedures for constitutional amendment. Under Article 131, the federal Parliament (legislative power) has the right to declare that there are reasons to revise certain specified constitutional provisions. Following such a declaration, the two Houses are then automatically dissolved, and replaced by two new Houses aconvened under the procedures laid down in Article 71. These Houses then reach a decision, in common accord with the King, on the points submitted for revision. Under the amendment procedures laid down in the constitution, the Houses may only conduct their debate if at least two thirds of the members who make up each House are present, and no change may be adopted unless it is supported by at least two thirds of the votes cast. Under Article 131b, no constitutional revision can be started or pursued during times of war or when the Houses are prevented from meeting freely on federal territory.

Using these mechanisms, the constitution was formally redrafted to recognise the division of the country into three distinct Regions, each with clearly established powers. These changes are now reflected in article 1 of the Belgian constitution, which states clearly: ‘Belgium is a federal State composed of Communities and Regions.’ A nation which, to all intents and purposes, had been divided both linguistically and territorially thus officially recognised those divisions in its fundamental law.

The political background: gradual recognition of the Communities and Regions by the Belgian constitution

The 1993 reform was the latest, provisional stage in a constitutional evolution that had developed to address the growing friction between the Flemish and Walloon populations. This so-called ‘long transition’ was shaped not by a guiding vision, but by the need to attempt to settle immediate differences between different communities. At each stage, political imperatives determined the compromise that emerged.

Reform in the post-war era advanced in small steps, provoked by periodic crises such as the royal question (resolved in 1950), disputes about language teaching in schools, and in the late 1950s and early 1960s the rise of the Flemish economy. The polarisation of public opinion, evident in several strikes and large street demonstrations in 1961 and 1962, put significant pressure on the political elites. It

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333 A brief description of the structure of the Belgian constitution is at Cullen, ‘Adaptive federalism in Belgium’ (1990) 13 UNSWLJ 346, 348-50. There is no official English translation of the Belgian constitution. A fully updated but unofficial translation prepared by the Belgian House of Representatives is at:
334 The Belgian constitution was renumbered in 1994. Unless otherwise stated, this paper uses the numbering as applicable at the time of the events in question
caused the main parties to subdivide and organise on a regional basis, which in turn contributed to the difficulty of forming governments.335

In 1970 the fourth government of Gaston Eyskens introduced a programme of constitutional revision that sought to establish the union on ‘a renewed basis’. As a result three ‘cultural Communities’ - Dutch, French and German – were established, each with their own councils empowered to issue decrees in limited fields.336 A new article was also inserted into the constitution establishing three ‘Regions’: Flanders, Wallonia and the capital Brussels.337 The powers of these Regions were not set out, but it was made clear that future reform would be the subject of ‘special majority laws’, that is, laws commanding the support of a simple majority in the Dutch-speaking and French-speaking parliamentary groups as well as the normal constitutional supermajority of two-thirds in parliament as a whole. In this way, the linguistic minority groups were suitably protected.

The procedure governing special majority laws is as follows. Under Article 3b, Belgium comprises four linguistic regions: the Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital and the German-speaking region, and each municipality of the Kingdom forms part of one of these linguistic regions. The boundaries of the four regions can only be changed or corrected by a law passed by a majority of the votes cast in each linguistic group in each House, on condition that a majority of the members of each group is present and provided that the total number of votes in favour that are cast in the two linguistic groups is equal to at least two thirds of the votes cast.

In 1980 the third Wilfried Martens government338 successfully employed this mechanism officially to establish the new regional units - with the significant exception of Brussels. Flanders and Wallonia were granted separate assemblies339 and executives with the power to legislate on various regional matters, such as the environment, housing and employment.340 As a consequence, Belgium was operating a dual structure made up of language-based Community and territory-based Regional entities with different jurisdictions and differing responsibilities.341 To complicate matters further the Flemish community and regional institutions were promptly merged. The Brussels Region was eventually established in 1988-89, when additional areas of competence were assigned to the respective regional authorities.

A mixed parliamentary commission was subsequently established to consider the next phase of institutional reform. Chaired by the Presidents of the two Houses of parliament and with a membership reflecting the balance of parliamentary forces, the commission was charged with examining key areas of the ‘national’ question, collecting evidence from a wide range of witnesses and making recommendations. Ministers who took part in proceedings were asked not to embark on any related reforms until the work of the commission had finished. Four substantial reports were published in 1990 dealing with parliamentary reform, the sharing of national and regional competence, the right of the Regions to conduct their own external relations,

335 An account of the language issue as a driver for the constitutional reforms occurring since 1970 is at Cullen (n 1) 350-52
336 Belgian constitution, art 2 (current numbering)
337 Belgian constitution, art 3 (current numbering)
339 Composed of their MPs serving in the national parliament
341 Described at Cullen (n 1) 353-54
and other relevant issues. While there was unanimity on most of the main topics, it was widely understood that no further action would be taken until the principal political parties had forged a consensus.

In October 1991, a second Martens coalition government, at the time close to collapse, pushed through a ‘declaration of revision of the constitution’, outlining the provisions that it sought to alter. In conformity with the procedure prescribed by the constitution, the passing of the declaration and the submission of royal approval automatically triggered the dissolution of parliament.

On taking office as leader of a four-party formation following the general election, new Prime Minister Jean-Luc Dehaene called for an urgent ‘dialogue’ between the Flemish and Walloon communities in order to ‘develop’ the federal system. Further reform was stalled by a failure to resolve several outstanding disputes, including the establishment of direct elections to the regional assemblies, the reform of the national parliament and the defining of central and regional prerogatives. Frustration with the Prime Minister’s approach was obvious. Much of the ‘dialogue’ was concerned with the issues that had already been examined by the mixed parliamentary commission. In any event, any decisions would have to be put to parliament and debated frankly and transparently.

In an effort to break the deadlock, the majority parties met for a two-day conference in September 1992. The agreed joint text - subsequently known as the accords de la Saint-Michel - envisaged the completion of the move to a true federal state, devolving still more responsibility to the Regions and, crucially, allocating a much greater share of the national revenue to the budgets of the Regions. This was the finest of balancing acts, carefully structured to hold together the coalition while resisting the demands of Flemish separatists. Hopeful of attracting the support of some of the smaller parliamentary parties, the coalition was in a position to press ahead with a bold scheme of constitutional ‘modernisation’ that would affect some thirty articles of the constitution.

**A reform package prepared and designed by a select group of politicians**

The discussion and negotiation of the accords was entirely in the hands of the leadership of the coalition partners, led by the Prime Minister. The final agreement was therefore shaped by the dynamics of coalition bargaining. It was only after the proposals were unveiled to the press that they were put before the officers of the various party organisations and the Council of Ministers. By operating in conclave and restricting participation to a narrow circle of decision-makers, it might be said that the Prime Minister took the necessary steps to secure a signed agreement.

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342 L’ensemble de la réforme des institutions parlementaires (Sénat n 935-1, 1989-1990; Chambre n 01167/1 - 89/90; La compétence résiduare (Chambre n 01167/2 - 89/90; Sénat n 0935-2,1989-1990); Relations internationales (Chambre n 01167/3 - 89/90; Sénat n 0935-3, 1989-1990); Autres problèmes institutionnels (Doc. Sénat n 0935-4, 1989-1990 Chambre n 01167/4 - 89/90)

343 In accordance with the procedure set out in art 131 (now art 195) of the constitution

344 Although a declaration must specify the provisions of the constitution that are intended to be amended, the succeeding legislature is not bound to implement the proposed reforms: Berhendt, ‘The process of constitutional reform in Belgium’, ch 5 in X. Contiades (ed), Engineering Constitutional Change (Routledge 2012) 40-41

345 La Chambre de Représentants de Belgique, 17 October 1991, 6 - 162-180 and 185-199; Le Sénat de Belgique, 17 October 1991, 7 - 125-142

346 Consisting of the Christian People’s Party, the Christian Social Party and the two Socialist parties

347 This amounted to around one quarter of the total length of the constitution
However, another view might be that since the proposals would result in profound constitutional change, the Prime Minister unwisely had flouted good democratic practice. In this respect, the all-important factor was not who had been involved but who had been excluded.

The opposition Liberal parties depicted the accords as a high-level political fix that was contrary to the wishes of most citizens, and called for a referendum. A new Belgium was in the making and in light of the ambiguity of the accords, it was argued that the electorate should be asked for their consent. The weight of opinion, however, was hostile. Many arguments were made against such a step, some of which might have been made in respect of any proposed referendum. They included the following: that parliament was elected to decide on this sort of issue; that public opinion was not fully informed; and that it would be wrong to try to reduce complex matters to a simple ‘yes’ or ‘no’ question. There were also some important objections, specific to the Belgian constitutional system. Technically, referendums are prohibited by the constitution. Further, the difficulties involved in polling the whole country and counting the vote were significant. Perhaps most importantly, in a political sense, any attempt to open the debate to wider discussion risked exacerbating an already unstable situation: a dramatic North-South split in voting would have had far-reaching consequences for the Belgian State. This illustrates the Belgian paradox - the more democratic the dialogue, the greater the peril to Belgian unity.

Perhaps unsurprisingly given their far-reaching implications, the accords were the focus of considerable controversy. Most federations are centripetal, based on the American model of power gravitating towards the centre. In contrast, the Belgian experience was one of progressively transferring competence outwards. It was sui generis. The commitment to move to a fully federal state raised a host of problems. It was possible that the proposed shifts of power to the Communities and Regions would be constitutionally inadmissible. There was the serious issue of the attribution of concurrent and residual powers. Further, the future status of the Brussels Region, a francophone island in the midst of Flanders, loomed large, fuelled by talk of Flemish annexation. Above all, reformers risked weakening the institutional framework to such an extent that Belgium would, sooner or later, cease to be a unified state. Anxiety that the Regions might soon be in a quasi-constitutional position to arrange their own institutions to their own liking, irrespective of the views of the national parliament, led some to believe that such an outcome was inevitable. Indeed, some even accused the Prime Minister of usurping the proper role of parliament in making and unmaking the constitution.

The coalition, however, maintained that it had acted in complete conformity with constitutional procedures. A declaration of revision had been put before parliament, voted on and approved by both Houses. There had followed an election, during which manifestos had been presented to the public, paving the way for the present ‘constituent’ parliament. Dehaene had made plain his plans for reform when entering office. He had proposed to establish a new form of nationhood, a coherently organised federal state, and he had every intention of finding the majorities to bring about change in a constitutional manner.

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348 The PRL and the VLD
349 Belgian constitution, art 42 (current numbering) states: ‘The members of the two Houses represent the Nation (…)’
350 Lagasse, ‘Referendums, mode d’emploi’, Le Soir, 1 December 1992
However, those majorities were not guaranteed. In order to obtain a majority of
two-thirds of the votes in both Houses, the four coalition parties looked to three minor
parties\textsuperscript{352} for support. To facilitate this, the coalition acknowledged that the \textit{accords}
were negotiable, providing that any changes did not alter their underlying philosophy.
Once an agreement had been reached, Dehaene allowed for no further debate on the
proposals. He argued that the reforms were the culmination of a process of change
dating back to 1970, and that further parliamentary scrutiny was unnecessary.\textsuperscript{353} This
uncompromising approach lent at least some credence to the view that the coalition
was preparing a veritable \textit{coup d’état}: that it was breaking up the union by stripping
away the safeguards normally included in a federative scheme, recklessly paving the
way to the disintegration of the Belgian state.

The formal passage of the constitutional reform proposals: a range of measures
and allegations of circumventing proper constitutional procedures

The Belgian constitution, dating from 1831, is exceptionally rigid - the rules
regulating the revision of the constitution are complex, and devised to prevent hasty
or partisan change. The constitution cannot be altered in times of war or when parliament is unable freely to meet, and it cannot be modified at short notice or in its entirety.\textsuperscript{354} The three-stage process - declaration, dissolution and division - is time-
consuming and taxing, and has never been amended. This onerous process makes the constitution highly resistant to revision.

Nevertheless, a significant parliamentary majority can achieve constitutional reform. The series of reforms that had decentralised power since 1970 were achieved using a variety of methods. The adoption of formal constitutional amendments was supplemented by the special majority law procedure of 1980, and ordinary laws were also used to co-ordinate and consolidate the reforms. However, the required majority differed in each of these three cases, creating some glaring anomalies (for example, supposedly ‘inferior’ special majority laws are harder to change than ‘superior’ constitutional provisions). Employing this range of measures meant that a series of complicated reforms was implemented, but some argued that in so doing, legislators had undermined article 131 and had breached the spirit, if not the actual letter, of the constitution.\textsuperscript{355} This charge of trying to circumvent the constitution using a creative interpretation of the relevant rules, as well as criticism that they had acted with excessive haste and even allegations of attempted blackmail, were levelled at the authors of the 1992 \textit{accords}.

Associated issues related to responsibility for the reform and authority to implement it. Critics argued that the reform was the work of the four-party coalition and its ‘external’ allies - a grouping of seven - giving rise to the unusual spectacle of a constitutional reform process driven by an artificial collection of parties wholly unknown to the constitution.

The precariousness of its majority and the fragility of the deal impelled the coalition to act quickly. The essential features of the \textit{accords} were drawn up into draft texts and submitted to parliament in the form of ‘\textit{projets}’ in the Senate and ‘\textit{propositions}’ in the House of Representatives. The drafts underwent detailed scrutiny

\textsuperscript{352} Ecolo and Agalev (the French and Flemish green parties) and Volksunie (the Flemish nationalists)
\textsuperscript{354} Delperée, ‘The process for amending the Belgian constitution’ (1991) \textit{14 Canadian Parliamentary Review} 18
\textsuperscript{355} ‘Revision de la constitution - de la valse au tango’, \textit{Le Soir}, 19 March 1993
by two committees, assisted by advice from the Conseil d’Etat. The Conseil was critical of several aspects of the proposals, particularly where there was potential for the new provisions to be applied differently in each of the Regions. Despite a large number of proposed amendments, the coalition was willing to accept only a handful of proposals made by the majority parties, and rejected all those made by the opposition. The first set of constitutional amendments was ready for discussion in parliament by the turn of the year, beginning with the new article 1 which proclaimed that Belgium ‘is a federal state composed of Communities and Regions’.

The coalition should have enjoyed a comfortable majority in the Senate, but this was called into question by a proposal to reduce the size and status of the upper chamber. During an introductory debate, hostile speakers denounced the origin and the content of the accords, which were said to have been conceived in secret and facilitated by underhand promises. It was also observed that the terms of the accords were purposely left open to several interpretations. Critics felt that parliament was being asked to sanction an almost unmodified document that had been devised by an ad hoc majority – hardly the most solid of grounds on which to base a permanent constitutional change of such magnitude. Unlikely to defeat the reform, Opposition senators instead proposed a constitutional amendment to article 26 which would allow the electorate always to contribute to the legislative process by putting measures approved by parliament to a popular vote. The new referendum requirement would be applied for the first time to the current constitutional reform. The amendment was roundly defeated by 121 votes to 37 (with 11 abstentions).

Opponents of the reforms were most obstructive in the House, where the coalition’s majority was on a knife edge. These opponents used a variety of tactics designed to stop the passage of the reforms. They reworded provisions to alter their import. They tried to suspend proceedings when the House was not quorate. Their trump card, however, was an amendment to the proposed new article 1 that would have required a one-off ‘constitutional referendum’ pertaining to the present reform package. It was argued that a fundamental transformation of the country was about to be undertaken, but the mandate for it in terms of majority support throughout the country was unclear. Further, parliament’s ‘constituent’ role was being stifled, and no-one seemed to be responsible for piloting the reform. A popular petition in favour of this amendment had already drawn 60,000 signatures. Nevertheless, the referendum proposal was rejected by a convincing margin.

In subsequent debates, attention turned to the coalition’s alleged abuses of process. Under Title III of the constitution the coalition proposed a new article 59bis to make provision for direct elections to the assemblies of the Communities and Regions. Representatives challenged the proposal when it came before the House, on grounds that the relevant article had not been included in the original declaration of revision of October 1991. According to the formal procedures for constitutional amendment, this article should not have been the subject of revision, as the ‘constituent’ legislature was unable to modify anything not outlined in the declaration of revision. Dehaene countered that additions to Title III were envisaged during the travaux preparatoires for the accords and that it was wrong to suggest, therefore, that the coalition’s intentions had not been clear. He also argued that each previous state

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356 Le Sénat de Belgique, Rapport de la commission de la révision de la constitution (1992-1993). Reports on article 1 alone ran to several hundred pages
358 La Chambre de Représentants de Belgique, 6 February 1993, 31 - 1223-1224
359 Covering arts 23 to 109 (currently arts 33 to 166)
reform had proceeded in the same manner. The chief obstacle was the francophone refusal to countenance changes to article 107quater, such that progress had always been achieved through inventive methods, while leaving the Brussels region intact. Hence the broad reference in the declaration of revisions to Title III as a whole, ensuring that such initiatives could proceed. In fact, he continued, the rules for revision were loaded unhelpfully in favour of the status quo.

Similar arguments were made in the Senate during the noisy exchanges over a new article 25ter, an essential concomitant of article 1 that would have altered the attribution of competencies, assigning residual competence to the Communities and Regions and only granting to the federal authority those powers that would, thereafter, be expressly enumerated. Opponents again argued that the coalition was attempting to avoid the strict rules governing constitutional amendments, showing contempt for the rule of law. In response, the coalition stated that some, though not all of the relevant articles fell under the broad category of Title III. Further if the previous legislature had not wanted certain articles to be revised, it could have excluded them altogether, but this had not happened. The coalition had always envisaged large-scale constitutional reform and needed scope to implement its proposals. During the debates, Serge Moureaux explained: ‘At the preconstituent stage, everybody recognised the need to permit the constituent to have at its disposal a vast field of possibilities. And that is what we did’. The Senate, like the House, subsequently passed the proposal with the necessary majority.

There were further significant clashes, but one final point of acute contention occurred in the House. Opponents had been striving clearly to define the degree of change, imposing a kind of institutional ‘stop’. An opposition resolution denouncing federalism as the ‘precursor’ to separatism was rejected. As an alternative, they explored the possibility of entrenching the revised article 1 and rendering it impossible to change, although expert opinion was divided on whether such a thing was possible. However, the PS had obtained a concession at a late stage of the coalition negotiations. This was brought forward in a clause stipulating that in future conflicts of interest there was to be a reciprocal obligation upon all federal entities to recognise and respect the concept of ‘federal loyalty’. That notion was not defined and, as the discussion in the Senate had made plain, there was no means of enforcement. Critics saw this as the ultimate insult, a concession to sweeten the Socialists. It was also, Liberal speakers remarked, entirely symptomatic of the way the coalition had conducted itself. They argued that the fact that subterfuge had been practised in the past did not mean it had become the constitutional norm. Further, the measures intended to inhibit constitutional change had been undermined. The one means of halting the rush to reform would have been a referendum, but this had been denied. To whistles of protest, the remaining few articles were voted through.

In a special edition of the Moniteur belge of 8 May 1993, the amendments to the constitution were set out in full, accompanied by the final stage of the revision

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360 This article, as revised in 1970, established the tripartite division of Belgium
361 Although he accepted that the Flemish regarded art 59bis (establishing the cultural communities in 1970) as equally sacrosanct
362 La Chambre de Représentants de Belgique, 10 February 1993, 35 - 1430-1431
363 Le Sénat de Belgique, 10 March 1993, 69 - 2057
364 Le Sénat de Belgique, 10 February 1993, 61 - 1748-1759
365 La Chambre de Représentants, 23 April 1993, 50 - 2144-2157
process, royal assent.\textsuperscript{366} The completion of these amendments allowed the presentation before parliament - reverting to its normal legislative capacity - of a series of special laws specifically relating to the financing of the Communities and Regions, as well as a number of ordinary laws required to adjust existing legislation, particularly the electoral codes but also the initiation of ecotaxes (which had been an important demand of Ecolo).\textsuperscript{367}

Publication of the remaining provisions in the \textit{Moniteur belge} marked the completion of the entirety of the constitutional reform programme. It was an opportunity for reflection. Despite a dogged struggle, Dehaene, by general consent, had pulled off a political \textit{tour de force}. Though cumbersome, the revision process had proved adaptable enough to enable an experienced politician to form a majority and translate the \textit{accords de la Saint-Michel} into legislative reality. King Baudouin, too, though he had been careful to maintain strict neutrality, supplied his royal seal of approval. In a message on the Belgian National Day he acknowledged the fulfilment of the work that had started in 1970 and warmly welcomed the new settlement that had been achieved between the centre and the Communities and Regions. He praised the democratic and peaceful character of the change and hoped that it reflected a desire for long-lasting conciliation and tolerance.\textsuperscript{368}

\textbf{Media coverage of the constitutional reform process}

The Belgian media is divided along Dutch-language and French-language lines, and reporting often reflects the interests of the respective communities. The constitutional reform of 1993 was a case in point. The provision of information to the media by politicians was tailored to the audience of the particular media outlet,\textsuperscript{369} and coverage varied. Flemish news outlets minimised expressions of anti-separatist opinion in Wallonia, whereas Wallonian papers were apt to give extra prominence to expressions of Flemish independence. Reports reflected preconceived attitudes. For example, as the \textit{accords de la Saint-Michel} were initially greeted favourably by the Flemish press, some argued that the \textit{accords} therefore favoured the Flemish.

Opinion polling showed that a majority of the public supported a referendum. According to polling organisation Sobemap, in February 1993 there were majorities in favour of such a measure in Flanders (60%), Wallonia (65%) and Brussels (70%). Conversely, few claimed to have a very good or good knowledge of the content of the \textit{accords}. A sizeable minority had not even heard of them. There was therefore interest in the constitutional reform process, but it was often ill-informed.

The political class might be said to have taken advantage of this lack of understanding. Sensitive to the controversial nature of the issue, the pro-reform camp were anxious not to stir up public feeling, whereas the Liberal opposition tried to agitate and antagonise. As a result, the events of 1993 reinforced a widespread impression that Belgium was governed by a closed party system at the mercy of political machinations, and that, in the words of the Prime Minister during one televised debate, although certain things could be said in public, other things were best discussed behind closed doors. The hope that the constitutional reform process might restore to parliament some of its lost prestige was in vain.

\textsuperscript{366} Special edition of \textit{Le Moniteur belge}, 8 May 1993
\textsuperscript{367} Loi ordinaire visant à achever la structure fédérale de l'Etat (20 July 1993)
\textsuperscript{368} ‘Le roi approuve la réforme de l'état et invite au civisme fédérale’, \textit{Le Soir}, 22 July 1993
\textsuperscript{369} For example, Dehaene gave separate off-the-record briefings to Dutch and French journalists
An interim stage in a long process of ‘permanent revision’: the outcome and effect of the 1993 constitutional amendment

The creation of a federated Belgium was the culmination of a quarter of a century of constitutional change, of more or less ‘permanent revision’. Its purpose was to try to establish a new era of common coexistence. It was not, however, a conclusive change. Dehaene himself referred to the federal form of government as ‘dynamic’, and reformers had been careful to allow for a balance to be struck between the need for national cohesion and the scope for greater autonomy. Further, far from offering a lasting resolution of the issues, the increasing length and detail of the text of the constitution seemed instead to be a symptom of instability.  

Demands for further constitutional reform in Belgium soon followed. In the wake of the partitioning of the province of Brabant in 1995, the French-speaking minority living on the Dutch-dominated periphery of Brussels complained about growing linguistic restrictions imposed by the Flemish majority. The Flemish, moreover, felt aggrieved that the granting of residual competence to the Communities and Regions, specified in article 35, had still to be enacted. By the late 1990s there were calls for an even looser confederal Belgium.

Assessing the Belgian constitutional reform of 1993: lessons for the UK

A process driven by an elite group of politicians, and the exclusion of popular participation

The Belgian constitutional reform of 1993 was not an abstract constitutional exercise but a political act, controlled by an elite of senior politicians and engineered by cross-party negotiation and compromise. However, the need to preserve the fragile agreement that had been reached between the coalition partners meant that the government was unwilling to accept any changes or amendments to the accords. As a result, although the accords were subject to the parliamentary process, the legislature was effectively required to accept or reject the reforms as a whole. This approach antagonised the opposition parties, and further reinforced the perception that this constitutional reform was the preserve of a very small group of politicians, a pre-arranged package of measures that was not subject to full scrutiny by the democratically elected branch of government.

If parliament had only a minimal impact on the reform proposals, popular participation was virtually non-existent. Calls for a referendum to allow the electorate to have a voice in the adoption of this state reform were repeatedly rejected. This meant that the only input that the general public was able to have in this process was through participation in the general election that followed the 1991 declaration of revision of the constitution. In light of the subsequent controversy regarding the authority to implement some of the measures as a result of the allegedly vague references to reforms under Title III of the constitution, it can hardly be said that the public were fully informed of the exact nature of the changes envisaged by the

370 Alen & Ergec, Federal Belgium after the Fourth State Reform of 1993 (1998) 17
371 Information regarding further constitutional reform in Belgium may be found in, for example, Alen & Peeters, ‘The Belgian Federal State after the Fourth State Reform’ (1995) 1 EPL 8 and Peeters, ‘The Fifth Belgian State Reform (‘Lambermont’): A General Overview’ (2003) 9 EPL 1
372 Described above, p 7
coalition at the time of the election. Therefore, the degree of public participation was at best indirect.

Given the far-reaching consequences of the 1993 constitutional reforms, it is strongly arguable that more extensive public participation would have been desirable. Any attempt to adopt a codified constitution for the UK should prioritise public awareness, understanding and participation in the constitutional reform process, something that could today be facilitated by widespread access to and use of the internet and social media. Further, efforts should be made and measures taken to avoid any impression that constitutional reform was something to be devised by politicians behind closed doors, an elite process inaccessible to the public. Achieving the widest possible participation and trust in any process that sought to codify the UK constitution by facilitating open and transparent debate and discussion would be important in terms of ensuring that the measures adopted were acceptable to and accepted by the public, both vital factors in the long-term success of any significant constitutional reform.

**Constitutional reform is possible, even in the face of rigid rules for constitutional amendment**

The Belgian experience demonstrates that constitutional change with profound consequences can be achieved even in a State with a fully entrenched constitution with rigid rules for its amendment. The 1993 constitutional reforms helped bring about an historic shift of power away from the central authority as part of a process of peaceful constitutional evolution: these piecemeal reforms brought to fruition a federal state and may have helped avert a national catastrophe.\(^{373}\) In this sense, Cullen has argued that the Belgian constitution is considered by politicians as ‘a highly useful instrument for contemporary political problem solving’.\(^{374}\) This may seem surprising, given the rigid rules for constitutional amendment applicable in Belgium. However, it illustrates that the adoption of a codified constitution for the UK would not preclude further constitutional reform.

The Belgian example does demonstrate the need for carefully drafted rules to govern the amendment of a codified constitution for the UK. As has been explained, revising the Belgian constitution is an onerous task. As a result, in order successfully to achieve the 1993 constitutional reforms, politicians resorted to a variety of legislative measures.\(^{375}\) This approach led to allegations that the government was attempting to circumvent proper constitutional processes. In other words, there was a damaging perception that constitutional reform was taking place as a result of underhand dealings and in violation of the rule of law. The end result was the raising of serious questions about the constitutionality of the measures.

In order to avoid such difficulties, it would be advisable for rules for amending a future codified constitution for the UK to seek to satisfy two main criteria. First, these rules must be clear so that any constitutional reform was transparent and accessible to the public. This would help to avoid allegations that politicians were attempting to avoid the proper constitutional processes, and engender trust in the reform process. However, the rules must also allow for constitutional reform to take place. While likely that the constitution would be more difficult to amend than ordinary legislation

\(^{373}\) Others have argued that this incremental approach was destabilising. See the comments of Xavier Mabille, quoted in ‘Le ver était dans le fruit’, *Le Vif*, 18-31 July 2008

\(^{374}\) Cullen (n 1) 357

\(^{375}\) Discussed above.
in recognition of its status, such a task should not be so difficult that politicians would be forced to resort to dubious tactics to achieve change. Striking an appropriate balance between these factors would encourage trust and confidence in the codified constitution, and ensure that it would be a practical document that did not inhibit the development of the law in light of contemporary concerns.

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The Making of the Spanish Constitution, 1978
(‘Fathers of the Constitution’)

2013 marks the thirty-fifth anniversary of Spain’s Constitution and its return to democracy after almost forty years of dictatorship. The Spanish Constitution of 1978 (CE) has reformed almost every aspect of the Spanish State, from its political system, to its military, from the political economy and educational system to the role of the Church in public life. But the CE’s most remarkable characteristic is that it is a model of what can be achieved through a consensual process of constitution-building.

It was an inauspicious task that faced the constitutional drafting committee in 1977. Spain had had received no fewer than eight constitutions between 1812 and 1975, with only one lasting more than 20 years. Franco himself had used the constitutional form in his seven Fundamental Laws, but these did not provide any constitutional framework for the practice of politics. Their purpose was to legitimize established practice under an authoritarian regime and are regarded as constitutions in form rather than in substance.

Background

Spain’s transition to democracy is often held up as an example of particularly smooth change in political system. Unlike the Portuguese experience, there was no abrupt call for the end of the regime, and no uncertainty on the part of the leader that a democratic system should follow. Unlike in Greece during the seventies or in France and Italy after the Second World War, there were no reprisals taken against former figures of authority or their collaborators. Moderate forces within Franco’s regime had been preparing for democracy at least since the late 1950s. Franco himself, of course, had intended that his regime continue in some form; he famously observed that he would leave the nation “well and truly tied up” (“atado y bien atado”), attesting to the solidity of the political and administrative system he had built up over the thirty-six years of his dictatorship. But by the time of his death in late 1975, some of the institutions which had formed the bulwark of the regime were experiencing fundamental changes in political outlook. Some members of the clergy, for example, were finding it difficult to sustain support for the regime on ideological and economic grounds. During the early 1960s, young Catholics inspired by the Jesuits opened dialogue with leftist opponents of the regime, merging Marxism with

376 Thanks to Dr Simon Burgess for research and drafting assistance.
377 Promulgated between 1938 and 1967.
Christianity to form the germ of liberation theology. At the other end of the political spectrum, theologically conservative Catholics began to demand an end to economic autarky and a return to free-market capitalism.

In 1977, the newly-elected UCD (Unión del Centro Democrático) was less a party than a loose association of small, moderate-right and centre groups whose existence had been tolerated under the last years of the regime. Weak in structure, the UCD had not achieved an overall majority, and hence the party was obliged to form a coalition government. Its leader Adolfo Suárez and emerging opposition parties proceeded cautiously, aware that even after the death of Franco, the social and institutional forces of Francoism remained intact, yielding a disproportionate amount of power, and that the transition to democracy required a delicate balancing act. The new government had been established within the laws of the old regime, but now it needed to distance itself from that regime. Hence both the interim government headed by Franco’s appointee Carlos Arias Navarro and the succeeding UCD government drew a distinction between ‘legality’ and legitimacy. The former denoted the authority conferred on the new political order under the existing laws, while the latter invoked a higher, external and fundamental moral authority deriving from values shared by the community. In the aftermath of Franco’s death, polls showed that peace and order where held to be the most important concerns by 77% of Spaniards, followed by freedom of expression and justice. All sides feared another descent into civil war, and the legitimacy of the new democratic system would depend on the government’s success in maintaining public order. Although Spain in the 1970s was a more complex and less divided society than it was on the eve of the 1936 Civil War, the historical rift between the old power elites and the majority of the population persisted in the national consciousness. The economic and social reality had changed, but the mentality of victor and vanquished lingered. Nevertheless, the war was an acute and living memory, and it helped to concentrate the minds of those tasked with guiding Spain towards civil society. The most pressing and sensitive points for the drafting committee would be regional autonomy, and the roles of the Church and the military in political and civilian life, as these represented the most significant causes of the 1936 Francoist rebellion.

Reform began slowly after the death of Franco on November 20, 1975. Franco had appointed Carlos Arias Navarro Prime Minister in 1973 after the assassination of his second-in-command Admiral Luis Carrero Blanco by the Basque separatist group ETA. After Franco’s death, Arias Navarro, together with the President of the Council of the Realm Torcuato Fernández Miranda had to decide whether to continue the regime or to initiate reform. They announced a programme of political reform in which a caretaker government would oversee the transition to some form of constitutional monarchy. The King Juan Carlos I, who had become Franco’s successor as Head of State later dismissed Arias Navarro and approved the election of Adolfo Suárez, the leader of the centre-right party, the UCD, as prime minister in 1976. Suárez main task as the head of the caretaker government would be to present the CE as a legislative proposal to the Cortes.

Soon afterwards real change began. In September of that year Suárez presented the eighth Fundamental Law, called the Law for Political Reform. Approved by popular referendum, the Law for Political Reform comprised a package of changes,  

378 Rafael López Pintor, “El estado de la opinión pública española y la transición a la democracia” REIS 13 (1987) 22
379 The Council of the Realm was Franco’s advisory body.
including the transformation of the Cortes into a bicameral body with 350 directly elected congressmen (diputados) and 207 senators. The lower Chamber was chosen through proportional representation, with each of the 50 provinces receiving a minimum of three diputados. Each province sent 4 senators to the upper Chamber, regardless of proportionality. The King was given power to nominate the Prime Minister, appoint one fifth of the senate, dissolve the Cortes and call for new elections at will. Reform gathered momentum with the legalisation of political parties in 1977, amnesty for political prisoners, engagement with Basque and Catalan regional demands and culminating in the first free elections in forty years on June 15, 1977.

The seven-phase drafting of the Spanish Constitution

Shortly afterwards, all political parties agreed on a process comprising seven technical phases for drafting the CE.\textsuperscript{381} The process would last 16 months, from August 22, 1977 to December 27, 1978. The process consisted of initial drafting of the text and its submission to debate, amendment and approval by committees in and across both Chambers.

The first phase, drafting by the Congressional Sub-Committee on Constitutional Affairs, was the most important. The Sub-Committee, known as the Ponencia, was made up of 7 political leaders from the Congress of Deputies in proportion to their parties’ representation in that chamber, with the exception of the PNV. Collectively, these members are known as the 'Fathers of the Constitution' as they produced a draft text that, for the most part, was eventually approved as the CE. They met in strict secrecy, although towards the end, there were some leaks to the press. The main problems they had to resolve were the territorial organisation of the Spanish State, the nature and structure of the new political system, the fundamental freedoms to be guaranteed under the CE, and the elimination or modification of the existing Francoist state institutions.

After almost 8 months of deliberation, the Ponencia signed the Preliminary Draft (Anteproyecto) on April 10, 1978, and passed it for further consideration during the second phase to the Committee on Constitutional Affairs and Public Freedoms. Over the next six weeks, the 36-member Committee reviewed the Anteproyecto and amended the text, producing a version called the Constitutional Project (Proyecto Constitucional).

The third phase was the Plenary Session of Congress. On July 4, the Proyecto Constitucional was presented to the full house of the Congress of Deputies, who voted in favour of it after three weeks of amendments and minor changes. The vote was overwhelmingly positive: 274 members voted in favour, two against and 14 abstained. Thereafter the Proyecto entered the fourth stage and was presented to the Senate Committee on the Constitution on August 9. This Committee comprised 25 members chosen from the 207-seat upper chamber. Few changes were made during this five-week stage (and most were later vetoed by the Joint Committee during phase six). The lightly amended Proyecto was then presented to a Plenary Session of the Senate for approval in its fifth phase.

On October 11, the Proyecto entered its sixth phase, in which the differing versions approved by the Congress and the Senate had to be reconciled before a Joint

\textsuperscript{381} Those parties were: UCD (central party), PSOE (Socialists), PCE (Communists), AP (Conservatives), MC (Catalan nationalists). The PNV (Basque Nationalist Party) was not represented. During the Franco regime, the only legal party was the Movimiento Nacional, although a few others were tolerated.
Committee. After two weeks of debate and amendments, the eleven members from both chambers approved a version which became the text of the CE.

Finally, the seventh phase saw the Proyecto winning overwhelming approval in separate votes in the Congress and Senate on October 31. A national referendum was then held on December 6, in which 67% of the electorate voted. Almost 88% of votes cast were in favour, 8% against, with 4% ballots blank or spoiled. The CE, with its 160 articles, received the Royal Assent on 27, December, 1978.

The way in which the committees worked

Andrea Bonime-Blanc has identified six political phrases in Spain’s constitution-making project. The first political phase occurred during the first four months of the initial drafting phase, and was taken up with setting the agenda. During this period a dominant coalition emerged, made up of the UCD, the PSOE, the PCE and the MC (and so spanning the spectrum from centre-right to far left and including a regional party). This became known as the Consensual Coalition, and it prevailed during most but not all the phases of constitution-making.

The second political phase – the publicising and mobilizing phases according to Bonime-Blanc – occupied the rest of the drafting phase. A leak about the text of the Anteproyecto to El País newspaper in November prompted a fierce public debate and some rioting in the regions. The text was officially published the following January, whereupon the various parties attempted to distance themselves from those aspects least to the liking of their supporters.

The third political phase running up to the Anteproyecto’s submission to Congress was characterised by bitter disagreement. It saw the breakdown of the Consensual Coalition, as the PSOE (led by Felipe González) opposed articles allowing the involvement of the Church in education. The conservative AP supported Catholic education but opposed the involvement of the state in economic affairs. Eventually, however, the PSOE relented in order to avoid a possible right-wing coalition between the UCD and the AP. This led to the fourth political phase in which the AP and the Basque Nationalists (the PNV) became marginalised by their own unwillingness to compromise. The Anteproyecto was approved as the Proyecto by a congressional plenary session.

During the fifth phase, roughly corresponding to the Proyecto’s scrutiny by the Senate Committee on the Constitution, the Consensual Coalition was tested once again over the issue of regional autonomy. The left generally supported the return of regional foral rights suspended under Franco, but the PNV’s distrust of any national party and its unwillingness to control violent extremists among its supporters alienated the PSOE and pushed it back again towards a firmer coalition with the centre.

The sixth, “constitutional approval” phase took in the final editing of the text by the Joint Committee, the final vote from both Chambers on the adoption of the CE, and the public referendum of December 6th. The AP and PNV both voiced strong opposition and mounted vociferous campaigns to ensure a public ‘no’ vote, but in the end the AP promised to seek reform through legislative action. The Constitution won the favour of 15.4 million votes out of the 17.4 million cast.

382 Congressional vote of 345 members gave 325 in favour, 6 against and 14 abstentions. The Senate vote of 239 members gave 226 in favour, 5 against and 8 abstentions.

A Constitution of compromise

The parties’ initial positions on key issues fell along the expected ideological lines. While the centre-right and conservatives favoured a parliamentary monarchy, an active role for the monarch and a majority electoral system, the left and regionalists preferred a republic or a parliamentary monarchy with a purely representative role for the monarch and proportional representation. The centre-right and conservatives supported a pre-eminent role for the executive over the Cortes, while the left and regions argued for the supremacy of the Cortes over the executive. The centre-right sided with the left in preferring only fairly rigid approach to constitutional reform, with the Catalan regionalists asking for slightly more flexibility, and the conservatives and Basques regionalists demanding total flexibility.

The CE also set out the framework to govern other important social and political institutions. The judiciary would be independent of party politics. The death penalty was abolished and the way was left open for future legislation to allow divorce. The military could defend the State against internal (terrorist) as well as external forces, national service was maintained, but conscientious objection to military service was protected. The Church’s role was relegated from its privileged position under Franco; it would now become just one of a number of factions, such as the trade unions, media, political parties, as Spain would thenceforth be a secular state.

The approved text of the CE mostly satisfies the wishes of the centre-right and moderate left (including those of the moderate Catalan nationalists), and shows the bias of the congressional drafters towards a more powerful Congress than Senate. The CE sets out the framework for a parliamentary monarchy, ensures the unity of the Spanish state while guaranteeing the right to regional autonomy, protects political pluralism, fundamental freedoms, and introduces a mixed economic system. Spain is divided into 50 provinces (each an electoral district), which are set amongst 17 territories or regions.

The make-up of the Cortes is a compromise between proportional representation and a majority system: Congress is made up of between 300 and 400 diputados, with each province being assigned at least 2 representatives to ensure that sparsely populated rural areas were guaranteed a minimum number of seats. The Congress has a limited motion of censure whereby it may, by majority vote, bring down a government, provided it can also nominate a new Prime Minister. It has priority over the Senate and may present bills for the Royal Assent without Senate approval if the Senate has not acted in a timely manner.

The Senate represents both the territories and the provinces. Each province elects four senators, while the autonomous communities have one senator each and the right to nominate a further one for each million inhabitants.

A Constitution still in the making: The ‘State of Autonomies’

The CE contains an apparent contradiction at its heart. Article 2 of the Preamble sets a clear boundary on regional autonomy. It affirms the ‘indissoluble unity of the Spanish Nation’, while at the same time recognising and guaranteeing the right to autonomy of the ‘nationalities’ and regions therein. The term ‘nationalities’ is a tacit reference to Catalonia, the Basque Country and Galicia, the three regions who claimed that their distinct history, culture and language gave them an identifiable nationality separate
from that of other Spaniards. Yet, surely a unitary state could only recognise one nationality. Hence, a compromise was struck during the drafting stage whereby ‘nation’ and ‘nationalities’ would be given stricter meanings than usual: the latter, always in the plural, would refer to the identity of the historic regions, called the Autonomous Communities (AC), while it singular form, like the term ‘nation’ would be reserved for Spain.

The paradox of a ‘nation of nationalities’ is also reflected in the very structure of the relations between the centre and the periphery. CE Title VIII provides the framework within which individual regions may claim autonomous status and the procedures by which they may do so, and seven of the nine Transitional Provisions of the Constitution govern the transfer of power to the regions. The regions were not set out in advance under the Constitution nor were they defined by an act of Parliament; rather, they were allowed to design themselves by means of their respective Statutes of Autonomy. In this respect, the Constitution is famously open-textured: the drafting committee deliberately built in a flexibility that would allow the regions themselves to define both their geographical extent and the content of their autonomous status. The result is a constitutional ‘state of autonomies’ which is remarkably elastic. Because although the principle of the unity of the Spanish state as enshrined in art 2 serves as a ‘ceiling’ on the ACs’ ability to attain ever greater powers of self-government, the text is ambiguous about the content of those powers. Articles 148 and 149 list the specific powers that can be assumed by the ACs and that are exclusive to the state, respectively. Article 149.3, however, leaves open the possibility that ACs may claim residual powers, i.e., those not specified as exclusive to the state in the preceding paragraph. And so where ACs wish to pursue a greater level of autonomy than perhaps was envisaged by the framers of the Constitution, they need not necessarily raise the question of reform. It is exceedingly difficult to reform the Constitution, and the autonomous communities are finding that they can claim more powers either by reforming their own Statutes of Autonomy to claim residual powers under art 149.3 or by appealing to the Tribunal Constitucional to interpret the Constitution in a favourable way. So although regions accept the sovereignty of the Spanish State (minority separatist groups aside), they continue to push the boundaries of their power to self-govern. The question then arises, to pursue the spatial metaphor, just how high is the ceiling? The Constitution appears to guarantee two irreconcilable principles: the unity of the nation and an unspecified extent of regional home rule. After 35 years of a constitutional ‘nation of nationalities’, the unity of the Spanish State is being tested to its limits by the Catalans’ recent push for ever greater autonomy.

Conclusion

The CE is a remarkable achievement of consensual bargaining. It was worked well over the past three and half decades with hardly any reform. It is not far-fetched to attribute the spirit of compromise to the desire of all those involved to avoid another civil war. The process was a purely political one in that those tasked with drafting, amending and approving the CE were elected representatives, working together and for the most part behind closed doors. Public debate was allowed only after the basic draft had been prepared; public opinion was sought again only at the last stage in the

384 Consistent with the argument that Spain is not quite a federation, any residual power not claimed by the AC in its Statute of Autonomy falls to central government: art 149.3. The reverse is true of residual powers under the German Basic Law, article 30.
months before the referendum. It is noteworthy that the process slowed and the parties became more prone to disagreement the more the public was privy. In other words, the public gaze made the participants more wary about being seen to do deals with those whom their constituents might regard as former enemies. Working in secrecy, beyond the pressure of public opinion, seems to have allowed the participants to relinquish most of their ideological baggage and given them the freedom to compromise.

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Germany's Post-Unification Constitutional Revisions
(Joint Parliamentary Committee)

The substantive issue

In the wake of German unification in 1990, the German Grundgesetz underwent significant amendments, which can be divided into five groups: a) amendments brought about by the Unification Treaty (August and September 1990); b) amendments which resulted from the ratification of the Maastricht Treaty (December 1992); c) several privatisation amendments concerning air traffic control (July 1992), railways (December 1993), posts and telecommunication services (August 1994); d) an amendment restricting asylum (June 1993); e) amendments following the recommendations of the Joint Constitutional Commission (October 1994).

Political background and origin of the substantive issue

While the Grundgesetz (GG) had already been amended several times since its adoption in 1949, the parallel processes of German unification and further European integration posed unique external challenges to Germany’s constitutional system. In particular the unification process led to considerable public debate about the future of the Constitution in a united Germany. The process of German unification took place under considerable international scrutiny, which made it advisable to resort to an accession of the new (five) Länder created in the former GDR to the Federal Republic on the basis of Article 23 GG (which was subsequently deleted), rather than to the use of Article 146 GG, which would have required the adoption of a new Constitution by referendum for the whole of Germany, but with the risk of

385 See G. Robbers, ‘Die Änderungen des Grundgesetzes’, Neue Juristische Wochenschrift 1989, 1325, refers to 35 amendments in the between 1949 and 1989. These concerned constitutional provisions for the armed forces, the use of emergency powers, changes to provisions concerning financial and institutional arrangements.
386 For an excellent discussion, see K. H. Goetz and P.J. Cullen (eds.), Constitutional Policy in Unified Germany (Frank Cass, London, 1995).
387 The ‘Treaty on the Final Settlement with Germany (the ‘Two-plus-Four Treaty’) of 1990, while granting the united Germany full sovereignty, imposed limitations on Germany’s armed forces and finalised its external borders. The latter arrangement required the deletion of the (old) Article 23 GG (to exclude further accessions to Germany territory) and a modification of Article 146 GG.
delaying the unification process. As a compromise the Unification Treaty of August 1990\textsuperscript{388}, the ratification of which required certain constitutional amendments in September 1990, also provided the basis for further debate about constitutional amendments (see Article 5 of the Treaty). This process led to a rather limited set of amendments in October 1994 following by and large the recommendations of the Joint Constitutional Commission. The Joint Constitutional Commission also provided the recommendations for the constitutional amendments which were considered necessary for the ratification of the Maastricht Treaty. In particular the German Länder demanded more input in the European integration process, which they claimed had eroded their constitutionally guaranteed powers within Germany.

The preparatory stage

Article 5 of the Unification Treaty, while referring to specific issues for consideration, provided a rather vague agenda for constitutional reform. In contrast to the opposition parties (mainly SPD and Bündnis 90), which advocated a complete revision of the Constitution, the governing collation of CDU/CSU and FDP was however not in favour of far-reaching reforms. When the Bundestag, the directly elected Federal Parliament, and the Bundesrat, the Federal Council representing the German Länder, decided in November 1991 to set up a Joint Constitutional Commission, which was to act as the main preparatory forum for constitutional reform, the agenda of the Joint Commission was phrased in fairly vague terms by asking it to consider any changes brought about by German unification and European integration.

The potentially wide mandate of the Joint Commission was however restricted by its institutional design. The Joint Commission consisted of 64 members with 32 coming from the Bundesrat (each Land had two representatives) and 32 from the Bundestag (allocated in accordance with the strength of the political parties in the Bundestag). Recommendations could only be passed with a two-thirds majority with each member having one vote.\textsuperscript{389} In contrast to previous preparatory work undertaken by constitutional experts (mainly law professors) or a Constitutional Council, the institutional framework of the Joint Commission ensured tight control by the relevant political actors (the political parties and the Land governments) and was therefore characterised on the whole by strategic bargaining rather than rational argumentation.\textsuperscript{390} While the members of the Joint Commission were in theory independent, the Joint Commission formed working groups along party lines, which in turn were expected to follow party positions. Equally, the position of the German Länder on the Joint Commission was largely pre-determined by the recommendations formulated by the Bundesrat Commission on Constitutional Reform\textsuperscript{391}, which by and large had already completed its work before the Joint Commission.\textsuperscript{392}

\textsuperscript{388} See http://www.gesetze-im-internet.de/einigvtr/BJNR208890990.html.

\textsuperscript{389} While it ensured that recommendations had a high probability of adoption in the legislative process (see below 5), the two-thirds requirement also significantly limited the recommendations made.


\textsuperscript{391} The Bundesrat Commission was established in April 1991 and completed its work in May 1992. The Bundesrat Commission comprised 32 members (two members from each of the 16 Länder). Each Land on the Commission had one vote and a 2/3 majority was required to pass a recommendation.

\textsuperscript{392} On the position of the Länder in this process, see U. Leonardy, 'To be Continued: The Constitutional Reform Commissions from a Länder Perspective', in: K. H. Goetz and P.J. Cullen (eds.), supra note 2, 75-98.
This was also evident in the Commission’s relationship with the public at large, who played only a limited role in the preparatory work of the Joint Commission, discussed below.

**Working methods**

The Joint Commission met in 23 sessions between January 1992 and October 1993. Such meetings were dominated by statements of spokespersons of the parties or the Land governments. Speaking time was allocated according to the size of the political parties.\(^{393}\) The Joint Commission acted by and large more like a super-parliamentary committee than a constitutional forum of debate. This was also reflected in its working methods.\(^{394}\) It was only from the fourth session onwards that the discussions were held in public. Media coverage was limited with the exception of certain high profile events.\(^{395}\) And even though the Joint Commission received more than 800,000 petitions, their impact on the discussion has been considered as extremely limited.\(^{396}\) Also innovative contributions from the representatives of the new Länder, which were in the process of adopting their own constitutions, was apparently limited.\(^{397}\) The Joint Commission organised expert hearings (involving mainly law professors) on important issues and a hearing of the presidents of Länder parliaments. The Joint Commission therefore resembled ‘a closed circle of a political elite’ where negotiations were conducted ‘among a small group of the spokesmen of the parties and the governments’.\(^{398}\)

**Formal procedures for adoption**

Although Article 146 GG would have provided for the possibility of adopting a new Constitution by means of a referendum, this option was discarded and the constitutional amendments were enacted by statutes in conformity with the requirements set out in Article 79 GG. The procedure for the adoption of a statute amending the constitution follows the normal legislative procedure subject to the requirements of Article 79 GG. Article 79(1) GG stipulates that the amending statute must expressly modify or supplement the text of the GG. Article 79(2) GG requires a majority of two-thirds of the members of the Bundestag and of two-thirds of the votes in the *Bundesrat* for the adoption of such statutes and Article 79(3) GG contains certain principles which are beyond constitutional amendment. While this procedure excludes any form of a referendum, the super-majority requirement makes cross-party and *Länder* support essential.

The Joint Commission submitted its first set of recommendations already in June 1992 as basis for constitutional amendments in connection with the ratification of the Maastricht Treaty.\(^{399}\) Given the need for *Bundesrat* consent, the *Länder* used their

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\(^{393}\) See A. Benz, supra note 6, at 108.

\(^{394}\) The resolution setting up the Joint Commission determined that the standing orders of the *Bundesrat* should apply.

\(^{395}\) In February 1993, Rupert Scholz, one of the two co-chairmen of the Joint Commission, temporarily resigned.

\(^{396}\) See A. Benz, supra note 6, at 109.

\(^{397}\) Ibid., at 109.

\(^{398}\) Ibid., at 110.

\(^{399}\) The recommendations concerned a new Article 23GG, which set out the general principles of the conferral of powers to the European Union and determined the participation of the Länder in the process of European integration. Recommendations were also made for the amendment of Articles
bargaining position to obtain far-reaching powers regarding their participation in the process of European integration. In October 1993, the Joint Commission presented the remainder of their recommendations\(^{400}\), which were jointly submitted in December 1993 as a bill in the Bundestag by the governing coalition parties (CDU/CSU and FDP) and the SPD. After reservations by representatives of the CDU and CSU against part of the recommendations, the SPD also introduced its own bill in the Bundestag. Most recommendations of the Joint Commission were however accepted as constitutional amendments. The final statute was adopted in October 1994, but only after agreement was found in the conciliation committee of Bundestag and Bundesrat.

**Outcome and effect of the reform**

For some, in particular on the left of the political spectrum, German unification provided an ideal opportunity for a complete constitutional reform through the adoption of a new Constitution. This was also foreseen by Article 146 GG. On the other hand, for others, including the parties of the ruling coalition of CDU/CSU and FDP, the existing *Grundgesetz* provided a solid constitutional basis for a united Germany and only some limited adaptations brought about by European integration and German unification were therefore considered necessary. Despite its potentially wide agenda, the Joint Constitutional Commission delivered only a modest set of recommendations for constitutional reform. This was mainly due to its institutional framework, which was dominated by the agenda of the political parties and widely excluded any meaningful participation of the public.\(^{401}\) Its need for cross-party and Federal-Land consensus meant that more far-reaching reforms were not undertaken.

Ultimately, the most substantial reforms resulted from the ratification of the Maastricht Treaty. The newly formulated Article 23 GG has provided a solid constitutional basis for future conferrals of power to the European Union and strengthened the participation of the *Länder* in the process of European integration.\(^{402}\) On the other hand, the amendments in the statute of 1994 were rather more limited.\(^{403}\) A limited number of amendments concerned basic rights (prohibition against discrimination on grounds of disability\(^{404}\)) and state objectives (positive discrimination\(^{405}\), environmental protection). More far-reaching demands for direct citizen participation in the GG already failed to win support in the Joint Constitutional Commission. Constitutional amendments also strengthened local autonomy\(^{406}\) and modified the procedure for territorial re-organisation in Article 29 GG. More controversial were the recommendations of the Joint Constitutional Commission on the allocation of competences in Germany’s federal system, which formed a central aspect of its work. The bargaining position of the *Länder* was here much weaker than

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400 See http://dipht.bundestag.de/dip21/btd/12/060/1206000.pdf.

401 See A. Benz, supra note 6.


404 See the second sentence of Article 3(3) GG. This amendment was introduced in the

405 See the second sentence of Article 3(2) GG.

406 See the third sentence of Article 28(2) GG, which emphasises financial autonomy of local communities.
in case of amendments to Article 23 GG\textsuperscript{407} and the resulting compromise provided only a modest rebalancing of powers in favour of the Länder.\textsuperscript{408} Detailed amendments were also made to the legislative procedure, mainly with a view to extend the time limits for responses by the Bundesrat and to shorten those of the Federal Government.\textsuperscript{409} Finally, amendments were made to Article 87 GG, which concerned matters of direct Federal administration.

Several amendments to the Constitution during this period were negotiated outside the forum of the Joint Constitutional Commission. The most important one was the modification to the right to asylum, now enshrined in Article 16a GG, the aim of which was to reduce the entitlement to asylum in Germany. This topic was raised in the Joint Constitutional Commission, but no recommendation was made and the amendment was adopted in June 1993 following a compromise between the major political parties in discussions outside the forum of the Joint Constitutional Commission. Similarly, the constitutional amendments concerning the privatisation of air traffic control\textsuperscript{410}, the privatisation of public railways\textsuperscript{411}, and posts and telecommunication services\textsuperscript{412}, were negotiated largely outside the Joint Constitutional Commission.

Certain elements of the constitutional reforms turned out to be short-lived. In particular the constitutional debated on the appropriate relationship between the Federal and Land level in the Federal Republic continued and was finally resolved in a more comprehensive manner in two subsequent reform packages. The first federalism reform of 2006 concerned the (re-)allocation of competences between the Federal and Länder level\textsuperscript{413}, the second federalism reform of 2009 introduces the constitutional requirement of balanced budgets at Federal and Länder level\textsuperscript{414}. It is however widely agreed that financial aspects of the relationship between Federation and Länder are in need of constitutional reform. Attempts to resolve this matter in 1994 failed and still await a resolution.

**Assessment and relevance for the United Kingdom**

While it was disappointing for those who expected a more comprehensive constitutional revision, the ultimately limited constitutional reform of the early 1990s fits well within an established pattern of evolutionary change in the German constitutional system.\textsuperscript{415} The institutional framework was clearly more designed to achieve workable compromises between the constitutionally relevant political actors in a process of strategic bargaining.\textsuperscript{416} In particular the Joint Commission ‘was not a forum for open deliberation, which could, by reasoned argument on constitutional

\begin{footnotesize}
\begin{enumerate}
\item See A. Benz, supra note 6, 112.
\item Constitutional amendments were made to Articles 72, 74, 75, 93a (by inserting Nr. 2a), and Article 125a GG.
\item See the amendments to Articles 76, 77 and 80 GG.
\item See the amendment by Federal Statute in July 1992.
\item See the amendment by Federal Statute in December 1993.
\item See the amendment by Federal Statute in August 1994.
\item See U. Leonardy, supra note 8, 94-96.
\item For a critical assessment, see A. Benz, supra note 6, 113-115.
\end{enumerate}
\end{footnotesize}
principles, lead to new solutions and find broad societal consensus for them."\textsuperscript{417} Contributions by the public were mainly ignored despite considerable interest in a public debate in Germany at the time. The potential for constitutional innovation remained therefore unrealised.

This model might therefore be advantageous when the aim of the constitutional reform is to achieve consensus between the political parties on the codification of existing constitutional principles with minor constitutional adaptations, but does not provide a good example of engaging the public in any meaningful way and to provide comprehensive and innovative solutions to constitutional issues.

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[M]

(Elected Assembly and Popular Engagement)

I. What are Swiss cantonal constitutions?

Switzerland being a federal State, the Swiss Cantons enjoy a broad “constitutional autonomy”. They all have their own constitution, which organizes cantonal institutions (i.e. parliament, government, territorial organization), defines which mechanisms of direct democracy (referendum or popular initiative\textsuperscript{418}) are provided, states fundamental rights at the cantonal level and describes the main tasks of the cantonal State.

According to article 51 par. 1 of the Federal Constitution of the Swiss Confederation of 18 April 1999 (FC), “Each Canton shall adopt a democratic constitution. This requires the approval of the People and must be capable of being revised if the majority of those eligible to vote so request.” In addition, “Each cantonal constitution shall require the guarantee of the Confederation. The Confederation shall guarantee a constitution provided it is not contrary to federal law.” (art. 51 par. 2 FC).

In fact, the obligation for the Cantons to adopt a democratic constitution dates back to the birth of the Swiss federal State in 1848 (previously Switzerland was a mere confederacy). The mandatory content of a cantonal constitution is rather minimal: it must provide the basic tools of a democratic system, but neither a Bill of rights, which is provided for by the Federal Constitution, nor a list of the tasks of the State are compulsory.

II. Historical context

The previous Constitution of the Canton of Geneva had been adopted on May 24, 1847, following the “radical revolution” led by James Fazy, which toppled the

\textsuperscript{417} Ibid, 113.

\textsuperscript{418} In Switzerland, a popular initiative is a constitutional or legislative proposal put forward by a fraction of the voters. If the required threshold of signatures is met, the proposal is discussed by the parliament and shall be put on the ballot for the voters to decide on it. In some cases, when the proposal is accepted by the parliament, a popular vote is not necessary.
aristocratic government in power since 1814. It predated thus the first Federal Constitution of 1848. Since then the Geneva Constitution of 1847 had been amended so many times that its original and widely admired structure was barely recognizable.

In 1965, starting with the small Canton of Nidwald, began a large movement of total revision of the cantonal constitutions, which finally caught almost all the Cantons. This movement grew in several waves: 1965-1968, 1980-1988, 1993-1997 and 2000-2012. Geneva remained untouched until the end of the last and largest wave.

It is worth emphasising that these total revisions of the cantonal constitutions were not triggered by crisis, revolutions or other extraordinary events. It was on the contrary a rational, deliberate and quiet process of updating the cantonal institutions. In all cases, the impetus came from the authorities – government or parliament – and not from a popular initiative. In roughly half of the Cantons, the total revision of the constitution was conducted by the cantonal parliament, in the other Cantons this task was entrusted to a constitutional assembly. In all cases, the process was successfully completed, albeit in two Cantons only on the second try after a first project was rejected by the voters.

III. The political process

In 2005 a group of citizen led by Andreas Auer, then professor of law at the University of Geneva, published a manifesto promoting the idea of “a new Constitution for Geneva”. For a while the group contemplated the launch of a popular initiative but instead chose to lobby members of the Geneva parliament and convinced several of them to introduce a multipartisan bill calling for the election of a constitutional assembly entrusted with the task of drafting a new Constitution. Although previous bills to the same effect had died without much attention, this time the cantonal parliament agreed to proceed and adopted a Constitutional Act, which was then approved by 79.25% of the voters on February 24, 2008. The Constitutional Act of 2008 provided for the election of an 80-member Constitutional Assembly which should draft a new Constitution within four years.

The election was held on October 19, 2008, according to a system of proportional representation. A minimum threshold of 3% of the votes was required for a list to obtain seats (whereas this threshold is set at 7% for representation in the 100-member cantonal parliament). As a result of the election, the Constitutional Assembly comprised eleven political groups. Eight of them were linked to traditional political parties, one emanated from the business community, one from a coalition of citizen organizations and one from a large pensioners’ and seniors’ association. Five groups comprising together 37 members could be classified as left or centre left and six groups comprising together 43 members could be classified as right or centre right.

In the first 18 months of its life, when the Assembly had to set up its organization and to begin substantial work in thematic committees, the atmosphere was rather serene and productive. The mood changed dramatically in May 2010. Feeling they had ceded too much ground to the left in the committees, the leaders of the right called for more discipline within their ranks. To make their point they provoked a

vote on an amendment which, in one strike, scrapped a large number of constitutional rights dear to the left. In the following months, a clear partisan divide pitted the right, which had a majority in the Assembly, against a hapless left. The former won most of the votes with an “automatic” majority. The latter denounced an arrogant majority and to many observers the whole process appeared increasingly doomed.

Then, the main political groups of the Assembly realized that a failure would politically damage all of them. A team of five to seven negotiators met regularly and devised a compromise on the most hotly contested issues. It involved giving up some important reforms, amongst them an extension of voting rights for foreign residents and a revamping of the taxation system at the municipal level. Eight groups adhered to the deal and, using strict discipline within their own ranks, were able to get it through. One hardliner group on the right was split. Two groups on the hard left were strongly against the deal. One of them, the group representing the pensioners’ and seniors’ association, had been from the outset against the very idea of a new constitution and was particularly vehement in its opposition. On the final vote the new Constitution passed with 57 votes against 15, with 5 members abstaining.

The campaign for the compulsory referendum on the new Constitution was rather harsh, but failed to stir a lot of interest in a large part of the electorate. The main political parties admitted that they had to make painful concessions, but tried to explain to their respective constituencies that in any case the new Constitution was clearly better than the one it meant to replace. The opponents, from the hard right and the hard left, joined by a large part of the unions, had specific arguments but also tended to use apocalyptic statements, based sometimes on outrageous interpretations of the constitutional provisions on the ballot.

On October 14, 2012, the Geneva voters accepted the new Constitution by a majority of 54%, not a landslide but a surprisingly comfortable margin, given the active campaign of the opponents.

It is worth noting that both the parliament and the government of the Canton of Geneva showed little interest, if not at times outright hostility, toward the constitutional Assembly. It seems clear that the government counted on the failure of the process. Ironically, in doing so the government missed several opportunities to bear on the decisions made by the Assembly.

IV. The methodology

From the outset, the constitutional Assembly chose the method of the “blank slate” (“la méthode de la page blanche”), i.e. it decided not to let the government or selected experts prepare a first draft of the new constitution. It chose instead to begin with “thesis”, that is statements of principles on the many questions the Constitution should deal with. These thesis were discussed in thematic committees and then in plenary sessions.

Of course, the slate was not actually blank for Geneva already had a Constitution, that of 1847. But while the Assembly had in mind the content of the Constitution of 1847, it didn’t try to amend it, but instead embarked on writing a whole new text, although a lot of the existing rules and institutions were finally retained.

A drafting committee of five members was entrusted with the task of converting the principles adopted by the Assembly in constitutional provisions.

420 In Geneva, as in all the Cantons, the government is a collegial body, directly elected by the voters. It comprises seven members and is called « Conseil d’Etat » (Council of State).
Then the constitutional text emanating from the drafting committee was discussed in three readings by the Assembly. After the first and the second reading, the drafting committee could amend the text for formal or legal reasons, without modifying its underlying substance.

V. The novelties

The Geneva Constitution of October 14, 2012 certainly does not revolutionize the cantonal institutions. On the other hand, the changes it brings go way further than a mere tidying up of the previous constitution. Here are some examples.

The principles governing the activities of the State are clearly expressed, amongst them the principles of information, consultation and dialogue.

The Constitution now contains a comprehensive Bill of rights. While many of those rights are simple restatements of the corresponding provisions of the Federal Constitution, several of them go further: e.g. the rights of disabled persons, the right to a sufficient standard of living, the right to a healthy environment, the right to access the information held by the authorities (along with the duty for the authorities to publish all regulations including related administrative guidelines).

The mechanisms of direct democracy have been moderately amended. The requested number of signatures for referendums and popular initiatives is now set in percentage of the electorate. In the process the threshold for legislative initiatives has been lowered to encourage its use instead of resorting to constitutional initiatives. Mandatory referendum in housing and tax matters has been replaced by a referendum on demand with a very low threshold of signatures. The control of the validity of popular initiatives falls now in the responsibility of the government, deemed less politically biased than the parliament, formerly entrusted with this legal task. The parliament can now call *sua sponte* a referendum on an act it adopts.

As to political institutions, elections for the parliament and the government will be held every five years instead of four. The government will elect its chair for five years instead of one. The parliament now comprises not only regular members but also deputy members, the latter being called to temporarily replace the former when they are not able to attend a session or a committee meeting. A cantonal constitutional court will consider direct legal challenges against cantonal statutes (whereas such challenges went previously directly to the Federal Supreme Court).

The new Constitution contains general principles of action for all the main tasks of the State. This was not previously the case in such a systematic way. For hot topics, as housing, energy or transportation, the wording of those principles was furiously debated and negotiated. However their legal significance remains highly uncertain. Clearly new is a provision on the responsibility of the State in the domain of the arts and culture.

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The Adoption of the Swiss Federal Constitution  
(Building Blocks Process)

1  Background and issues

The adoption of the Swiss federal Constitution of 1999 is to be seen against the following background: the first Swiss constitution, which founded the Swiss federal state, was adopted in 1848. The only major systematic reform took place in 1874. Within the following century, more than 130 partial amendments to the Constitution were adopted. A great number of these amendments were proposed via popular initiatives, which enable citizens to draft a new constitutional provision. If supported by 100,000 signatures, the constitutional provision is subject to popular vote (so-called mandatory referendum). It is adopted if it obtains the double majority of the people (meaning the majority of the votes cast in all the country) and the cantons (meaning the majority of the votes of the citizens in the majority of the 23 cantons).

As the Swiss constitution does not provide for legislative initiatives, the constitutional initiative is the only instrument enabling the people to shape laws and policy directly. As a consequence, the constitutional initiatives are frequently used and often deal with issues which are not of constitutional significance. They tend to be worded in great detail so as to reduce the authorities’ discretion in implementing the new constitutional provisions. Due to its frequent amendments, the Constitution had become an unwieldy text which lacked overall coherence.

At the same time, the lack of a major systematic reform had left Switzerland with a relatively incomplete and obsolete text. The Swiss constitution of 1874 did for instance not provide for a comprehensive bill of right. Many essential rights, such as freedom of expression, freedom of assembly, the right to property, had been recognized by the Supreme Court as unwritten constitutional rights. There was thus a substantial gap between the written constitution, on the one hand and constitutional law and principles governing the Swiss polity, on the other hand. The Constitution also contained some provisions which seemed clearly out of date (such as the prohibition of selling absinthe, an anis-based spirit, or the prohibition for members of the church to sit in the lower house of Parliament).

More fundamentally, it was argued that reforms pertaining to important constitutional issues, including federalism, direct democracy, the judiciary, and the government were required.

2  Overview of the reforms: strategy and outcome

2.1. Strategy

The adoption of the Constitution of 1999 is the result of a lengthy process which lasted over three decades. Two main stages need to be distinguished. During the first stage (1965-1985), the aim was to draft a new constitution which would include important substantive reforms. As the proposed changes met with strong skepticism, the government decided to change strategy and to achieve constitutional reform through different “building blocks”: during the second stage (1985-1999), the drafting process focused on three “building blocks” of the Swiss constitutional order, the idea
being that further reforms would be undertaken later on.

• The *first* and major building block consisted in updating the text of the Swiss federal Constitution of 1848/74. Compared with drafts of a new constitution proposed during the first stage, the aims pursued were much more modest. The new text was not aimed at including any substantive reforms. It was meant to codify unwritten constitutional principles and rights, to eliminate patently outdated provisions, to provide for a coherent structure of the new constitutional text and to modernize and harmonize the language. Harmonization was deemed necessary, as the old constitution contained, due to the frequent piecemeal amendments, provisions which differed in terms of depth and style. The overall aim was to increase the transparency and accessibility of the Constitution for the ordinary citizen and to provide for a solid foundation for future reforms.

• The *second* building block consisted in a package aimed at reforming direct democracy. Among the major aims of the reform were the following:
  1. Increase the number of signatures required for statutory referenda and the popular initiative in line with the population increase since 1874.
  2. In return, extend the participation of the people in international matters by extending the mandatory referendum to new categories of international treaties.
  3. Provide for a new form of popular initiative called the “general initiative” which would enable parliament to decide on how to implement a generally worded proposal made by the people. The aim of this instrument was to give Parliament the leeway to implement proposals considered of lesser importance on the statutory, and not the constitutional level.
  4. Transfer the competence to decide on the validity of popular initiative from parliament to the Supreme Court\(^\text{421}\).

• The *third* building block was a reform package of the judiciary. The purpose of the reforms was threefold:
  1. to decrease the case load of the Swiss Supreme Court (named Swiss Federal Tribunal), by the following means: restricting access; creating specialized federal tribunals for certain issues; decreasing the areas in which the Swiss Supreme Court acted as a first instance court.
  2. to improve judicial protection against federal acts; this was deemed necessary, as the powers of the federal government had increased dramatically since the creation of the Swiss federal state. However, the system of judicial protection remained focused on providing protection against cantonal acts. The reform proposed, *inter alia*, constitutional review of Acts of the federal Parliament, and increased judicial oversight over the election and votation process on the federal level. The first issue was highly controversial, as constitutional review is viewed by its detractors as being incompatible with popular sovereignty and direct democracy.
  3. to confer the central government the power to adopt uniform rules on civil and criminal procedure; these areas were cantonal matters, which resulted in 26 different sets of rules.

\(^{421}\) Popular initiatives which have gathered 100'000 signatures are submitted to popular vote if they meet certain requirements, including compatibility with mandatory international law (*ius cogens*).
2.2. Outcome

A separate assessment of the outcome needs to be made for each building block:

• *First* building block: the new federal Constitution was adopted on 18 April 1999 with a safe margin of 58.4% of the votes cast in favour, and 40.2% votes against. As regards the cantonal level, the Constitution was approved in 13 and rejected in 10 cantons. All major political parties supported the new Constitution. Opposition was limited to the extreme right and left wing parties. The Constitution achieved stronger support in the French and the Italian Speaking part than in the German Speaking part of Switzerland. Moreover, approval was lower in rural areas than in urban ones. Despite the positive outcome of the votation, it is worth mentioning that the “updating process” was a difficult exercise, fuelling discussions on how to draw the line between codification and innovation. The codification of certain unwritten principles was controversial, too. How to codify, for instance, the Supreme Court’s practice with respect to the principle of supremacy of international law? Although recognized as a general principle, the Court carved out an exception in favor of Acts of Parliament without applying it consistently. Should codification be limited to the principle of supremacy, or should it extend also to the exception? The controversy was finally settled through a compromise. The drafters decided to include only the supremacy principle in the Constitution and to refrain from codifying the Court’s strand of case law deviating from the principle of supremacy, but chose a relatively soft wording in the German version so as to underscore that supremacy of international law was to be understood as a general principle and not as a strict rule governing conflict of norms.

• *Second* building block: A constitutional statute reforming the instruments of direct democracy was adopted on 9 February 2003. However, important concessions had to be made after a first proposal had failed in Parliament in 1999. Objectives 1 (increase of number of signatures) and 4 (competence of the Supreme court to decide on the validity of initiatives) turned out to be too controversial and were abandoned. The general initiative (objective 3) was introduced, but abolished in 2009 on the grounds that the new instrument was unworkable in practice.

• *Third* building block: A constitutional statute reforming the justice system was adopted on 12 March 2000. However, similar to the second building block, important concessions were made so as to secure a positive outcome. Whilst objective 1 and 3 were largely achieved, the outcome of objective 2 (enhanced judicial protection) was less favorable. The introduction of constitutional review of Acts of parliament turned out to be too divisive and had to be dropped. A new attempt to introduce constitutional review of parliamentary acts failed in 2012, exemplifying the deeply engrained fears of a “juristocracy”, viewed as a threat to (direct) democracy.

The adoption of the constitutional reforms outlined above did not put an end to constitutional reform. Two important reforms, one on (fiscal) federalism, and the second on education policy, were approved in 2004 and 2006 respectively.
3. Explanation of the political background and origin of the substantive issue with which the constitutional reform exercise engaged

The constitutional reform was triggered in the early 1960ies. Apart from the substantive issues highlighted above (see question 1), the political and social context played an important role. Although Switzerland was not faced with as strong social movements as other countries in 1968, a debate arose about Swiss identity. Reflecting the critical spirit of this time, Max Imhof, a renowned professor of constitutional law, wrote an influential book “Malaise Helvetic” in which he made the case for constitutional reforms. During the same year when the book was published – 1964 – one of the major political scandals of Swiss history (the so-called “Mirage Affaire”) concerning financial issues linked to the purchase of army airplanes reinforced demands for constitutional change. In 1965, Parliament approved a motion requesting the Government to undertake reforms of the Constitution.

4 Drafting process and procedures

As mentioned, previous to the adoption of the Constitution of 1999, no comprehensive constitutional reform was adopted during the 20th Century. However, during this period, new constitutions were adopted in a considerable number of cantons, a good part of which had opted for a separate drafting body, a constitutional assembly. For the adoption of the new federal Constitution, this method was, however, rejected. The procedure which was applied was the one laid down in the old constitution. Pursuant to the Constitution of 1874, even comprehensive constitutional amendments (including the adoption of a new constitution) are governed by a procedure which is very similar to the adoption of ordinary acts of Parliament. The major difference is that constitutional amendments are subject to a mandatory referendum and need to secure the double majority of the Swiss people and the cantons, whereas legislative acts are subject to an optional referendum and require approval by a simple majority (e.g. majority of the people).

During the first stage of the reform process, the government set up a working group in 1967, chaired by a former Federal Councilor (e.g. one of the seven members of the Swiss Government) which confirmed the need for comprehensive constitutional reform in 1973. In 1977, a commission composed of experts and chaired by a federal Councilor published a proposal of a new constitution which met with strong resistance. Despite this setback, government decided to pursue the reform process in a report published in 1885. Parliament followed suit and gave the Government the mandate to work out proposals for the three constitutional building blocks outlined above. For the building blocks 2 and 3, working groups chaired by two constitutional law professors were set up which produced first drafts reworked later by the Justice Ministry. The text of the new Constitution (block 1) was mainly drafted within the same ministry based on various expert reports. All three drafts were, like other legislative proposals, subject to a consultation process which is an important part of the Swiss consensual political culture. With a view to reaching as broad an agreement as possible and making parliamentary acts “referendum proof”, political parties, the cantons, trade unions, entrepreneurs and other interest groups are consulted. In the case of the Swiss

422 An Act of Parliament is subject to popular vote if 50’000 citizens or 8 cantons make this request within a deadline of 3 months as of the adoption by Parliament.
constitution, the consultation procedure was extended to the citizens, a decision which turned out to be highly popular. More than 11,000 comments were submitted.

The draft and the results of the consultation process were thereafter discussed in Parliament, which entails a two stage-process: (1) discussions, including expert hearings, in a parliamentary commission of each Chamber (the discussions are not public, but a report summarizing the main findings and recommendations is published) (2) separate discussion in the plenum in both Chambers. The approval of both Chambers is necessary for the adoption of legislative and constitutional acts. The new Constitution met this requirement with flying colours. It was approved with unanimity in the Upper Chamber and with 134 against 14 votes in the Lower Chamber.

5 Outcome and effect of the reform

There were to our knowledge no unintended consequences of the constitutional reforms. Within the Swiss political system, however, the goal of achieving a coherent, up-to-date constitutional text cannot be achieved for a long time. In the absence of statutory initiatives, the constitutional initiative remains the only option for the people to shape political decisions and policy. As it is widely used, the Constitution of 1999 has been subjected to a considerable number of piece-meal amendments, including, amongst others, controversial provisions such as the notorious minaret ban.

6 Assessment of the overall method used in preparing and implementing the constitutional change, and what it has to offer to the United Kingdom

The Swiss experience highlights, in my view, the difficulties to achieve major constitutional reform in polities which have a long tradition of constitutional continuity. This is the case for both Switzerland and the United Kingdom. The Swiss solution consisting in drafting different “building blocks” may be an interesting avenue for the United Kingdom to explore. This pragmatic approach, which separates codification of existing constitutional law and major constitutional reform, viewed as an ongoing process, reduces the risk of failure, as experienced during the first stage of the Swiss drafting process.

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Iceland: Crowd-Sourcing a Constitution
(Elected Council and Popular Engagement)

Recent events in Iceland are illustrative of the paradigm of constitutional change brought about by political crisis. The notorious kreppa, the financial collapse of October 2008, destroyed public confidence in the country’s governing elite, exposed the complicity of the authorities in criminal mismanagement and led directly to the long-overdue drafting of an entirely new Icelandic covenant. The Icelandic experience is significant because of its groundbreaking process of crowd-sourcing as a
mechanism for constitutional reform. However, although an excellent example of public participation in a constitutional reform process, the Icelandic experience demonstrates that the ultimate success or failure of such reforms relies on political consensus and commitment.

**Political crisis and constitutional upheaval**

The Icelandic state was established in 1944. Having achieved independence from Denmark, the new republican constitution ‘took effect on 17 June 1944, following a referendum where it was approved with approximately 95% of the vote’. It was modelled on the relatively succinct Danish *Riges Grundlov* or fundamental law, and in light of the wartime circumstances, a decision was taken ‘to postpone any comprehensive revision to a more favourable time’. As a result, the Icelandic constitution was a cautious, strictly provisional text. Article 79 contained the following special procedure for constitutional amendment:

> Proposals to amend or supplement this Constitution may be introduced at regular as well as extraordinary sessions of Althingi. If the proposal is adopted, Althingi shall immediately be dissolved and a general election held. If Althingi then passes the resolution unchanged, it shall be confirmed by the President of the Republic and come into force as constitutional law.

A number of piecemeal changes to the constitution have been made since 1944, including ‘reorganisation of the electoral system, the working procedures of the Althingi in 1991, and a new human rights chapter in 1995’. However, despite repeated attempts to tackle the larger question of the constitutionally ambiguous relationship between the president, the government and parliament, the “Danish” text remained essentially unreformed.

Unlike its constitution, Icelandic society has undergone a process of fundamental transformation since 1944. Significant factors driving this change include the economic deregulation in the late 1980s and Iceland’s admission to the European Economic Area in 1994, which brought new wealth to the island and reduced its dependence on primary resources such as fishing. Iceland has also adopted a more adventurous foreign policy, as was evident in its participation in the “coalition of the willing” against Iraq in 2003. These developments led many to question whether the Icelandic constitution was suitable for modern conditions.

The constitutional issue crystallised in the summer of 2004, when President Ragnar Grimsson took the unprecedented step of exercising his personal power of veto in respect of a bill seeking to control media ownership. Although the President argued that the legislation interfered with freedom of expression, his critics, among them government ministers, accused him of defying the will of parliament in light of

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423 Björg Thorarensen, ‘Constitutional Reform Process in Iceland’ (Olso-Rome International Workshop on democracy, 2011) 3.
424 Ibid.
425 i.e. the Icelandic parliament.
426 Constitution of the Republic of Iceland 1944, art 79.
427 Björg Thorarensen (n 1) 4.
428 Ibid 4-5.
his own private interests. Following Grimsson’s re-election, instead of submitting the bill to a referendum as required by article 26, the government withdrew the proposals. Nevertheless, Prime Minister Halldor Asgrimsson grasped the opportunity to appoint a small cross-party committee to review the constitution, including the vexed question of the presidential veto.

Asked to report by the end of 2006, the committee’s terms of reference were restricted to reviewing the mainly unreformed sections of the constitution. However, the Chairman took a broader approach, and as a result the Committee’s discussions were frank and wide-ranging, covering the general scope and nature of governmental authority as well as examining issues in respect of which the 1944 Constitution was silent. Progress was slow. An interim report issued in February 2007 recognised the antiquated character of the existing constitution and fully accepted the need to strengthen the democratic principles of popular and parliamentary control. However, in the absence of a consensus among committee members it recommended an amendment to article 79 as a logical first step. The report suggested that rather than triggering a general election, proposed changes to the constitution ought instead be put to a referendum. This would give the public ultimate authority but avoid the disruption of a parliamentary dissolution. A draft bill to this effect was provided to the Prime Minister. A general election in May 2007 resulted in a coalition government formed by the Independence Party and the Social Democratic Alliance (SDA). In spite of newly-appointed Prime Minister Geir Haarde’s pledges that the constitutional review would continue, the Committee did not meet again and its work was quietly shelved.

When the credit crunch struck in the autumn of 2008 Iceland was the first European economy to face the full force of the financial shock, and was pushed to the brink of national bankruptcy. The public response was a mixture of astonishment and outrage. The government attempted to assuage public anger appointing a special prosecutor charged with investigating suspected illegal activity surrounding the banking catastrophe. Parliament also established a Special Investigation Commission (SIC) to inquire into the matter and assess the implications for public administration. Despite these measures, the public outcry did not abate and in January 2009 the Haarde government stood down and was replaced by a minority coalition led by the SDA.

Constitutional reform was at the heart of the formation of this coalition. New Prime Minister Johanna Sigurdardottir was an outspoken reformist. Further, in return for agreeing to support the coalition in any vote of no-confidence, the Progressive party insisted that a Constitutional Assembly (stjórnlagathing) be created with the express purpose of modernising the constitution. Although it was not at all certain that

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431 President Grimsson was alleged to have close links with a large Icelandic media conglomerate.
433 Prime Minister’s Policy Address, 4 October 2004.
434 For example, judicial review of executive action.
435 Endurskoðun stjórnarskrárinnar - Afangaskýrsla nefndar um endurskoðun stjórnarskrár lýðveldisins Íslands, febrúar 2007 (1293 - 709).
436 Frumvarp til stjórnarskipunarlag.
438 Um rannsókn á áðraganda og orsókum falls íslensku bankanna 2008 og tengdra Atbara (142/2008).
439 An account of the so-called ‘pots and pans revolution’ and the events leading to the resignation of the government is at Hardarson & Kristinsson, ‘Iceland’ (2010) 49 Eur J Pol Res 1009, 1011-12.
the crisis had been *constitutional* in origin, the reformers were able to deploy a powerful new argument that the systemic lack of constitutional checks and balances had, at the very least, allowed wrongdoing to flourish.\(^{440}\)

Pledging to increase democratic openness and accountability in the wake of the financial disaster, the coalition duly introduced a bill to convene a Constitutional Assembly.\(^{441}\) The bill vested the ultimate power of decision in the electorate: in any dispute a referendum result would be, thus eliminating the need to dissolve parliament whenever a constitutional proposal was made.\(^{442}\) The bill was strongly opposed by the Independence party - still the largest single party - and shortly before election day the government withdrew the bill.\(^{443}\)

The results of the April 2009 election reflected the anger of large parts of the electorate. The SDA won a decisive victory, while the Independence party lost a third of its votes. The election also saw an increase in support for the Greens and the Progressive party, as well as the election of four members of newly-formed protest group, the Citizens’ Movement. The election results may demonstrate that ‘the crash and its aftermath led to a greatly increased distrust of the political elite among voters’, as the successful parties were less closely associated with the failed financial system than had been the Independence Party.\(^{444}\) To the victors, the outcome was a strong signal of popular support for change.

**Public participation: the National Forum and the Constitutional Assembly**

The SDA/Left-Green claimed to have obtained a clear mandate for democratic renewal\(^ {445}\). A bill was brought before parliament in November 2009 that would establish a Constitutional Assembly. Opening the debate, the Prime Minister argued a Constitutional Assembly was needed to examine the exercise and oversight of executive governance in Iceland. The Assembly would review and propose changes to the Icelandic constitution, focusing on eight specific areas:

1. The foundations of the Icelandic constitution and its fundamental concepts;
2. The organisation of the legislative and executive branches and the limits of their powers;
3. The role and position of the President of the Republic;
4. The independence of the judiciary and their supervision of other holders of governmental powers;
5. Provisions on elections and electoral districts;
6. Public participation in the democratic process, including the timing and organisation of a referendum, and including a referendum on a legislative bill for a constitutional act;
7. Transfer of sovereign powers to international organisations and the conduct of foreign affairs;

\(^{440}\) An example of such an argument is at Gylfason, ‘Constitutions: send in the crowds’ (n 15) 4-5.
\(^{442}\) Frumvarp til stjórnarskipunarlaga (Bill on the Constitution), 4 March 2009.
\(^{443}\) Hardarson & Kristinsson (n 17) 1013.
\(^{444}\) ibid 1014-15.
8) Environmental matters, including the ownership and utilisation of natural resources.\textsuperscript{446} The Prime Minister hoped that these measures would stimulate public interest in a dialogue of a kind that the country had never had.\textsuperscript{447} The government accepted that the Assembly’s role could be advisory only, it being impossible under the existing constitution to tie parliament’s hands. Even so, the reform process itself was innovative in Iceland: constitutional reform would be the responsibility of a body other than parliament, controlled not by politicians but by the wider public.

The importance of public involvement in constitutional reform was demonstrated by a ‘National Assembly’ attended by a randomly selected, statistically representative sample of 1200 people, along with a further 300 individuals from assorted institutions. This amounted to a sample of 0.5\% of the Icelandic population. The Assembly sought to harness “the wisdom of the crowd” to draft a manifesto embodying a set of core Icelandic values and a vision for the future.\textsuperscript{448} The event was organised by ‘the Anthill’, a private collective receiving some public funding.\textsuperscript{449} The government sought to work in partnership with the campaign and build on ‘the Anthill’ experience. Accordingly, the Bill on a Constitutional Assembly was modified to enable the formation of a similarly composed “National Forum” to identify the public’s principles and priorities in advance of the Assembly’s deliberations.\textsuperscript{450}

In its final form, the Bill on a Constitutional Assembly reflected the ideal of a compact, popularly-elected institution, operating transparently and with a clear sense of public participation.\textsuperscript{451} The only obvious omission in the bill was any reference to a referendum,\textsuperscript{452} which left unresolved the issues of the nature and timing of a future popular vote. In June 2010 the bill was passed by parliament with an overwhelming majority,\textsuperscript{453} and sent to the President for validation.\textsuperscript{454} Elections to the assembly would take place no later than the end of November 2010.

In accordance with the terms of the Act, Parliament established a Constitutional Committee composed of seven expert members charged with organising the National Forum and processing its findings for the Assembly.\textsuperscript{455} The widest possible public engagement was encouraged, through consultation with the municipalities and other civic organisations, and a website to provide information and promote “active” discussion.
The National Forum: public participation to establish values for a new constitution

On 6 November 2010 some 950 participants, randomly selected to represent a cross-section of the Icelandic population, assembled in Reykjavik for the one-day National Forum. The aim was to crowd-source "the norms and values of the population of twenty-first century Iceland ...[and] produce a bottom-up map of contemporary Icelandic values on particular constitutional matters – to establish the values framework within which the Constitutional Assembly would produce its draft constitution".

The participants were a diverse group: ‘the youngest participant was 18 years old, the oldest was 91 years old, and the division of the participants by gender was even’. Online live streaming was available to allow the public to follow the conversation. The Forum was arranged so that groups of ‘eight participants were seated at a total of 128 round tables in a meeting hall with a specially trained mediator to guide the discussions at each table’. The discussion focused on eight main topics, and participants were asked for their ‘views on fundamental values’.

Overall the participants collectively expressed a common wish for a constitution that would amount to a new social contract guaranteeing the sovereignty and independence of Iceland, safeguarding its language, preserving its culture and resources, and promoting multiculturalism and the continuing separation of church and state. Equal voting rights to correct a long-standing disparity in constituency sizes was also mentioned. The results were passed to the Constitutional Committee for submission to the upcoming Constitutional Assembly.

ELECTING THE CONSTITUTIONAL ASSEMBLY: QUESTIONS OF LEGITIMACY

The National Electoral Commission (NEC) was responsible for the elections to the Assembly. Its role was to implement the legal rules regulating the election and to explain the unfamiliar system to the voting public. For the purposes of the Assembly elections, Iceland formed a single constituency, with each voter having up to 25 votes. Much effort went into ensuring voter accessibility and facilitating voter choice. To prevent fraud and assist the count, the ballot paper carried a barcode with a unique identifying number which could be scanned electronically. To reassure the public, the Ministry of Internal Affairs confidently stated that it would be impossible to trace a ballot paper to a particular voter.

A total of 522 ‘personal’ candidates competed for 25 seats. To inform people about each candidate ‘the Ministry of Justice sent a brochure to every home in the country (...) and in addition a special website was set up for the same purpose’. Campaigning was polite and civilised, and the main political parties played only a negligible role. It was, in effect, politics without partisanship. Voting took place on 27

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456 Bater, ‘Hope from below: composing the commons in Iceland’, 1 December 2011.
457 Björg Thorarensen (n 1) 7.
458 ibid
459 ibid
460 ‘The main conclusions from the National Forum 2010’, 7 November 2010.
461 Act on a Constitutional Assembly, arts 7 & 8.
462 For example, ‘electronic samples of the ballot papers were posted on the Internet, which voters could fill in and take with them to the polling stations for reference’: Thorarensen (n 1) 8.
463 Ministry of Internal Affairs, ‘Strikamerkíð hefur ekkertímed nafn kjosanda ad gera’, 18 November 2010.
464 Thorarensen (n 1) 8.
November 2010. After a count running to 508 rounds, 15 men and 10 women were eventually elected. The successful candidates were a diverse group comprised of "doctors, lawyers, priests and professors as well as company board members, a farmer, a champion for the rights of handicapped persons, mathematicians, media people, erstwhile members of parliament, a nurse, a philosopher, poets and artists, political scientists, a theatre director, and a labor union leader."  

In contrast to this positive aspect of the election, the turnout of 83,531 voters - 35.95% of the total electorate - was ‘considerably short of the normal turnout in elections to the Althingi’.  

This low turnout might be attributed to a number of different factors.

First, the 'large number of candidates (...) made it difficult for voters to pick candidates’, and as ‘candidates had no connections with political parties (...) it seemed to be difficult for voters to assess which policy they were presenting”. Only one individual won enough votes to be elected outright on the basis of first preferences. Further, there may have been less general interest in the exercise than had been expected, leading some to conclude that there was no ‘general political consensus about these new methods of the reform process'. All of these factors may have denied the Assembly a degree of legitimacy.

The election itself was vulnerable to legal challenge because of the complex interplay between its own special rules and the requirement to comply with existing election law. Within days of the election the Icelandic Supreme Court had received appeals from three complainants - two voters and one candidate - contesting the conduct of the election on various grounds. The Supreme Court acknowledged the unusual nature of the election, but noted that the organisers had been required to conform to the law on parliamentary elections where this was ‘applicable’. The Court found that breaches of the secrecy of the ballot had clearly deviated from the provisions of the country’s election law. It identified two ‘serious deficiencies’ (traceable ballot papers and agents not being present during the count) and four ‘deficiencies’ (unacceptable voting booths, unfolded ballot papers, unlocked ballot boxes and closed counting). The election to the Constitutional Assembly was accordingly ruled to have been invalid.

The coalition’s plans were thrown into complete confusion. A working party, composed of one representative from each party, was established to consider the options. It was generally accepted that the Supreme Court’s decision was final. However, rather than holding a further election, the working party instead recommended that the successful candidates be appointed to serve on a Constitutional Council (stjornlagarad). Although not having the authority of a directly-elected Assembly, the Council could ‘[submit] proposals to the Althingi on a review of the Constitution in the same manner as the Constitutional Assembly had been intended to do.’ Despite strong criticism from the Opposition, a parliamentary resolution in

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465 Further details of the election results are available on the following website: www.kosning.is/media/stjornlagathing-2010/Frambjodendur-til-stjornlagathing03112010.pdf.
466 Gylfason, ‘Constitutions: send in the crowds’ (n 15) 6.
467 Björg Thorarensen (n.1), 8.
468 Ibid.
469 Ibid.
470 Including: claims that the ID barcode on each ballot paper meant that individual voters were in fact traceable, and that the polling booths were inadequate to ensure the secrecy of the vote. A description of the relevant election rules and grounds for the legal challenge is at Thorarensen (n 1) 9.
471 Decision of the Supreme Court, 25 January 2011.
472 Thorarensen (n 1) 10.
favour of a Constitutional Council was passed by 30 votes to 21, with 7 abstentions and 5 absentees. The Act on a Constitutional Assembly was repealed shortly thereafter.

**The Constitutional Council: crowd-sourcing as a means of constitutional reform**

The Council enjoyed a great degree of autonomy over its own procedures. The only restrictions were that it was required to elect a Chairman from among its members and to hold its proceedings in public. This latitude extended to its programme of work. The Council was provided with a detailed report by the Constitutional Committee, summarising the findings of the National Forum and setting out various options for change and methods for implementation. The report argued that the constitution needed to be updated to reflect the contemporary notion of the public interest in clear, certain and intelligible terms. It did not, however, bind the Council, which would consider the report but formulate its own recommendations.

Establishing the composition of the Council was straightforward. Of the 25 candidates originally elected to the Assembly, 24 accepted the invitation to participate. The single vacancy was filled by the candidate who had finished in 26th place. Once sworn in, a Chair (Salvor Nordal, an academic) and Deputy-Chair (Ari Teitsson, a farmer) were chosen to preside over proceedings. The Council was assisted by a team of legal advisers. Although it undertook to fulfil its revising role thoroughly and promptly, the three-month time limit imposed on the Council was a highly ambitious target, even with the possibility of a one-month extension.

The Council was subdivided into three working groups, each examining specific topics. They worked with the text of the existing constitution to propose amendments, but reserved the right to draft a wholly new document. The findings of these group discussions were considered on a weekly basis at a full Council meeting and published. Although parliamentarians and lobby groups were deliberately kept at arm’s length, public participation was encouraged, particularly through the use of social media. According to Björg Thorarensen, the entire procedure in the Council was very open and transparent. The Council maintained an active website, where consultation was sought with the nation by granting to everyone the opportunity to submit thoughts and questions and comment on the draft proposals that were posted on the website as they took shape. This made it possible to keep track of progress as the proposals developed. [The Council’s] work could also be seen on the major communicative media such as Facebook, YouTube and Flickr. Every day short interviews with delegates were put on YouTube and Facebook and

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473 Parliamentary debates, 15 March 2011.
474 Among them the Minister of the Interior, who was unwilling to condone a move that sought to evade the Supreme Court ruling.
475 Þingsályktun um skipun stjórnlagaráðs (Resolution to appoint the Constitutional Council), 24 March 2011.
476 Bill for the cessation of the Act on the Constitutional Assembly, 7 April 2011.
477 Gylfason, ‘From collapse to constitution’ (n 10) 16.
478 Bater (n 34).
479 The tasks were divided as follows: Working group A - Language, rights and resources; Working group B - The President, parliament and government; Working group C - The courts, elections and foreign affairs.
480 Minutes of the 4th meeting of the Constitutional Council, 14 April 2011.
weekly there was live broadcast from the Council meetings on the webpage and Facebook.\textsuperscript{481}

The Council’s website received some 3,600 comments and 323 formal proposals from the public. This level of participation has been interpreted as evidence that ‘the people of Iceland welcomed the Council’s invitation to them to participate in the project’.\textsuperscript{482} Fears that public input might be undermined by abusive and unwelcome posts proved largely unfounded: most contributors were well-intentioned.\textsuperscript{483}

In light of the Council’s working practices, devising the new draft constitution was an organic, evolutionary process:

The work was done in three overlapping rounds. Each week, the Council posted on its website some new provisional articles for perusal by the public. Two or three weeks later, after receiving comments and suggestions from the public as well as from experts, the Council posted revised versions of those articles on its website. In a final round, proposals for changes in the document as a whole were debated and voted upon article by article and the final version of the bill was prepared.\textsuperscript{484}

According to Bater, the Council’s encouragement of public participation lent legitimacy to it and its work:

The Council’s legitimacy did not draw simply from its composition of elected ‘ordinary’ Icelanders; it stemmed from the ongoing, \textit{real time}, technology-enabled dialogue between the Council and the people. It stemmed from the Council’s openness to the public (...) and from its complete independence from political meddling and subversive corporate lobbying.\textsuperscript{485}

The Council approved its final draft unanimously and in its entirety. By presenting a united front the Council hoped to further enhance the document’s legitimacy and provide a degree of protection from attacks by hostile MPs.

The final draft was submitted to the speaker of parliament and to the Icelandic public in July 2011. \textit{A Proposal for a New Constitution for the Republic of Iceland} contained a preamble and nine chapters, comprising 114 articles.\textsuperscript{486} Although the draft preserved large parts of the existing constitution, the Council was anxious to emphasize that it had been willing to innovate. The draft was designed to make clear the precise future distribution of governmental power and responsibility, ‘making the constitution more understandable and accessible to the general public’.\textsuperscript{487} A number of provisions reflected the mistrust generated by the crash of 2008. The status and role of the executive was more clearly defined. Parliamentary control of ministers was enhanced through improved monitoring and increased disclosure. The public appointments process was reformed to prevent the use of patronage. Many new articles, however, were devoted to aspirational expressions of public empowerment that had been a prominent feature of the National Forum, illustrated especially by the added prominence given to human rights and the introduction of voter initiative.

The draft constitution reflected the Council’s decision to maximise the opportunities for public participation. Some argued that the impact of the crowd-
sourcing exercise may have been excessive: some complained that the draft was too idealistic, that there were too many inconsistencies and that it would be too difficult to apply in practice.\(^\text{488}\) Crucially, the Council’s draft went much further than an executive-dominated parliament would have in strengthening parliamentary oversight. The Council’s supporters argued that such measures justified the widespread public involvement that had been encouraged by the Council.

**Public approval: the October 2012 referendum**

Opening the new parliamentary session in October 2011, President Grimsson recognised that there had developed a gulf between politicians and the public which the Council’s proposals were designed to address. Nonetheless he expressed concern over the length of time and the expense of the reform process, as well as the possible future application of Article 79. If, as some wished, there was to be an early referendum on the matter, he urged parliament to come to a view about the draft ‘in good time’. As the presidential election of June 2012 was fast approaching, Grimsson argued that voters needed to know what the post of President would involve in future.\(^\text{489}\) The Althingi subsequently consented to a government resolution to refer the draft to a new standing committee of the chamber, the Constitutional and Supervisory Committee, which would assess its provisions in co-operation with the Council. This would allow for further modifications and prepare the way, it was hoped, for a June referendum.\(^\text{490}\)

Following a four-day meeting in mid-March 2012, a revised draft was submitted to parliament. Although some opponents of the new draft argued that it would be inappropriate to put the question to the public before parliament had had the chance to hold a substantive debate, the government sought parliamentary approval for an advisory referendum to be held in conjunction with the Presidential election on 30 June.\(^\text{491}\) It wished to add “democratic weight” to the process of constitutional reform, counting on a higher turnout if the referendum and the presidential election were held on the same day. It might also have hoped that a strong ‘Yes’ vote in June might reduce political opposition to the measure.

However, the government’s resolution was not accepted. After the National Electoral Commission had suggested changes to the phrasing of the proposed referendum, an initial parliamentary vote was delayed because the chamber was not quorate. Then, the opposition proposed several blocking amendments and talked-out the resolution during a fractious ten-hour debate on 29 April. At midnight the three-month deadline expired and the June 30 date was lost.\(^\text{492}\) Six weeks later, the government reintroduced the resolution, promising that a group of qualified lawyers would review the Council’s draft from a technical perspective. A new referendum date - 20 October - was targeted. Opposition MPs, convinced that this legal exercise would amount to more than mere proofreading, argued that it was wrong to hold a

\(^{488}\) ibid 12. The Venice Commission was critical of the broad drafting of many of the provisions of the proposed constitution: ‘Opinion on the draft new constitution of Iceland’ (Opinion no 702/2013, 11 March 2013)

\(^{489}\) Address by the President of Iceland at the opening of the Althingi, 1 October 2011. The president highlighted in particular the consolidation of the role of parliament and the strengthening of the position of the Head of State

\(^{490}\) Parliamentary debates, 11 October 2011.

\(^{491}\) By law, the government was required to give three-months’ notice of any referendum

\(^{492}\) Parliamentary debates, 29 March 2012.
referendum during the drafting process. Nevertheless, on 24 May parliament finally agreed to hold a referendum on 20 October 2012 on the following six questions:

1. Do you wish the Constitution Council’s proposals to form the basis of a new draft Constitution?

2. In the new Constitution, do you want natural resources that are not privately owned to be declared national property?

3. Would you like to see provisions in the new Constitution on an established (national) church in Iceland?

4. Would you like to see a provision in the new Constitution authorising the election of particular individuals to the Althingi more than is the case at present?

5. Would you like to see a provision in the new Constitution giving equal weight to votes cast in all parts of the country?

6. Would you like to see a provision in the new Constitution stating that a certain proportion of the electorate is able to demand that issues be put to a referendum?

The referendum campaign ran largely along party lines. A recently formed pressure group, Union for a New Constitution, urged the public to seize the chance for real change, while critics rejected the vote as meaningless in the absence of a final draft constitution. President Grimsson, who had been elected in June to serve a fifth term, made it clear that in his view it would be wrong to attempt to revise the constitution amidst such parliamentary disagreement.

Despite the lack of political consensus, all six questions asked in the referendum were answered with an overall majority of ‘yes’ votes. Turnout was 48.95%, and the results were as follows:

**Question 1:** Yes: 64.2%
No: 31.7%

**Question 2:** Yes: 74.0%
No: 15.2%

**Question 3:** Yes: 51.1%
No: 38.3%

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493 The vote was carried by 35 votes to 15; several MPs were absent
494 Parliamentary debates, 24 May 2012.
495 Ballot paper for the Referendum of 20 October 2012.
497 ‘President opposes changes to the constitution’, *Iceland Review* (3 July 2012).
The Icelandic people therefore supported the use of the Council’s draft as the basis for future parliamentary legislation to reform Iceland’s constitution. Prime Minister Johanna Sigurdardottir called on parliament to complete the process of constitutional reform in advance of the general election scheduled for spring 2013.

Assessing Iceland’s recent attempt at constitutional reform: lessons for the UK

Crowdsourcing: a ’high water mark’ in public participation

One of the most significant features of Iceland’s recent constitutional reform project was the extent of public participation, something that had been actively encouraged from the start of the process.

The first mechanism for achieving this was ensuring that ordinary citizens were able to participate in meetings and form decision-making bodies. The National Forum and the Constitutional Council were both diverse bodies, composed of a representative cross-section of Icelandic society. This helped to ensure that the draft constitution was informed by a range of voice and opinions, and was not dominated by party politics. A body established to examine the case for the adoption of a codified constitution in the UK should also seek to achieve a diverse membership that included members of the public. The long-term success of such a significant constitutional reform may depend on the degree of public support that it enjoys. In the current climate of mistrust of politicians, ensuring that the public are able directly to participate in the formulation of reform proposals may help to increase support for and understanding of the constitutional reform in question.

However, perhaps the more significant factor in the Icelandic process was the use of ‘crowd-sourcing’ methods to identify the values that should underpin and the content of the provisions of the draft constitution. Public participation in the Icelandic reform process was facilitated by innovative and effective use of the internet and social media. This gave the Constitutional Council access to a very wide range of opinions when formulating its proposals, and facilitated a responsive drafting process that could fully engage interested members of the public in the constitutional reform project. The transparency provided by the crowd-sourcing method may also have meant that the Icelandic people were able to consider themselves a valuable and equal part of a process that was not dominated by vested interests. Although the Council was advised by experts, it:

- did not invite representatives of interest organisations to special meetings, but these organisations – bankers, boat owners, farmers, politicians – had the same access as everyone else to the Council, its open meetings, and to individual Council members. This was an important benefit of the crowdsourcing aspect

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499 Saunders, ‘Constitution-making in the 21st century’ (2012) Intl Rev L 1, 8
of the operation: it created a framework for inviting everyone to have a seat at the same table.  

An inquiry in the adoption of a codified constitution for the UK should seek to emulate the methods of public participation adopted by the recent constitutional reform process in Iceland. The internet and social media are part of everyday life. While it may be true that access to online methods of engagement and consultation are not universal if the internet and social media are part of a range of methods designed to encourage public participation ‘the democratic gains from [extensive use of the internet] seem to easily outweigh potential losses from slightly unequal access’. The internet can provide an accessible, low-cost and effective means of raising awareness of and encouraging participation in constitutional reform. This is especially significant because of the potential to reach groups who might not ordinarily engage in political activities, such as young people, members of certain hard to reach communities, or those who are unable to attend public meetings. Such measures are important, as facilitating widespread public participation and building trust in a constitutional reform process are:

increasingly seen as (...) key to a Constitution that is effective and lasting.

Process can underpin the legitimacy of a Constitution, increase public knowledge of it, instill a sense of public ownership and create an expectation that the Constitution will be observed, in spirit as well as form.

The level of public participation in the Icelandic constitutional reform process may also have had a more fundamental effect. Perhaps the most important - and possibly most enduring - result of the process has been the recognition of the Icelandic people as an accepted constitutional actor. This is also significant in the UK context. At a time when many members of the public are not members of political parties and feel that politicians are detached from their everyday lives, allowing the public fully to participate in and influence constitutional reform may not only increase support for the constitutional reform in question, but may also encourage greater engagement in the wider political process.

Continuing uncertainty: the need for political consensus and commitment to reform

Despite significant public participation in the constitutional reform process and an expression of clear support for use of the draft constitution as the focus for reform in the October 2012 referendum, the future of constitutional reform in Iceland is uncertain.

The current Icelandic Constitution requires any constitutional reform to be adopted in votes held in two successive parliaments, separated by a general election. No vote was taken on the constitutional reform proposals in parliament before its dissolution in advance of the general election of 27 April 2013. Therefore, if the Constitutional Council’s draft constitution is to be adopted, a vote in parliament

500 Gylfason, ‘Constitutions: send in the crowds’ (n 15) 10.
501 The ‘crowd-sourcing’ approach may have been particularly suitable for Iceland, where 95% of the public has internet access: ibid 11.
502 ibid.
503 Recent research by the Hansard Society has found that only 12% of 18-24 year olds would be certain to vote in the event of an immediate general election in the UK: Audit of Political Engagement 10: The 2013 Report (2013 Hansard Society) 19.
504 Saunders (n 78) 3.
505 See generally the findings of the Hansard Society (n 82).
506 Constitution of the Republic of Iceland 1944, art 79.
must be followed by a further general election in order to comply with article 79. It would seem unlikely that a new government would choose this path soon after an electoral victory. Even if the government did pursue constitutional reform, changes to parliamentary processes for approving constitutional reforms were initiated in the dying days of the last parliament that would make such reforms harder to achieve in practice. The new changes would require a two-thirds majority in Parliament and a forty per cent vote of the electorate (meaning there would have to be a very high turnout).\textsuperscript{307} Such amendment procedures would make constitutional reform extremely difficult to achieve in future.

In the general election of 27 April 2013 the Independence Party achieved 26.7% of the vote and the Progressive Party 24.4\%,\textsuperscript{508} meaning that a coalition between these parties will produce the next Icelandic government. This, too, has made constitutional reform in Iceland increasingly unlikely as neither party had supported the work of the Constitutional Council. Indeed, the draft constitution received no clear support from any of the major Icelandic political parties prior to the election, including the parties that had established the Council when in government.\textsuperscript{509} This lack of political support may have its roots in the far-reaching changes proposed by the draft constitution. For example, provisions such as that declaring Iceland’s natural resources to be the ‘perpetual property of the nation’\textsuperscript{510} may have posed too much of a threat to wealthy vested interests.\textsuperscript{511}

The uncertain fate of Iceland’s recent attempt at constitutional reform highlights the need for political consensus and commitment to reform. In the absence of such agreement the success of any constitutional reform, even one that was formed with extensive public participation and which received popular support, will be left to the vicissitudes of party politics. To avoid such uncertainty and the implication that popular support is of little consequence in the face of party political interests, any UK process examining the case for adopting a codified constitution should seek to proceed on the basis of cross-party consensus and commitment to implement the outcome of the reform process.

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\textsuperscript{307} Gylfason, ‘Putsch: Iceland’s crowd-sourced constitution killed by parliament’ (30 March 2013).
\textsuperscript{510} A Proposal for a new Constitution for the Republic of Iceland (n 65) art 34.
\textsuperscript{511} Dessi (n 88).
\textsuperscript{512} Thanks to Dr Simon Burgess for research and drafting assistance.
Post-apartheid Constitutional Reform in South Africa
(Negotiating Council and Technical Committee)

1 Constitutional change in South Africa, from a racially based system of parliamentary sovereignty to a system of constitutional supremacy

After the Union of South Africa was created in 1910 by an Act of the British Parliament, two new constitutions were adopted in 1960 and 1983 based on apartheid, a form of universally denounced racial segregation. The eventual democratic transition from apartheid started in 1993. It was facilitated at a legal and political level by a radical process of constitutional reform comprising of a two step process: Political negotiations resulted in the adoption of a transitional constitution (the 1993 Constitution), often referred to as the ‘interim Constitution’ which embodies a political settlement bringing an end to apartheid. The 1993 Constitution provided for a Constitutional Assembly (CA) elected by universal adult suffrage to draft and adopt a new constitutional text within two years of the first sitting of the National Assembly. The first truly democratic general election was subsequently held in April 1994, when the ANC replaced the National Party as the government. The current 1996 Constitution was drafted and adopted accordance with the constitutional principles agreed on and incorporated in the 1993 Constitution.

The 1993 and 1996 post-apartheid constitutions purported to introduce a non-racial democracy based on human rights. It marks the break away from a Westminster system of parliamentary supremacy backed up by British common law principles to a system of constitutional supremacy, introduces a Constitutional Court with the power to decide whether law, Presidential and parliamentary conduct are constitutional, demarcates the country into nine provinces (replacing the previous four), and recognises eleven official languages. Whereas the 1993 Constitution contained a chapter on Fundamental Rights, the 1996 Constitution incorporates a fully-fledged justiciable Bill of Rights.

2 Explanation of the political background and origin of the substantive issue with which the constitutional reform exercise engaged

The substantive issue with which the constitutional reform engaged was to bring an end to white domination and apartheid. The process may be better understood against the following background.

Goverance in the apartheid era was characterised by its flagrant disregard of internationally accepted human rights standards.\(^\text{513}\) Abuses of international human rights characterised the very nature of the apartheid legal order such as institutionalised racial discrimination and non-adherence to the right of self-determination.\(^\text{514}\) International opposition to these practices led to the adoption of numerous United Nations resolutions and the development of new rules of treaty and


\(^\text{514}\) H.A. Strydom “Self-determination and the South African Interim Constitution” vol 1 South African Yearbook of International Law Verloren van Themaat Centre for Public Law Studies, University of South Africa. (1993/94) at p. 43.
customary international law to promote human rights, racial equality and decolonisation, exerting pressure on the South African government to introduce political reform.\textsuperscript{515} At a continental level the Organization of Africa Unity (OAU) established in 1963 was geared to eradicate all colonialism in Africa, with the abolition of apartheid high on the agenda. It was no surprise that when the African Charter on Human and Peoples’ Rights was adopted by the OAU in 1981, African states once again pledged their commitment to eliminate apartheid.

The South African government of the time justified these policies as a domestic matter shielded from international scrutiny and involvement by article 2(7) of the UN Charter which prohibits international interference in the domestic jurisdiction of states. Wilful non-recognition and violation of human rights led to isolation from South Africa’s African peers, the international community at large, as well as exclusion from participation in international organisations such as the UN. Needless to say that South Africa did not make any effort to become a party to international human rights agreements during this period. Moreover, in accordance with the applicable British common law principles, fundamental rights were never constitutionally recognised. Courts had very little scope to develop common law protection of human rights as it was severely limited by a supreme parliament based on race.

By the 1980s South Africa was embroiled in turmoil. Popular resistance had grown since the 1983 launch of the United Democratic Front resulting in an increase in armed attacks on both strategic installations and civilian targets designed to “make South Africa ungovernable”. This was countered by a campaign of the apartheid security forces to suppress the armed struggle, including detentions, shootings, banning of political opposition supporting the armed struggle and repeated states of emergency.\textsuperscript{516} In the early 1990s the search for a peaceful settlement to South Africa’s political problems could no longer be postponed due to escalating international isolation and domestic pressure. This climate was stimulated by academic debates and research projects by the South African Law Commission,\textsuperscript{517} amongst others, on alternative constitutional models based on non-racialism, democratic principles and the protection of human rights, which informed subsequent negotiations that changed the course of South Africa's history. Constitutional protection of human rights and

\begin{footnotesize}
\begin{enumerate}
\item Dugard (2005) at pp. 20-21. Notable examples of treaties are the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) opened for signature in 1966 and directed at the elimination of racial discrimination through such policies as apartheid, the International Convention on the Suppression and Punishment of the Crime of Apartheid adopted by the United Nations General Assembly in 1973 which declares apartheid as a crime against humanity and the International Convention against Apartheid in Sport adopted in 1985. International humanitarian law was revised to confer prisoner of war status on combatants who were members of national liberation movements.
\item M. Levy “From Dakar to Democracy” ABC Press (2007) at p. 5.
\end{enumerate}
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ratification of or accession to international human rights agreements became a widely accepted priority amongst the different political stake holders set to embark on the negotiation of a constitutional settlement.

3 Participation in preparation and design of the reform package

A multi-party negotiating process to seek a negotiated settlement for South Africa’s political difficulties commenced in March 1993. The starting point was the granting of indemnity enabling political adversaries to participate in a negotiating process that would ultimately produce the 1993 Constitution. A Negotiating Council (NC) was composed of the South African government led by the National Party, its historic rival the African National Congress (ANC) and twenty four other groupings. Each party was represented by a male and female representative and assisted by two advisers. Given the undemocratic nature of the South African landscape at the time, (the negotiating parties never had the opportunity to participate in democratic elections before), all the parties lacked legitimacy. It was therefore deemed inappropriate to grant the negotiating parties the power to agree on a final constitution. Instead they agreed on a constitution of a preliminary nature establishing the mechanism for the adoption of a replacing democratic constitutional text.

4 Working methods of the design process

In the NC decisions were taken on the basis of sufficient consensus and were subject to endorsement by a Plenary Session, a body comprising the leaders of the parties represented on the NC and nine representatives from each party. The NC appointed seven technical committees to assist and advise on different aspects of the negotiating process including a Technical Committee on Constitutional Issues (TTCI) who became responsible for drafting the constitution for an interim period and a technical committee on fundamental rights. 518

5 Formal Procedure

The final text of the 1993 Constitution was arrived at in the following manner: The TTCI systematically compiled a draft text based on submissions received from the parties represented on the NC as well as interested parties outside the process. The process was promoted as a collective drafting process, where special care was taken to invite inputs from all South Africans: historically marginalised groups such as women and traditional leaders were encouraged to submit their views. 519 In general, the drafting was done on a chapter-by-chapter basis. Any amendments agreed upon by the NC were referred back to the TTCI for incorporation in the text. Finally the corrected text was referred to the State Law Adviser of the Department of Justice, for

518 The TTCI consisted of constitutional experts: Advocate Arthur Chaskalson (later to become the first President of the Constitutional Court), Prof George Devenish (Constitutional Law, University of Natal), Advocate Dikgang Moseneke, Advocate Bernard Ngoepe, Michèle Olivier (Legal adviser Department of Foreign Affairs), Prof Willem Olivier (Political Science, University of the Orange Free State), Prof Francois Venter (Constitutional Law, Potchefstroom University) and Prof Marinus Winchers (Constitutional Law, University of South Africa). Both Chaskalson and Wiechers were closely involved in the drafting of the Namibian Constitution.
technical refinement and preparation for parliamentary enactment by the Nationalist Party parliament (who was still in place at the time).\textsuperscript{520}

Adoption of the 1996 Constitution: The 1993 Constitution provided for a CA elected by universal adult suffrage, tasked to draft and adopt a new constitutional text within two years of the first sitting of the National Assembly. For such adoption section 73(2) of the 1993 Constitution required a majority of at least two-thirds of its members. The new constitution had to comply with constitutional principles agreed to by the negotiators of the 1993 Constitution. These constitutional principles, contained in Schedule 4 of the 1993 Constitution, recorded a “solemn pact” made between the striving political groups to break a deadlock in the negotiations and facilitated the reaching of a political settlement in 1993. The concept of constitutional principles enabled the previous government, which enjoyed only white minority support, to play a significant role in the drafting of a new constitution, after the loss of their powerbase. For this reason section 71(2) of the 1993 Constitution provided that any constitutional text passed by the CA would not be valid unless the Constitutional Court had certified that all its provisions complied with the constitutional principles.

All political parties elected to the CA, with the exception of the Inkatha Freedom Party, participated in the deliberations of the CA. A wide variety of experts were consulted on an on-going basis to assist in the drafting of a new constitutional text. An open invitation was also extended to the general public to make submission to the CA. On 8 May 1996 the CA adopted a new text by a majority of 86% of its members. The Chairperson of the CA transmitted the draft to the Constitutional Court to certify that it complies with the Constitutional Principles.\textsuperscript{521} The Constitutional Court found that all the Constitutional Principles were not complied with and consequently withheld certification and referred the text back to the CA for amendment. An amended text was subsequently adopted by the CA on 11 October 1996 and retransmitted to the Court. After considering of the text, at this occasion, the Constitutional Court found that it did comply with the Constitutional Principles.\textsuperscript{522} The Constitution finally came into operation on 4 February 1997.

6 Outcome and effect of reform

The negotiations and subsequent the adoption of the 1993 and 1996 Constitutions successfully managed to bring an end to political violence and conflict in a much divided and increasingly isolated South Africa. The 1993 Constitution presented a watershed in South African legal and political history terminating white minority rule, paving the way for a constitutional democracy, and giving all South Africans access to the same ballot box and the enjoyment of justiciable human rights. It discarded the old Westminster model of parliamentary sovereignty, which in the case of South Africa was based on racial representation, establishing instead a system of constitutional supremacy. The Bantustans (Transkei, Ciskei, Bophuthatswana and Venda also known as TCBV states), who were given independence by the apartheid government in furtherance of the policy of separate development, were reincorporated


\textsuperscript{521} In Re Certification of the Constitution of the Republic of South Africa (1996) (10) BCLR 1253 (CC) at 1271.

into a unitary South African state. Provision was made for nine provinces with some legislative and executive autonomy.

The effect of the constitutional transformation was experienced at a multitude of different levels. The issues listed below identify some major areas were change occurred and are by no means exhaustive. The complexity of the issues identified is immense and can be further explored as the numerous unforeseen consequences arising from a dynamic political process are being dealt with on an ongoing basis.

6.1 Constitutional supremacy
Parliamentary sovereignty was replaced by constitutional sovereignty and the rule of law.

6.2 Human rights
The constitutional Bill of Rights is regarded as the cornerstone of the South African democracy. It reflects international human rights instruments but also introduces some uniquely South African features. Formerly disadvantaged categories of persons enjoy special protection in order to eradicate the inequalities of the past; socio-economic rights are recognised and legally enforceable; environmental rights and the right to just administrative action are protected. The inclusion of human rights as part of the supreme constitution entrenched its position and protects it from political meddling. The justiciability of socio-economic rights has implications for the separation of powers as it implies a pro active role for courts in shaping policy and implies possible intervening in budgetary allocations.

6.3 Consolidation of territory and introduction of new provinces
Whilst the TBVC states were brought back into a united SA, the former four provinces were abolished and nine new ones introduced. This resulted in the abolition of former provincial structures and the introduction of a new system of devolved governance at a provincial level in accordance with constitutionally provided functional areas.

6.4 Civil Service
Reincorporation of TBVC states into the larger South Africa was based on a political agreement that their civil servants would be incorporated into the South African civil service retaining levels of seniority. This implied an organisational overhaul of the entire civil service and public administration. Different post level and academic requirements existed between the SA and TBVC civil services and had to be accommodated in a new civil service. Affirmative action was constitutionally recognised and facilitated promotion of former disadvantaged groups.

6.5 Court system and role of the judiciary
A Constitutional Court was introduced as the highest court in constitutional matters with the power to decide on the constitutionality of constitutional amendments, parliamentary and provincial legislation. All law including provincial legislation had to meet the requirement of constitutionality.

6.6 Common Law
Common law remained in force only as far as it complied with the constitution and Bill of Rights. Former authority based on British constitutional common law and judicial precedents were forfeited under this requirement.
6.7 Legislative interpretation
The constitution plays a decisive role in statutory interpretation amending previous principles. The Bill of Rights must be interpreted to promote the values of an open and democratic society with obligatory consideration of international law.

6.8 Establishment of new constitutional practice
The 1993 and 1996 Constitutions rendered pervious constitutional practice void. A Manual on Executive Acts was accordingly drafted to provide new forms and procedure for engaging government and parliament.

6.9 Democratisation of treaty making
The status of international law became constitutionally recognised as part of South African law. The treaty making process was radically changed. Parliament was given a role in treaty making introducing a break away from the executive approval as required by British common law previously adhered to. In addition to legislative incorporation of treaty obligations, the direct application of self-executing treaty provisions is permitted. The British inspired dualist transformation of treaties is therefore no longer the only possibility for domestic enforcement of treaties.

6.10 Prerogatives and conventions
British prerogatives and constitutional conventions that formed part of pre 1993 South African law were incorporated into the constitutional texts are far as deemed necessary.

7 Assessment of the overall method and what it has to offer to the United Kingdom
Given South Africa’s close historic relationship with the United Kingdom predating the constitutional transformation there are many areas of shared legal and governmental practice despite contextual differences. The South African experience has much to offer on codification practices, inclusive drafting, transformation and reform of a Westminster system, introduction of constitutional supremacy and protection of human rights, design of devolved governance and reversal of the process and the establishment of a constitutional court.

An interpretational difference between the two countries worthy of mentioning in such discussion is the relationship between parliamentary sovereignty and the rule of law. In accordance with UK practice, the pre-1993 Constitutions in South Africa excluded the courts from substantial review, rendering statutory law unchallengeable. Given the white minority controlled nature of parliament in South Africa, it effectively perverted the expression of majoritarian democracy embodied in the English context. Similar to the English practice legal positivism prevailed amongst South Africa lawyers, framing their interpretation of the will of the sovereign or parliament. This approach distorted the ideals of equality embedded South Africa’s Roman Dutch common law.523 The UK courts’ cautious approach to the application of European and international human rights treaties that could compromise parliamentary sovereignty prior to the adoption of the Human Rights Act 1998 may

be similarly inspired by positivist thinking. The influence of parliamentary sovereignty, positivism and the rule of law on human rights protection appear to be inspired by shared legal traditions and thinking.

South Africa’s growing body of constitutional litigation has much to offer in terms of good practice. Not only does it underline constitutionalism in legal interpretation, it also shows the flexibility and dynamic nature of interpreting a codified constitution. Legal certainty is introduced whilst political manipulation is potentially limited. These are all safeguards much valued in a heterogeneous society. Courts and not elected politicians are considered as gate keepers of the constitution, thus legal instead of political considerations reign supreme.

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Ireland’s Constitutional Convention

Origins of the Constitutional Convention: modernisation and political crises

Ireland’s Constitutional Convention was established by the coalition government in 2012 as part of a major programme of constitutional reform. In addition to proposals for specific constitutional amendments relating to parliamentary reform, judges’ salaries and children’s rights, the Constitutional Convention would ‘consider comprehensive constitutional reform’ and report within 12 months. Both coalition partners, the Irish Labour Party and Fine Gael, had made commitments to implementing constitutional reform during the 2011 general election campaign, including the establishment of a decision-making body with citizen members.

Fine Gael proposed the creation of a ‘Citizens Assembly’ which would ‘make recommendations on electoral reform’ and on ‘how the number of women in politics can be increased’. It would be ‘composed of up to a 100 members (…) chosen from the public to reflect the demographic make-up of the country’. The Labour Party’s proposals were for a ‘Constitutional Convention’ to ‘review the Constitution and draft a reformed one within a year’. The Convention’s 90 members would include members of the Oireachtas, ‘civil society organisations and other people with relevant legal or academic expertise’, and ‘ordinary citizens, chosen by lot’.

The stated aim of the coalition government’s constitutional reform programme was to ‘ensure that [the Irish] Constitution meets the challenges of the 21st century’, in recognition of ‘the combination of huge social, economic and cultural change over

524 Department of the Taoisigh, Programme for Government 2011-2016 (2011) 17. Details of constitutional referendums held in Ireland since 1937 are set out in Department of Environment, Community and Local Government, ‘Referendum Results 1937-2013’ (Dublin).
526 Ibid, para. 17.2.
527 Fine Gael, n 2.
529 Ibid.
the decades’. However, modernisation of the Irish Constitution was not the only factor informing the proposed constitutional reforms. Ireland’s recent history of political crises was also significant:

The idea for a citizen’s convention to examine our Constitution came against the backdrop of the most profound crisis our country had ever faced. Caught in a perfect storm, where a world crisis, a European crisis and a domestic crisis met, the very viability of our independent state was in question. Confidence in our institutions – in Government, in the banking system, and, in recent years, the Church – had been shaken to its core.

The Convention’s Terms of Reference: narrow drafting, broad application

The Constitutional Convention was created in accordance with the terms of a Resolution approved by both Houses of the Oireachtas in July 2012. The Convention was thus authorised to consider, make recommendations, and report to the Houses of the Oireachtas on the following matters:

(i) reducing the Presidential term of office to five years and aligning it with the local and European elections;
(ii) reducing the voting age to 17;
(iii) review of the Dáil electoral system;
(iv) giving citizens resident outside the State the right to vote in Presidential elections at Irish embassies, or otherwise;
(v) provision for same-sex marriage;
(vi) amending the clause on the role of women in the home and encouraging greater participation of women in public life;
(vii) increasing the participation of women in politics;
(viii) removal of the offence of blasphemy from the Constitution; and
(ix) following completion of the above reports, such other relevant constitutional amendments that may be recommended by it.

These terms of reference were not without criticism. Opposition parties argued that the Convention’s programme of work was too narrow and that the Government was seeking to avoid more profound constitutional and political reform by focusing on uncontroversial or non-urgent matters. For example, Deputy Micheál Martin, Leader of Fianna Fáil, stated:

At this moment of continued economic crisis and with lost public faith in the role of politics, proposing to give priority to discussing the President’s term of office and the voting age is worse than ridiculous. If the Convention sticks to the core agenda insisted on by Government, it will not be able to deliver on the promise of real political reform.

The Government is proposing to try to avoid serious discussion of its role and powers. What it appears to want from the Convention is to be able to claim to be considering fundamental reform rather than actually doing anything about it.

531 Address by the Chairman, Mr Tom Arnold, 1 December 2012.
532 Adopted in 1937.
533 Speech by Tánaiste Eamon Gilmore at Launch of the Constitutional Convention, 1 December 2012.
534 The Resolution was approved by the Dáil on 10 July 2012 and by the Seanad on 12 July 2012.
535 Dáil Éireann Debates, 10 July 2012.
Similarly, Deputy Seán Ó Feargháil argued that ‘the Government wants to have a Convention which cannot touch the fundamental issues of how the Oireachtas and the Government work’.  

In practice the Convention has taken a broader approach to its work than might have been anticipated at the time of its creation. This is evident in relation to the specific issues that the Convention was required to consider, and to the more discretionary module of its work, provided for in point (ix) of the Resolution. For example, although required only to examine whether to reduce the voting age to 17, the Convention first considered whether to reduce the voting age at all and then discussed what that age should be, eventually supporting lowering the voting at to 16.  

The composition of the Constitutional Convention: citizens, politicians and questions of diversity

The 100 members of the Convention included a Chairperson, 66 citizens and 33 elected politicians. The 66 citizen members were ‘randomly selected [from the electoral register] so as to be broadly representative of Irish society’ by an independent polling company on behalf of the Government during July and August 2012, as follows:

- The sample was ‘stratified across a total of 16 broad regions’ in order to ‘ensure a representative geographical spread of citizens, covering all of the main urban and rural population centres across the country’;
- In addition, ‘detailed quotas were set in relation to age within gender, socio economic status, and working status’;
- The 16 broad regions were divided into ‘District Electoral Divisions’ designed to reflect ‘the known population distribution across [each] region’;
- Interviewers approached citizens within those District Electoral Divisions, starting at a ‘randomly generated’ address and continuing until the quotas were achieved;
- If a citizen was interested in taking part in the Convention they were ‘given an information booklet explaining what the Constitutional Convention was, who would be participating in it, how it would work throughout the year, and the type of issues that would be discussed at it’.

The 33 politician members of the Convention included ‘a member of the Northern Ireland Assembly from each of the political parties in the Assembly which accepts an invitation from the Government’ and ‘members of the Houses of the Oireachtas’. Four political parties in the Northern Ireland Assembly accepted the Government’s invitation and were represented in the Convention. The remaining 29

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536 ibid. Similar arguments were made by Deputy Gerry Adams. The possible extension of Convention’s agenda was also the subject of questions in the Dáil on 18 September 2012.
537 First Report of the Constitutional Convention on (i) Reducing the voting age to 17; and (ii) Reducing the Presidential term of office to five years and aligning it with the local and European elections (March 2013).
538 Resolution, 10 July 2012.
539 ibid.
541 Resolution, 10 July 2012.
542 These are the Green Party, the Alliance Party, the SDLP, and Sinn Féin.
politician members were nominated by the political parties and groups in each House of the Oireachtas on the basis of their strength in the Houses.\textsuperscript{543}

The inclusion of politicians in the membership of the Constitutional Convention was not universally welcomed. Deputy Stephen S Donnelly declared it a ‘mistake’, as academic research demonstrated that ‘the presence of partisan influence can lead to distorted deliberations and outcomes’.\textsuperscript{544} Deputy Paschal Donohoe further argued that the place and work of elected politicians was already protected by the Constitution, and that ‘a mechanism (…) that is set up to allow deliberation based on the participation of people who do not form part of the political system should be allowed to do that’.\textsuperscript{545}

However, the inclusion of politicians in the deliberative body means that those with practical experience of the operation of the Constitution can contribute to the process of constitutional reform. Indeed, parliamentarians have an active role in Ireland’s constitutional reform processes: ‘it is ultimately the Dáil and Seanad that will propose an amendment to the Constitution or substantial changes to it. Representatives of all political groups (…) must be involved from the outset to ensure that the views of [its members] are articulated’.\textsuperscript{546} It is also significant that no single party dominated the political membership, which itself constituted only one third of the total membership of the Convention. Further, politician members of the Convention worked free of the party whip as, ‘if applied, the straitjacket of the Whip system would stifle debate and act as a barrier to any meaningful analysis’.\textsuperscript{547} In these circumstances, even if the political voices were influential, they could not be completely dominant. Indeed, Chairman Tom Arnold has acknowledged that the ‘citizen members proved more than capable of holding their own in the discussions and the interaction between citizens and politicians was a particular highlight of the way the debate was conducted’.\textsuperscript{548}

Further criticisms of the Convention’s membership focused on the fact that no specific provision had been made for representation of those under 18 years of age, or for other specific groups. Deputy Mary Lou McDonald explained:

Those under 18 years of age will be excluded, despite the fact that we will debate the possible lowering of the voting age, as will the diaspora and citizens from the Six Counties. Indeed, there is no guarantee that Ireland’s newest citizens or citizens with disabilities will be represented. We may well have a bizarre situation where same-sex marriage or marriage equality will be debated by a convention potentially made up entirely of heterosexuals. That is a design flaw in the proposed approach.\textsuperscript{549}

Despite this, it must be recognised that the methods of selecting Convention members helped to achieve significant representation for women. Of the 100 members of the Convention, forty-three were women. Thirty-three of those were citizen members, meaning that there was gender balance among that group. Ten of the thirty-three politician members – around 30% of that group – were women. While this falls short of the gender balance among the citizen members, it is significantly higher.

\textsuperscript{543} http://www.constitution.ie/Convention.aspx.
\textsuperscript{544} Dáil Éireann Debates, 10 July 2012.
\textsuperscript{545} ibid.
\textsuperscript{546} ibid, Deputy Patrick O’Donovan.
\textsuperscript{547} Dáil Éireann Debates, 18 July 2013, Deputy Charles Flanagan.
\textsuperscript{549} Dáil Éireann Debates, 10 July 2012. See also the comments of Deputy Maureen O’Sullivan.
than the percentage of women members of the Houses of the Oireachtas, which is currently 15%.550

**Working methods of the Convention: timely reporting and impressive online presence**

The Convention’s terms of reference imposed clear deadlines for the completion of its work, requiring reports to the Houses of the Oireachtas on issues (i) and (ii), above, ‘not later than two months from the date of the first public hearing’.551 It was for the Convention to determine the order in which it would examine the remaining issues within an overall timeframe for completing its work ‘not later than one year from the date of the first public hearing’.552 It was also specified that ‘all matters before the Convention will be determined by a majority of the votes of members present and voting, other than the Chairperson who will have a casting vote in the case of an equality of votes’. Otherwise, the Convention was able to define its own working methods ‘for the effective conduct of its business in as economical manner as possible’.553

At its first working meeting in January 2013, Chairman Tom Arnold set out the following ‘five operational principles’ that would guide the work of the Convention: openness; fairness; equality of voice; efficiency; and, collegiality.554

*The Convention’s Inquiries and Reports*

The Convention held at least one weekend-long plenary meeting for each of its inquiries into the issues specified in the Resolution.555 The first day of each meeting featured roundtable discussions supported by facilitators and note-takers, followed by a plenary session during which any emerging themes would be reported. The second day usually began with a roundtable session to reflect on the previous day’s discussions and/or a question and answer session with experts.556 The Convention then voted on the matters under discussion, with the results of the vote announced by press release on the same day,557 and a report subsequently drafted and published.558

The Convention worked at an efficient pace and received a significant number of submissions,559 as illustrated below:

<table>
<thead>
<tr>
<th>Report subject</th>
<th>Plenary meeting</th>
<th>Report date</th>
<th>Number of submissions received</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Presidential term: 24</td>
</tr>
</tbody>
</table>

551 Resolution, 10 July 2012.
552 Ibid.
553 Ibid. In this regard the Convention appointed a Secretariat and an Academic & Legal Support Group to assist it in its work.
554 Arnold, n 31.
555 There were two plenary meetings in relation to the inquiry into the Dáil electoral system.
556 For a positive description of the workings of the Convention see O’Mahony, ‘A Day at the Constitutional Convention’, 17 April 2013.
558 Convention Reports are available at: https://www.constitution.ie/Meetings.aspx#minutes.
559 Number of submissions correct on 18 February 2014.
Submissions to the Convention were made online, and all were published. In order further to engage the public with its work, all public sessions of the Convention were live-streamed on its website. The Convention took additional steps to encourage contributions from the public for its work on the right to vote for citizens living outside the State in Presidential elections. An online questionnaire aimed at Irish citizens resident outside the State was available to complete between 22 August and 18 September 2013, and was extremely successful: the Convention received a ‘huge response’ consisting of ‘thousands of replies’ from Irish citizens resident in 64 countries around the world.560

For the final stage of its work, the Convention was permitted to consider ‘such other relevant constitutional amendments that may be recommended by it’561 Nine regional meetings were held across Ireland during October and November 2013 to help set the agenda for this element of its work, and online submissions were encouraged.562 Despite budgetary constraints affecting the ability of the Convention to promote and advertise this process, almost 1,000 people attended the nine meetings, and the Convention received well over 700 submissions.563 Dáil Reform and Economic, Social and Cultural Rights were eventually selected as the issues to be considered.564 A plenary meeting on the issue of Dáil Reform was held on 1/2 February 2014 and a further meeting on Economic, Social and Cultural Rights is due to take place on 22/23 February 2014. The Convention’s final reports must be issued by 31 March 2014.

The original time limit imposed by the Resolution of 10 July 2012 has therefore been exceeded. In order fully to complete its programme of work the Convention was granted an extension of two months by Resolution of the Houses of the Oireachtas on 29 January 2014. It may be questioned whether the initial period of one year for the Convention to complete its work was optimistic. The Convention members themselves (in particular the citizen members) have proved very comfortable making recommendations following detailed discussion during weekend plenary meetings.565 However, any timeframe for developing constitutional reform proposals on a variety of disparate issues must be sufficient to ensure that such work may be completed thoroughly, and following adequate and informed consideration.

<table>
<thead>
<tr>
<th>Role of women (incl. women in politics)</th>
<th>16/17 February 2013</th>
<th>8 May 2013</th>
<th>Role of women: 30 Women in politics: 13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Same-sex marriage</td>
<td>13/14 April 2013</td>
<td>2 July 2013</td>
<td>1099</td>
</tr>
<tr>
<td>Review of the Dáil electoral system</td>
<td>18/19 May &amp; 8/9 June 2013</td>
<td>27 August 2013</td>
<td>95</td>
</tr>
<tr>
<td>Votes outside the State</td>
<td>28/29 September 2013</td>
<td>25 November 2013</td>
<td>137</td>
</tr>
<tr>
<td>Removal of the offence of blasphemy</td>
<td>2/3 November 2013</td>
<td>27 January 2014</td>
<td>94</td>
</tr>
</tbody>
</table>

561 Resolution, 10 July 2012.  
563 Email correspondence between Art O’Leary, Secretary to the Convention, and authors.  
565 Email correspondence between Art O’Leary, Secretary to the Convention, and authors.
The Convention’s Online Presence

The Convention’s online presence, designed to inform the public about its work and to facilitate public engagement with the constitutional reform process, was notable. The Convention’s website went live on the day of its inaugural meeting, and active Facebook and twitter accounts were maintained. Further, the Convention made available all ‘Convention documents’ on its website, all submissions were published online, and all public meetings – amounting to around 100 hours of footage - were live-streamed.

These measures proved effective as means of encouraging public participation and engagement with the Convention’s work: the Convention received 2,500 submissions and its website was visited 350,000 times from 144 countries. Maintaining an active and frequently updated online presence can only have contributed to ensuring that accessible and accurate information about the Convention’s work was available to the public. This accessibility helps reinforce the message that the Convention’s procedures were intended to be open and transparent, and that the Convention welcomed input from anyone affected by or interested in the constitutional issues being discussed.

Government responses and the formal procedures for constitutional amendment

The procedures governing constitutional amendments are set out in Articles 46 and 47 of the Constitution of Ireland. According to Article 46(2):

Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people (…)

Article 47(1) governs the holding of a referendum to amend the Constitution:

Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purposes of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.

Therefore, in order for any recommendations of the Convention to result in reform to the Constitution, they would have to be the subject of an Amendment to the Constitution Act enacted by the Houses of the Oireachtas, and subsequently approved by a majority of votes cast in a referendum.

The Government was required to ‘provide in the Oireachtas a response to each recommendation of the Convention within four months and, if accepting the recommendation, [to] indicate the timeframe it envisages for the holding of any related referendum’. In spite of early concerns that this would enable the Government to control whether Parliament could vote on the Convention’s

566 Address by the Chairman, Mr Tom Arnold, 1 December 2012.
568 This footage remains available to view in the Convention’s ‘Video Archive’ at https://www.constitution.ie/Meetings.aspx#live-streaming.
569 Arnold, n 31.
570 Resolution, 10 July 2012.
recommendations, requiring a Government response within a specified timeframe demonstrates a commitment to ensuring an effective and timely response to the Convention’s reports.

The Government has so far responded to the first three Convention reports in a broadly timely fashion, illustrating the capacity for effective parliamentary and governmental engagement with the work of a constitutional reform body. Indeed, the work of the Constitutional Convention is likely to achieve real constitutional reform. In many cases the Government has accepted the Convention’s recommendations and agreed to put them to a referendum in 2015. Those recommendations that were not fully accepted by the Government have not been completely rejected, but instead have been referred to an Oireachtas committee for further investigation or subject to further consultation by the Government.

Overall assessment and lessons for the UK

The current constitutional reform process in Ireland may be understood as an exercise in constitutional modernisation. Although having undoubtedly suffered a number of profound political difficulties, it cannot be said that the country has experienced a ‘constitutional moment’ in the sense of a major event leading to a fundamental reorganisation of the state. Rather, the current constitutional reform process - of which the Constitutional Convention is a part – was initiated in recognition of the fact that Irish society had changed markedly since the adoption of the Constitution in 1937. The Irish experience therefore demonstrates that constitutional reform, involving a deliberative body with citizen members, may be achieved successfully in a stable Western democracy even in the absence of a ‘constitutional moment’. The recent Irish experience may therefore provide a number of lessons to inform a process seeking to codify the UK constitution.

Lessons for the UK: composition of a deliberative body

A deliberative body involved in the process of adopting a codified constitution for the UK should seek to include citizen members and to achieve diversity in its membership. This would help to ensure that a wide range of views and experiences could contribute to the process, and would be likely to enhance its perceived legitimacy. However, the experience in Ireland suggests that consideration should be given to ensuring representation for younger people among the body’s membership.

571 See for example Deputy Michael Martin, Dáil Éireann Debates, 10 July 2012.
573 The following issues are to be put to a referendum before the end of 2015: whether the voting age should be lowered to 16; whether the minimum age for candidacy for presidential elections should be reduced to 21 years; whether references to ‘women in the home’ in the Constitution should be amended; and whether the Constitution should be amended to allow for civil marriage for same-sex couples.
574 The recommendation that citizens be able to contribute to the presidential election nomination process will be referred to an Oireachtas committee for further investigation.
575 Further Government consultation will take place on: whether to include a reference to ‘carers’ in the Constitution; whether to introduce a constitutional provision guaranteeing gender equality; whether to amend the Constitution to include gender inclusive language. This work is expected to be completed by 31 October 2014.
This is especially important in light of recent research demonstrating significant disengagement with the political process among young people aged 18-24.\(^{576}\)

It may also be advisable to include some politician members in a deliberative body in the UK. This could help to ensure that the body’s recommendations were practical and liable to be accepted by politicians and political parties. Such acceptance would enhance the prospects of successful implementation of the deliberative body’s recommendations: support from the major political parties would give the public a strong impression that the recommendations were workable and desirable. A further factor in favour of including political members is that current mechanisms for constitutional reform in the UK do not guarantee that meaningful contributions can be made by those with wide range of political views. Constitutional change is usually achieved by Act of Parliament enacted using ordinary legislative procedures. Given the strong influence of the executive over the House of Commons, there may be little opportunity for opposition parties to amend or even debate in detail the constitutional reforms supported by the Government. Increasing the ability of a range of political parties to contribute to this process may therefore help improve both the quality of the recommendations and the level of consensus in respect of them.

Lessons for the UK: working practices

The online presence and transparency of proceedings of Ireland’s Constitutional Convention may be seen as a model for a deliberative body in the UK. It may also be advisable to require a UK body to complete its work within a defined timeframe, to ensure that constitutional reform remains a relevant and live issue with a realistic prospect of implementation.

However, the Irish experience suggests that any such timeframe must be adequate. The Convention’s need to request from the Government and Parliament further time to complete its work suggests that any similar process in the UK should only begin following consultation and broad agreement on the most appropriate timeframe.\(^{577}\) In the case of the Irish Constitutional Convention, the initial twelve-month timeframe was simply presented by the Government as a feature of the initiative without any meaningful consultation regarding the adequacy of that period. The Government did seek the views of Opposition leaders on this point but required a response within one week. When concerns were raised as to the length of time proposed, the Government simply stated in reply: ‘The Government’s view is that the proposed work programme and timeframe are appropriate’.\(^{578}\) Ensuring broad agreement as to the time required for a deliberative body to complete its work may also reduce the appearance of political control over the constitutional reform process. We may only speculate as to the outcome had the Irish government and parliament refused to grant the extension requested by the Convention. Ensuring that a major constitutional reform process, such as an attempt to codify the UK constitution, is seen to be independent of government would be vital for its legitimacy.

A further feature of the work of the Irish Constitutional Convention that could provide a model for a similar body in the UK was its clear, defined terms of reference specifying the issues to be examined. This approach seems to have facilitated focused, detailed and efficient working practices in Ireland, and may be especially useful in the


\(^{577}\) The lack of consultation regarding the creation of the Convention was heavily criticised by the Irish Council for Civil Liberties; see ‘Hear Our Voices’ (2012).

\(^{578}\) Irish Government News Service, 28 February 2012.
UK, where the constitution is uncodified and in many respects unclear and uncertain. It would be particularly appropriate if a ‘Model C’ codified constitution was developed. In those circumstances, a deliberative body similar to Ireland’s Constitutional Convention could be used to examine specific reforms designed to be introduced as part of a wider constitutional reform. However, it would of course be necessary to achieve broad political consensus as to the issues to be investigated by the deliberative body, through cross-party consultation.

A final notable feature of the work of the Constitutional Convention in Ireland was the requirement that the Government respond to Convention reports within a defined period of time. A clear statement to that effect would underline the importance of the deliberative body’s work, and ensure that constitutional reforms recommended by it remained on the political agenda. It is evident from the myriad complaints regarding Government failures to respond to Select Committee reports that it would be difficult to enforce such a requirement in the UK. However, it would illustrate that the constitutional reform process was a serious process that aimed to result in real reform. In this respect, it may also be prudent to seek to achieve a clear commitment before any process of codifying the UK constitution began either that the Government would not oppose the recommendations of the deliberative body, or would put the recommendations to a free vote in Parliament or even a referendum. It would be vital for the legitimacy of any such constitutional reform process to avoid the perception that the Government was able to determine whether or not to adopt or implement the recommendations of the deliberative body, which would risk undermining public confidence and the very purpose of including citizen members in the constitutional reform process.

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Referendums and the Constitution

Almost all democracies in the modern world use the referendum as a means of consulting public opinion or gaining their support for some government proposal, but one which is regarded as an extraordinary constitutional procedure, and one which is to be used only rarely. The only three countries where the referendum can be regarded as being held regularly are Switzerland (which holds on average around one referendum a year), Australia and Italy.\(^{579}\)

*The public policy issues for a referendum*

Referendums are used primarily on three types of issues:

- Constitutional issues. For new constitutions e.g. France in 1958; or for major changes in the rules such as a change in the electoral system, e.g. New Zealand in 1993.

• Territorial issues relating to the principle of self-determination, such as Quebec in 1980 on independence from the rest of Canada, Greenland in 1979 on home rule within Denmark, and Curacao in 1993 on its role within the Netherlands Antilles Federation.

• "Moral" issues such as prohibition, divorce or abortion.

Referendums in the UK

In the United Kingdom referendums have been called by the government exclusively on constitutional and territorial issues, and there have been no serious suggestions that they should be held on any "moral" issues of the day. The list of occasions for them being held are -

1973 - Border poll, Northern Ireland, March (on whether the province should remain part of the UK or join with the Irish Republic)

1975 - European Economic Community, June (on whether Britain should remain in the EEC)

1979 - Devolution in Scotland and Wales, February

1997 - Devolution in Scotland and Wales, September

1998 - The Greater London Authority proposals, May

1998 - The Northern Ireland Agreement, May

2004 - A regional assembly for the North East of England, November

2011 - The powers of the National Assembly of Wales, March

2011 - The voting system (First Past the Post or Alternative Vote), May

2014 - Scottish independence, September

In addition there have been numerous local referendums, the number and frequency will increase following new requirements laid down in the Localism Act 2011.

Legislative or government requirements to hold a referendum

Current obligations to hold a referendum include the following matters -

• By the provisions of the Northern Ireland Act, 1998, Northern Ireland cannot cease to be a part of the United Kingdom without a referendum.

• By the provisions of the Local Government Act, 2000, no local authority could adopt a directly elected mayor without first holding a referendum. But the Local Government and Public Involvement in Health Act of 2007 removed
the requirement for a referendum, though a local authority can, if it so chooses, hold one.

- By the provisions of the Regional Assemblies (Preparation) Act, 2003, regional assemblies in England cannot be established without a referendum.

- By the provisions of the European Union Act, 2011, any significant transfer of powers from Westminster to the European Parliament requires a referendum.

- The present Prime Minister, David Cameron, has promised that, if he can negotiate a new settlement between Britain and the European Union, he will put it to referendum.

- Governments have also promised at various times in the past that the United Kingdom will not join the eurozone without a referendum, and that the voting system for elections to the House of Commons will not be altered without a referendum.

**The referendum and constitutional practice and theory**

There is no doubt therefore that the referendum has become an accepted part of the United Kingdom’s constitutional arrangements. However, there is no agreement on when it should be used. In most democracies, use of the referendum is regulated by the constitution. Because the United Kingdom lacks a written constitution, there can be no constitutional requirement on any government to hold a referendum on any issue. And because Parliament is the supreme authority in the state it can legislate as and when it wishes to call for a referendum on any issue at any time.

However, although there is no constitutional requirement to call a referendum on any particular issue, there are some persuasive precedents which taken together may be said to amount to a doctrine or convention as to when a referendum should be called.

- A referendum should be called before any part of the kingdom is allowed to secede – Northern Ireland, 1973.

- A referendum should be called before there is devolution of powers from Westminster – Scotland, Wales and Northern Ireland.

- A referendum should be called before there is a transfer of powers to the European Union - this is now a legal requirement under the European Union Act 2011 but could be regarded as establishing a general principle on any closer European integration (whereas previously no referendum was called on the Single European Act 1986 which involved a very wide transfer of powers nor on the Maastricht, Amsterdam treaty or Nice treaties).

- A referendum should be called when a wholly novel constitutional arrangement is proposed, supported by recent experiences of introducing directly elected mayors (the series of referendums across the country since
2012), and the attempt to introduce regional English assemblies (the North East England referendum in 2004).

The rationale for requiring a referendum before legislative powers are transferred lies deep in liberal thought and was well stated by John Locke in his Second Treatise of Government, para. 141. `The Legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the People, they who have it cannot pass it to others’. Voters, it might be said, entrust MPs as agents with legislative powers, but give them no authority to transfer those powers. Such authority, it may be suggested, can be obtained only through a specific mandate, that is, a referendum.

The issue of legitimacy is also crucial. There are some issues of such fundamental importance that a parliamentary verdict is by itself insufficient to ensure legitimacy. Issues of territorial allegiance, such as independence, fall into this class. So also is a major change in the political system such as a change in the electoral system, a change which could otherwise be implemented for purely partisan purposes. In these cases, a referendum is needed to help secure legitimacy. The same argument applies also, surely, to a constitution.

The role of the referendum in the preparation of codified UK constitution

What role can the referendum play in the debate on a codified constitution? There is a case for a consultative referendum before a constitution is drawn up. For if it were shown that the people did not want a constitution, voting `No’ in the referendum, it would be pointless to proceed and much parliamentary time would be saved. But if there were to be a `Yes’ vote, hostility in Parliament would be disarmed, just as the positive verdicts in the devolution referendums in Scotland and Wales in 1997 disarmed opposition to devolution in Parliament.

Consideration would need to be given as to whether there should be a threshold as in the 1979 devolution referendums in Scotland and Wales when there was a threshold of 40 per cent of the electorate. Some might argue that government should not embark upon the process of drawing up a constitution if there were only a slight majority for it on a low turnout. In addition, consideration needs to be given to the fact that Britain is now a multi-national state. Would it be appropriate to proceed with a constitution if there were a majority for it in England, but not in one of the non-English parts of the United Kingdom? If the argument for a qualified majority were accepted, it might be better, rather than requiring a certain majority of the electorate to vote `Yes’, as in 1979, to follow the Polish example by providing that, unless turnout reaches a certain level – 50% in Poland – the outcome is void. The difficulty with such proposals, of course, is that a threshold might deter those opposed to a constitution from voting since an abstention is equivalent to a `No’ vote.580

Once a constitution has been drawn up, a procedure needs to be found for ratification. The preamble to the United States constitution begins `We the people’, the implication being that the people of the United States have given themselves a constitution. The people, however, were not directly consulted either in the choice of Founding Fathers or in the ratification of the constitution, both of which were undertaken by elected representatives. Similarly, the preamble to the German

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constitution of 1949 declares that ‘The German people have adopted, by virtue of their constituent power, this Basic Law’, though that Law too was ratified by elected representatives rather than directly by the people. In some countries however such as France, the constitution has been directly ratified by the people. It would be natural to suggest that a UK constitution be put to the people for ratification. Parliament would then have signalled in the clearest possible way that in future it would no longer be sovereign, for it would then be bound by a constitution which had been enacted not only by itself but also by the people, from whom it would derive both its powers and also the limitations upon its powers. Should amendment of the constitution also be subject to referendum, or should Parliament alone be able to amend it? And if Parliament has the sole power of amendment, should it be able to amend the constitution in the same manner as it amends other legislation, or should some special procedure, such as explicit repeal, a qualified majority or a referendum be required? Whatever view is taken on this matter, most would surely agree that a written constitution for the UK ought not to be treated as if it were just an ordinary statute.

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Comparative Constitutional Bills of Rights

Today, as Alston and others have noted, the term ‘Bill of Rights’ is used to describe a variety of documents. These can range from short manifesto-style declarations that are chiefly symbolic with little accompanying detail on the status or enforcement of their contents to more formal constitutional instruments containing specific human rights protections that are entrenched to some extent against legislative repeal and set out the procedural mechanisms by which the protections may be enforced. A recent survey of the world’s constitutions suggested that approximately 25% of the world’s constitutions have been drafted and adopted since 1974. Such is the universal status of human rights discourse, that it is virtually unthinkable that the promulgation of a new constitution in the twenty-first century would not contain, as one of its component elements, a statement somewhere of the rights of the people and refer directly or impliedly to human rights standards prevailing in the international community. Events such as the collapse of former communist-bloc countries in Eastern Europe, demilitarised states in Greece, Portugal and Spain in western Europe (and elsewhere) and the post-colonial/apartheid emergence of states in Africa and elsewhere have generated new constitutional settlements that have featured at their respective cores bills of rights, guaranteeing a varying degree of rights and freedoms. Typically, these modern constitutions also state with some degree of precision both the remedies available to an injured party and the procedures by which these remedies might be enforced.

582 P Alston (ed) Promoting Human Rights Through Bills of Right (OUP, 1999)
The survey conducted by Elkins et al. of the constitutional features of 186 national constitutions reveals an interesting correlation. From a total of 117 different rights enshrined in these constitutions, the newer constitutions were more likely to contain a higher total of rights than their more venerable counterparts. Thus the Constitutions of Angola (2010); Bolivia (2009) and Ecuador (2008) set out respectively express protection for 79, 88 & 86 different rights, whilst the Constitutions of United States (1789); Norway (1814) and Belgium (1831) by contrast manage reference to 35, 14 and 34 different rights. This pattern might be attributable in part to the expanded range of human rights that are currently enumerated in international human rights treaties. From an initial (typically Western/Enlightenment) position in which a limited set of negative civil/political rights against the state are conceded (requiring in the main no positive actions or commitment of resources by the state and reflected in treaties such as the International Covenant on Civil and Political Rights) human rights commitments are likely in the 21st century to extend to a much broader set of socio-economic rights claims such as rights to healthcare, education, housing and so-called ‘third generation’ rights to the protection of the environment and cultural aspects of community life (to be found in treaties such as the International Covenant on Economic, Social and Cultural Rights). Both socio-economic and ‘third generation’ rights can require the allocation of state resources to be meaningful, although a problematic issue here occurs where the state has ‘outsourced’ some of its traditional functions to the private sector. At the outset however, it is probably wise to be cautious about drawing conclusions too readily from the experiences of other countries. Inevitably, the structure and content of national constitutions will reflect an interactive set of historical, economic, political and cultural influences that are unique to that state. Nonetheless, subject to this caveat, similarities in design and content do offer useful reference points that can be reflected upon here in the UK. In seeking to identify helpful pointers from experiences elsewhere, the comparative analysis of Bills of Rights that follows will examine (i) the status of ‘bills of rights’ (enshrined in constitutional settlements, statutes or located in common law rulings); (ii) their scope (what sorts of rights are found therein); (iii) the nature of any interpretative duty placed on the courts; and (iv) the remedies available in the event of a breach of human rights standards protected under the bill.

Evolving nature of Westminster constitutions

Interestingly, even within ‘Westminster-style’ constitutions that draw heavily upon notions of responsible government and parliamentary supremacy, ‘bills of rights’ have been adopted in Canada, New Zealand, the UK, the Australian state of Victoria and Australian Capital Territory and signal new relationships not only between the individual and the state but also inter-institutionally between the executive, legislature and judiciary. Two initial points can be made at the outset. The first concerns the clear trend towards conferring upon the judiciary an enhanced role in human rights

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583 Figures updated in 2013 see http://comparativeconstitutionsproject.org/ccp-rankings/
disputes. Second, the referential nature of ‘bills of rights’ debates by which is meant the conscious reflection upon and evaluation of bills of rights structures and resulting jurisprudence in other jurisdictions. In what follows, an overview of Bills of Rights developments in each jurisdiction is set out.

(i) Canada

Prior to developments in New Zealand, the UK and Australia, Canada’s adoption of an entrenched Charter of human rights standards in 1982 not only marks the first significant departure from pure parliamentary sovereignty models of rights protection, its ‘strong-form’ review features makes it an outlier among recently adopted Bills of Rights in the ‘family’ of ‘Westminster-style’ constitutions and, as such, closer in nature to the United States’ system of judicial review of primary legislation. Its unique features have shaped bills of rights debates elsewhere in ways that will be made apparent in this discussion. The Constitution Act 1982 ended the UK Parliament’s powers to legislate for Canada. Part 1 of the Constitution Act incorporates the Canadian Charter of Rights and formally authorises judicial review of primary legislation enacted by federal and state legislatures although it does contain two important restrictions upon judicial power that permit democratically elected legislatures to re-assert their preferred policy positions. First, Parliament or a legislature of a province may under s.33 of the Charter expressly declare that an Act or provision of an Act shall operate notwithstanding s.2, or ss. 7-15 of the Charter. Section 2 contains ‘fundamental’ rights such as freedom of expression, religion, assembly and association whilst Sections 7-15 confer Charter protection on ‘legal’ rights (such as the right to liberty, freedom from unreasonable searches, arbitrary arrest) and ‘equality’ rights (freedom from discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability). A Section 33 ‘Notwithstanding’ declaration lasts for a maximum period of five years after which it may be renewed. Second, all Charter rights and freedoms are subject to a general ‘reasonable limits’ clause that allows restrictions upon Charter rights and freedoms where these are ‘demonstrably justified in a free and democratic society.’585 In the case of proposed legislation, the Minister of Justice is required under the Department of Justice Act 1985 to alert the Canadian Parliament if a Bill is inconsistent with the Charter of Rights.586 No such report of inconsistency has ever been made by the Minister, a fact that suggests that parliamentary input on Charter questions has been muted587 and that the critical stage of Charter-compliance assessment occurs at a pre-legislative stage within the Executive.

Hiebert has argued that the innovative design and status of the Canadian Charter has proved a key moment in the evolution of systems of rights protection. Subsequent developments in New Zealand, UK and Australian jurisdictions reveal how constitutional imaginations have been freed up to think outside and beyond the

585 Section 1. See R v Oakes [1986] 1 SCR 103 for the Supreme Court’s structured approach to permissible s.1 limitations.
586 Note however that there is no duty on the Minister of Justice to make a statement to Parliament that the proposed legislation is consistent with Charter provisions.
587 See Hiebert who argues that Parliament has ‘remained relatively insignificant as a venue for debate about Charter considerations and rarely questions the implicit claims of government that bills are consistent with
hitherto exclusive constitutional models of unlimited parliamentary sovereignty on the one hand or US style judicial review of primary legislation on the other. In reality however, s.33 has only been used very sparingly in response to adverse judicial rulings and never by the federal government. Consequently, the claim that s.33 is an important means of limiting judicial power needs careful qualification. The first time the legislative override was used was in 1988 by the Quebec Government following the Supreme Court ruling in *Ford v Quebec* which held that a law prohibiting commercial signs in languages other than French was an unreasonable limitation on freedom of expression under s.2(b) of the Charter. 588 The Quebec Government wished to maintain unilingual French signs outside premises and so invoked s.33 to override the decision of the Supreme Court. Very occasionally, s.33 has been invoked during the passage of legislation in provincial legislatures in an attempt to shield a provision from subsequent judicial reverse under the Charter. 589 Thus the legislature in the province of Alberta inserted a s.33 notwithstanding clause in a Bill which defined marriage as exclusively between men and women. However, given the federal jurisdiction to on capacity to marry, it is generally considered that the Alberta Legislature’s use of s.33 was intended primarily as a political gesture, rather than one intended to shape the legal landscape. 590

Public confidence in judicial resolution of rights disputes under the Charter is evident in the few surveys of Canadian public opinion that have so far been undertaken. In 1987, when Canadians were asked who should have the final say on constitutional matters, 60% of respondents expressed a preference for judges, whilst 30% preferred elected politicians. A later survey in 1999 produced an almost identical 2:1 ratio in favour of judicial determinations on constitutional matters. 591 The proportion of persons who express no preference remained likewise at 10%. Finally, a study of polling data for the period 2004-8 concluded that Canadians had retained their confidence in the courts to settle constitutional questions by a similar majority to those found in 1987 and 1999. 592

(ii) Australia

The Australian Constitution of 1901 contains a highly selective form of protection for human rights. The product of gradual evolution in relations with the United Kingdom, the 1901 Constitution reflects the inherited values of representative and responsible parliamentary government from Britain. 593 There is no comprehensive statement of individual human rights guarantees, something which may in part be attributed to a Diceyean preference for common law regulation of individual liberty and a correlative hostility towards broad declarations of rights. Instead, one finds a few, eclectic rights scattered across the document including the right to a jury trial for indictable offences against the Commonwealth, the right to enjoy private property secure from compulsory acquisition by the Commonwealth, the freedom to cross state borders,

589 http://www.parl.gc.ca/content/lop/researchpublications/bp194-e.htm#ftn34
590 Ibid.
591 The surveys are referred to by P Howe & P Russell (eds) *Judicial Power and Canadian Democracy* (2001, McGill Uni Press, Quebec) at 261.
593 Although not the federal division of powers which owes more to US influence.
freedom of religion and the prevention of discrimination against any subject of the Queen on the basis of residence. In addition, the right to vote in elections for the Senate and House of Representatives is provided for in sections 7 and 24 of the Constitution respectively.

Despite the Labor Party having traditionally been more sympathetic to the idea, majoritarian conceptions of democracy and a confidence in the idea of responsible government have thus far at federal level prevailed to defeat moves towards a national Bill of Rights. Former Prime Minister John Howard thus dismissed the idea of a federal Bill of Rights as the ‘triumph of elitism’ and mistakenly premised on distrust of elected MPs and Senators. Politicians at state and territory level have also tended to oppose a federal bill of rights as a means of transferring powers away from states and territories. The re-election of Labor Party in 2007 rekindled the hopes of Bills of Rights advocates when it commissioned a new report into the state of human rights protection in Australia. The 2009 report of the National Human Rights Commission was generally supportive of a statutory Bill of Rights along the lines of the Victorian Charter of Human Rights and Responsibilities 2006 (discussed in further detail below). However, it aroused considerable and concerted opposition and was not implemented by the Rudd Labor Government. Despite recommending the inclusion of a relatively narrow cluster of civil and political rights only and confining judicial powers to issue a non-binding declaration of incompatibility to the High Court of Australia, this modest measure provoked opposition from leading politicians, elements of the press (including Murdoch-owned media organisations) and senior (and retired) judges. The existence of a ‘blocking’ majority in the Senate of representatives from the Liberal, National and Family First parties would also have posed a further threat to the legislative passage of any Bill had it successfully passed through the House of Representatives.

It would be wrong to conclude from the above history that Australia lacks any entrenched constitutional rights beyond those enumerated in the 1901 Constitution. Drawing upon the constitutional protection for the right to vote in Senate and House elections in ss.7 & 24, the High Court of Australia has found an implied freedom of political communication derived from the constitutional commitment to a representative democracy. In Australian Capital Television Property Ltd the High Court declared that sections 7 and 24 of the 1901 Constitution not only establish but, crucially, entrench Australia as a representative democracy.

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596 National Human Rights Consultation, National Human Rights Consultation Report (ACT, AG’s Department, 2009).
597 See further A Mason, ‘Human Rights and Legislative Supremacy’ in The United Kingdom’s Statutory Bill of Rights - Constitutional and Comparative Perspectives (eds R Masterman & I Leigh) (2013, OUP, Oxford)
600 (1992) 177 CLR 106.
that there be freedom of political communication of an on-going nature rather than periodically at election time. This has allowed the High Court to strike down statutory provisions in federal laws that restrict the implied freedom unless they are for a legitimate purpose and reasonably appropriate and adapted to achieving that legitimate end.\textsuperscript{601} This is a significant strike-down power that has been used by the High Court to invalidate/read-down provisions of federal and state laws impinging upon freedom of political expression.

It is also the case that the principle of legality operates separately as a canon of statutory interpretation to safeguard common law rights and freedoms unless the statutory restriction is expressed in clear and unambiguous terms.\textsuperscript{602} So stated however, such rights and freedoms established at common law are vulnerable to legislative curtailment where the statutory provisions are precisely drafted.

\textit{Developments at state/territory level in Australia -}

Two jurisdictions in Australia have adopted Bills of Rights whilst other states such as Western Australia and Tasmania have subsequently consulted individuals and communities but then deferred final decisions in the light of the national Bill of Rights debates occurring at much the same time.

\textit{The Australian Capital Territory}

The Australian Capital Territory (ACT) passed the first statutory bill of rights in Australia in 2004. The Human Rights Act is modelled on the UK’s Human Rights Act. The rights protected in the 2004 Act are mainly civil and political freedoms of the sort found in the European Convention on Human Rights. Like the ECHR, there is also a right to free education.\textsuperscript{603} An attempt to include a wider set of social and economic rights was included in the original Bill but this was dropped in the face of political opposition. In a clear nod to s.1 of the Canadian Charter of Rights and Freedoms, s.28 of the 2004 Act contains a general rights-limiting clause that allows the legislative assembly to pass laws restricting the enumerated rights provided the restrictions are ‘reasonable limits ... demonstrably justified in a free and democratic society.’\textsuperscript{604}

The 2004 Act preserves the sovereignty of the ACT legislative assembly and is expressly intended to stimulate a dialogue between the Executive, Legislature and Judiciary. It requires courts to interpret ‘so far as it is possible to so consistently with its purpose, a territory law must be interpreted in a way that is compatible with human rights’.\textsuperscript{605} This reference to purpose is also found in the Victorian Charter discussed below. The effect of this is to put an express brake on judicial interpretation that is not found in the UK Human Rights Act equivalent (s.3). Such a provision arguably makes it considerably more difficult for courts to interpret an Act in the way that the House of Lords did in the case of \textit{R v A}\textsuperscript{606} which has been seen in some quarters as ignoring the plain intention of Parliament. The ACT Supreme Court is empowered to issue declarations of incompatibility where legislation cannot be read in a manner

\textsuperscript{601} \textit{Theophanous v Herald & Weekly Times Ltd} (1994) 124 ALR 1


\textsuperscript{603} ACT HRA S.27A.

\textsuperscript{604} ACT HRA s.28

\textsuperscript{605} ACT HRA S.30

\textsuperscript{606} [2002] 1 AC 45.
consistent with human rights. Parliamentary input on legislation affecting human rights is aided by the work of standing committees of the legislative assembly. Prior to the passing of new laws affecting human rights, standing committees report their conclusions to the Legislative Assembly. The Attorney General is also required to make a written statement to the Legislative Assembly as to whether a new Bill is or is not compatible with the 2004 Act.

The State of Victoria

The Victorian Charter of Human Rights and Responsibilities Act 2006 is noteworthy on several counts. The rights protected under the Charter fall mainly into the category of civil/political rights. There is also a right to enjoy cultural and religious rights and express protection for Aboriginal persons to enjoy their identity, maintain their language and kinship ties as well as their ‘distinctive spiritual, material and economic relationship with the land and waters and other resources’.

Each of the enumerated Charter rights may be subject to laws imposing such ‘reasonable limits as can demonstrably be justified in a free and democratic society based on human dignity, equality and freedom’.

Like the UK’s HRA, the 2006 Act stops short of authorising judicial review over primary legislation. Instead, (as with the ACT HRA), the courts are required to ‘so far as it is possible to do so consistently with their purpose, interpret statutory provisions in a way that is compatible with human rights.’ The Victorian Supreme Court may issue a ‘declaration of inconsistency’ much like the UK’s s.4 HRA declaration. The Minister sponsoring the statute in question then has six months to prepare a response to the declaration and lay this before each House of Parliament. Significantly however (and unlike our HRA), the Victorian Parliament can issue a prospective override declaration during the parliamentary passage of legislation in respect of the whole Bill or a provision of the Bill with the result that, upon enactment, the courts cannot subsequently issue a declaration of inconsistency. The override expires five years after the provision comes into force although the override may be re-enacted by Parliament. The provision for a pre-emptive strike against a future declaration of inconsistency bolsters the position of the Victorian Parliament to pass such laws as it sees fit (and correspondingly diminishes the scope for judicial input). At the same time, the advance notice of Charter inapplicability may prompt closer parliamentary scrutiny by members of the legislature.

(iii) New Zealand

In New Zealand, the Labor Government proposed an entrenched Bill of Rights in 1985 largely on the basis that the dominant position of the governing party in a
unicameral legislature might risk the gradual erosion of individual liberties. However in the consultation exercise which followed, the vast majority of consultees expressed concern at the transfer of powers away from politicians and towards the judges. The Canadian version of strong-form rights review was considered by many to give the judges too much power. A statutory Bill of Rights followed in 1990 which sets out the weakest form of judicial input vis a vis the legislature hitherto discussed. NZBORA is not entrenched and is liable to be modified by subsequent Acts of the NZ Parliament under both express and implied repeal. NZBORA does not even suffice to impliedly repeal pre-1990 NZBORA-inconsistent legislation. The main rights-protecting achievement of NZBORA is that whenever a statute can be given a meaning that NZBORA consistent, the judges must prefer this meaning to a rival, NZBORA-inconsistent meaning. Unlike the UK’s Human Rights Act NZBORA - despite its claim to be a constitutional statute- does not enjoy respite from the doctrine of implied repeal in respect of Acts passed after 1990 that cannot be given a NZBORA-compliant reading.616

Scotland and resort to pre enactment judicial scrutiny of Bills

There is a mechanism in the Scotland Act 1998 that empowers the Attorney General to refer a Bill (or provision of a Bill) that is before the devolved Scottish Parliament to the UK Supreme Court in order to ascertain whether the measure is within the legislative competence of the Holyrood Parliament.617

If a decision was taken to give entrenched status to a newly codified constitution in which the judiciary was to have the final say on the constitutionality of primary legislation, then a form of pre-enactment judicial scrutiny at Bill stage might seem logical, if only to avert subsequent expensive and protracted litigation and, in the event of a successful post-enactment legal challenge, time-consuming legislative reform. What proportion of post-enactment challenges would be headed off by a system of pre-enactment scrutiny is not knowable. The Scottish experience is relevant here. Since the Scotland Act 1998 came into force, there is no single reported instance of a referral to the Supreme Court. It may be speculated that the distinction between reserved and non-reserved matters has been expressed with such clarity in the 1998 Act that there is little scope for disagreement on what is within/outside the competence of the Scottish Parliament. As to what might happen in the UK under a codified constitution, much would hinge on the design of any pre-enactment clause. For example who would have the power of referral? Would it be confined to Law Officers or might Members of Parliament and/or Select Committees be able to refer matters (in Germany one third of MPs may request an advisory/pre-enactment review)? If not, might MPs/HL members be able to seek judicial review in respect of a decision of a senior Law Officer not to refer? What about persons outside Parliament/Executive? Could individuals/NGOs/corporate entities/trades unions seek referrals if they were likely to be affected by the proposed legislation? In respect of which matters would the power to refer lie? How soon after the publication of a Bill would a referral have to be made? Would referrals go directly to the Supreme Court?

616 In the UK, there is support for the view that, as a ‘constitutional’ statute, the Human Rights Act 1998 is protected from the operation of the implied repeal doctrine, see further Laws LJ in Thoburn v Sunderland City Council [2002] EWHC 195.
617 Scotland Act 1998, s.33.
Pre-enactment scrutiny in the courts might contribute to a process whereby parliamentary debate on the best legislative policy is overshadowed and inhibited by the prospect of pre-enactment review. Both pre-enactment and post-enactment judicial review arguably encourage legislative policy positions that are ‘fire-proofed’ against judicial reverse.

Pre-enactment scrutiny has obvious similarities with the concept of an advisory opinion that is known in some jurisdictions such as Canada, Germany and England (in the guise of a declaration). It has been constitutionally prohibited in the United States on separation of powers grounds since Chief Justice John Jay refused to give President Washington the benefit of the Supreme Court’s opinion on the constitutionality of American neutrality in the war between Great Britain and France in the 1790s. In England and Wales, the remedy known as a ‘declaration’ can be used to obtain authoritative judicial guidance in the absence of any actual legal dispute. This has been used when an apparently hypothetical question is likely to become a concrete legal dispute in the near future.\(^{618}\) There is however an understandable caution on the part of English judges to issue advisory declarations too freely. Thus, they have refused to use this power where complex factual situations can be foreseen but have yet to materialise.\(^{619}\) This consideration however could not be invoked to deny pre-enactment scrutiny of bills.

At present the Joint Committee on Human Rights provides an informed analysis of the human rights implications of legislative proposals. This advice may not always be listened to by the Government\(^{620}\) but it serves (and is perceived to serve) as a valuable means of pre-legislative scrutiny.

**Process issues to emerge from Bills of Rights drafting experiences**

It is evident from recent developments at state/territory level in Australia where two jurisdictions (Australian Capital Territory, Victoria) have adopted statutory Bills of Rights that the **process** leading up to the adoption of a Bill of Rights is almost as important as the Bill’s contents - at least in terms of securing the legitimacy of the Bill in the eyes of ordinary citizens. Any attempt to codify the UK Constitution would require extensive and localised consultations that would do well to learn from the experiences of consultation exercises at state and territory level in Australia and elsewhere. Several issues would seem to call for close attention. First, ought the terms of reference under which a consultative process is conducted be fairly open as to the preferred outcomes? Some consultees might prefer to know what option the Government favours in order to know how best to influence the outcome. Should for example the terms of reference indicate whether socio-economic rights are being considered for inclusion in any Bill of Rights?

Who should run the consultation process? Should it include/be dominated by representatives from the mainstream political parties? What about NGOs/ trades unions and employers groups? and other civil society groups such as churches, and community groups? The Australian experience has shown that the active engagement of civil society groups (whether as members of the steering committee or simply on the ground organising events in specific localities) is vital for the purpose of energising the process. Should the committee/group have its own legal adviser? What

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\(^{618}\) Royal College of Nursing v DHSS [1981] AC 800; Dyson v AG [1911] 1 KB 410.

\(^{619}\) R (Pretty) v DPP [2001] UKHL 61.

\(^{620}\) See for example the Joint Committee’s proportionality concerns about the Blair Government’s Anti-Terrorism, Crime and Security Bill 2001 expressed at HC 37, HC 372 (2001-2).
about the balance between lawyer and non-lawyer representation? Independence from the government is probably a pre-requisite of any consultative committee that oversees the consultation process.

How should social media be used to stimulate interest and feedback views from consultees? Should direct polling methods be employed alongside social media, town hall meetings etc to gather as many citizen viewpoints as possible. Given the tendency of ‘human rights’ to produce strongly-felt opinions in some quarters, it is right to ask what level of impartial educative materials ought there to be to inform wider public debate? And how much public funding there should be to achieve an informed level of discussion. Lessons also clearly need to be learnt from the relatively poor level of responses to the last Labour Government’s ‘People, Power and Politics’ consultation in 2009 on the Green Paper on ‘a Bill of Rights and Responsibilities’ and, more recently, the Bill of Rights Commission which received around 1,000 ‘substantive’ submissions from an adult population of 50 million.

Conclusions

Even within the ‘Westminster’ model of constitutions based upon the concepts of responsible government and parliamentary sovereignty, constitutional reforms since 1982 have pointed in the general direction of increased judicial input on rights questions that would hitherto have been considered to fall within the exclusive competence of executives and legislatures. The various departures from a strictly majoritarian conception of democracy described above reflect both alternative understandings of constitutionalism and concerns about the weaknesses of political mechanisms to control the conduct of executives that enjoy a dominant position in the legislature. The moves away from purely political determinations of rights questions in countries such as our own and Australia have consciously sought to draw on the experiences of other jurisdictions.

At the same time however, Canadian-style strong-form judicial oversight of legislative policy-making (even though subject ultimately to override by the legislature) has not thus far taken root in other jurisdictions with ‘Westminster-style’ constitutions. There remains a sense of unease and suspicion (fomented in part by certain sections of the media) around the idea that unelected and unrepresentative judges ought to determine the nature and extent of constitutional rights. For their part, advocates of a federal Bill of Rights in Australia are however optimistic that the trend at State and Territory level towards statutory Bills of Rights incorporating mainly (though not exclusively) civil/political rights will in time persuade Australians of the benefits of a more explicit human rights culture in which the judges play a constructive role (in conjunction with the legislature) in the protection of vulnerable, neglected and unpopular minorities. In our own jurisdiction, the overwhelmingly positive response of the Executive and Parliament to s.4(2) HRA declarations of incompatibility may suggest that judicial insights on rights questions are perceived as having value. Whether, in the light of that positive experience, there is public support for further judicial input beyond existing forms of ‘dialogue’ (as in the form of advisory pre-enactment judicial scrutiny of Bills) or bolder still, Canadian-style judicial review with the option of a legislative override remains to be seen.

Experiences of constitutional reforms elsewhere indicate that the consultative and deliberative processes by which Bills of Rights come to be adopted/rejected assume a critical importance for reasons of legitimacy. For these processes to be instructive and truly reflective of a wide range of public opinion, not only is a level of
informed debate vital, those charged with designing and running the consultation exercise in communities across the UK must be able to reach out to otherwise disengaged persons and groups. Social media can play a role here. The committee charged with seeking out public opinion must also be seen to be independent of government, enjoy public confidence and have no preferred position from the outset of the consultation.

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Public Opinion and Codifying the Constitution

Introduction

The introduction of a codified constitution, whether or not this involves any degree of entrenchment and whether or not it involves any other substantive change to existing arrangements and procedures, raises two separate though related questions about how public opinion should be taken into account in drawing up proposals and making decisions. First, it must be decided to what extent the public will have input into the drafting of the proposals; and second, what is to be the role of the public in deciding whether or not to approve the proposals, and in particular whether there is a need to seek formal consent to legitimise the decision. These in turn raise the question of the level of interest in and understanding of constitutional issues: in general terms, the public take much less interest in process than in outcomes, and it may be a considerable challenge to increase citizens’ engagement with such questions to a level at which they can usefully participate.

There are several means by which the public could be given the opportunity to decide whether to approve or reject any proposals or by which opinion could be measured if there is not to be any direct public involvement in the decision. Most obviously is the possibility of a direct vote: this might be a referendum on the proposals themselves, but historically the victory at a general election of a party including the proposals in its manifesto has also been regarded as constituting an entirely adequate democratic mandate. Failing this, or in addition to it, public opinion can also be brought into the picture by holding a formal public consultation on the proposals, in which the decision-makers are not bound by any procedure but undertake to take opinion as revealed by the consultation into account – this might take various forms, ranging from publicising an opportunity for comments and submission of evidence to a full-blown constitutional convention. Also possible, instead of or in addition to any of these, is a process of informal consultation through survey research, which can offer more detailed understanding of the nuances of public opinion than any of the previous options, but which is a less transparent means than the others of incorporating public opinion into the decision-making process, and could not be taken as offering a mandate as such, yet might still be useful as evidence of the acceptability of the proposals to the public. Finally, it might in theory be decided that the public is not qualified to make the decisions of high legal and political complexity which revising the constitution entails, and that public opinion should therefore be ignored; but such an argument is probably untenable in modern Britain.
To evaluate these options, we need to understand how public opinion is measured and how the available means of measurement can best be deployed both to guide those drawing up the details of any constitutional proposals and to engage the public themselves in the process.

Consulting public opinion: legitimation and mandate

It seems plain that public opinion cannot simply be ignored if the basis of the British constitution is to be changed. In a democracy, the consent of the people to the system under which they are governed gives it its claim to legitimacy. But there are a number of different ways, both formal and informal, by which the public will can be judged. Each of the possibilities – a referendum, a general election, formal consultation or informal measurement through opinion research – has its advantages and disadvantages, and each draws on a different facet of public opinion and a different way of gauging it. Each, also, confers a different type of credibility on any decision which it endorses, and this may have consequences for the future stability of any constitutional arrangements introduced on that basis.

Because a referendum is a formal democratic exercise in which voters choose to express their opinions and are presumed to understand and take responsibility for the consequences of their decision, it would generally be accepted that they can be held to that decision as binding in a sense that does not apply to any less formal test of public opinion. Certainly, for a politician who wants to be able to claim a democratic mandate for proceeding in line with the decision, it offers clearer and less equivocal backing than any less formal form of consultation. Nevertheless, a number of points need to be borne in mind.

In the first place, referendums do not express the opinion of the whole public, only of those who vote, which can in some circumstances be a significant distinction. Turnout for referendums is rarely better than in general elections and often much worse, even on important issues\(^{621}\). It may therefore give a misleading impression of the overall state of public opinion, even though it conforms to the normal democratic convention of including the opinions of those who choose to vote and excluding those who do not. If, as is probably the case, the decision to turn out is strongly affected by the perceived importance of the issue to be decided, the eventual decision may (even more so than in a general election) be strongly influenced by the relative effectiveness of the campaigns on the two sides of the argument, by differential turnout and by short term factors affecting the public’s perspective. As has been evident in many referendums in many countries, a referendum decision is by no means guaranteed to be respected by both sides as the end of the argument.

Factors liable to weaken the authority of a referendum result, either immediately or at some point in the future, might include a perception that voters misunderstood what they were voting for or had been misled by the participants - a charge that has been made by Eurosceptics against the 1975 referendum - or that turnout was too low.

\(^{621}\) Under two-thirds of the electorate, 64.5\%, voted in the 1975 referendum on the Common Market, compared to the 73\% who had voted in the general election a few months earlier. In the 1998 referendum that set up the Welsh Assembly, turnout was almost exactly 50\%. The only British referendum with a turnout significantly above general election levels was the 1998 referendum in Northern Ireland on the Good Friday agreement, in which 81\% voted. See Dick Leonard and Roger Mortimore, *Elections in Britain: A Voter’s Guide* (Basingstoke: Palgrave Macmillan, 2005), pp. 212–223.
A referendum on constitutional issues might well expect to suffer from some of these failings.

There may also be criticism of the question asked, both for any bias in its wording deemed likely to influence the decision of voters, and for the effect of its wording or of the precise choice offered in framing the terms of campaign. The potential importance of such matters has been recognised by giving the Electoral Commission a formal statutory role in reviewing the wording of any proposed referendum, but since the matter is one of subjective judgment and since the Commission’s powers in the matter are only advisory, the problem remains a real one for the credibility of any referendum (and has received considerable media coverage in the context of the forthcoming Scottish independence referendum).

Although in recent years referendums have become more common in Britain for deciding issues of constitutional principle, and it might now be politically difficult to avoid offering one if a major constitutional change were proposed, historically they have been rare. More usually, the democratic mandate for constitutional changes as for any other policy is taken as arising from the general election victory of a party having included the proposal in its manifesto. But the mere inclusion of a proposal in the manifesto of a winning party might not be sufficient if all their (major) opponents are also committed to the same reform, since this would mean no choice had been offered to the voters. Yet even if this is not the case, the mere inclusion of proposals as one issue of contention in a contested election does not necessarily imply that voters for the party support the party’s stance on any given issue. Nor, of course, are minor revisions to the constitution likely to be an issue that is high on the election agenda even if the parties disagree, and one cannot therefore assume that the voters will have given the issue the same degree of consideration as they might have done in a referendum. Moreover, note that Britain’s electoral system means that a party winning a majority of House of Commons seats does not necessarily capture a majority of votes (and in fact very rarely does so). While a general election victory may suffice to give a mandate which is sound in terms of constitutional theory, it has obvious weaknesses as a real expression of public opinion.

Failing a direct or indirect vote on the issue, public opinion can be consulted in various ways with no binding influence on decision-makers which nevertheless offer a way in which the public’s views can be taken into account and also – importantly – can feed into decision-making during the process rather than merely exercising a veto once proposals are finalised. As well as helping to indicate which options will prove acceptable and which will not, and probably contributing a valuable non-expert perspective which may normatively improve the decisions being made, if such involvement is visible it can help increase the perceived legitimacy of the decision making process as well as encouraging public engagement with the issues. This might involve formal consultation or informal public opinion research, or both; indeed, the boundary between the two is not necessarily a rigid one.

There are many reasons for arguing that these means, allowing for the exploration of public opinion in much greater depth, may give better-informed guidance and reach decisions of higher quality than relying on the expression of opinions at the ballot box. But without explicit endorsement under secret ballot, it

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622 In the 2011 electoral system referendum, the eventual turnout was only 42%. Yet despite this, the British Election Study survey of the referendum found that a sizeable minority of those who voted had very low levels of political knowledge. See Paul Whiteley, Harold D. Clarke, David Sanders, and Marianne C. Stewart, ‘Britain Says NO: Voting in the AV Ballot Referendum’, Parliamentary Affairs, 65 (2012), p. 305.
might be argued that the adoption of a constitution lacks an adequate democratic mandate. This is a practical as well as a theoretical obstacle if it is intended that the codified constitution should have any degree of entrenchment, even only on an informal basis. If the sovereignty of Parliament is to be retained in the future arrangements, the survival of the provisions enacted depends entirely on the self-restraint of future parliaments: the stronger the expression of public consent at the time of introduction, the greater the moral obligation not to ignore the decision without at the very least an equivalent mandate to countermand it. On the other hand, if the proposals are to include an end to parliamentary sovereignty, placing the powers of the legislature under some higher constitutional authority, the establishment of such authority must surely require the consent of the people unambiguously expressed to be regarded as legitimate in any democracy. Therefore it may be that, useful though consultation or research can be, it can only play a supporting role and cannot replace the need for some form of direct vote. But the force of this argument may depend upon the degree of change involved in any proposals: the less radical the departure from existing practice, the more credible the idea that they might be legitimised by the informal knowledge that they are acceptable to the public and introduced without a formal democratic mandate.

A formal consultation does not necessarily make an accurate measure of public opinion since it only hears the views of those who take part – but for that reason it is likely to give greatest weight to those who feel most strongly, assuming they are aware of the consultation and able to take part in it. It has the advantage that it is normally designed to allow participation by any interested parties, ensuring that nobody should be able to legitimately feel excluded from the process.

Opinion research can take a number of forms, but is conventionally divided into quantitative and qualitative methods – colloquially, though misleadingly, opinion polls on the one hand and focus groups on the other. Scientifically-designed quantitative surveys are the only method which can hope to give a comprehensive measure of public opinion, including the views and beliefs of those who would not vote and would not choose to participate in consultation exercises – while such surveys of course fall far short of 100% participation themselves, they can attempt to correct for the non-response bias and measure the whole of public opinion accurately. In doing so the “topline” results from such surveys give equal weight to those who feel strongly and those who do not, and equal weight to the well-informed and ill-informed. Qualitative research includes “focus groups”, but also research in many other formats, and can often probe public opinion in much greater depth than a quantitative survey, which by its nature is formally and inflexibly structured. Of most relevance to the constitutional issue, it includes methods which rely on giving new information to members of the public and on having them reconsider their opinions in discussion with each other, which are well suited to issues where most of the public are uninformed or to which they have given little consideration. Qualitative research is normally not aimed at producing quantitative measurements of public opinion, and does not necessarily rely on being conducted with a representative sample of the public. However, hybrid methodologies, which use a representative sample and

623 Of course, the data from a well-designed survey can be used to examine the opinions of subgroups of the population, such as those who would vote in a referendum or election, as is demonstrated by the ability of opinion polls to predict election and referendum results with reasonable accuracy on most occasions.
produce a quantitative outcome, are also possible. Qualitative research may also be useful as a preliminary step to inform the design of a quantitative survey.

As democratic processes, all these forms of opinion research would normally be open to the criticism that they depend on the researchers selecting the participants (whether through random sampling or purposive selection), and that therefore participation is not open to all voters. Those who participate may be representative of them in the sense of holding similar views, but not in the sense of having been mandated to express those views on their behalf. But, well conducted, they may be much more informative than any formal democratic exercise.

There is little evidence to suggest how far the public would find the various alternatives to referendums acceptable. Referendums in principle have always been popular with the British public. A British Election Study survey at the time of the AV referendum in 2011 found two-thirds agreeing that “The UK should use referendums to decide important issues”\(^{624}\), notwithstanding the perception that many of the public resented the AV referendum itself as unnecessary. This was fully in line with earlier surveys over many years, including those in the Joseph Rowntree Reform Trust’s State of the Nation series and the Hansard Society’s annual Audits of Political Engagement.

Surveys asking whether there should be a referendum on a specific issue rarely find a plurality against the idea, although a referendum on the Monarchy has been an exception (perhaps simply reflecting public understanding that a vote to maintain the status quo would be a foregone conclusion and the whole exercise might therefore be seen as pointless). There is consistently a majority in favour of holding a referendum on continued British membership of the EU, and on other details of Britain’s relationship with Europe\(^{625}\). ICM’s polls for the Joseph Rowntree Reform Trust on four occasions between 2000 and 2010 all found between 50% and 60% support for a referendum on “changing the system we use to elect MPs”, and MORI has found on several occasions a clear majority backing a referendum on restoring the death penalty.

If a revised or codified constitution is to be subjected to any form of test-by-ballot, then clearly it will be necessary to ensure that its provisions are acceptable to the voters; this implies not only that opinions need to be monitored during the process of drawing up proposals, but that a sufficiently in-depth understanding is required to judge how to win over opinion if it is not initially favourable. But even if no such chance to vote is envisaged, there are strong democratic arguments for wishing to ensure that the constitutional provisions adopted are in line with the will of the people. However, it can reasonably be argued that the low levels of public interest, understanding and knowledge of the issues that prevail at present make the current state of public opinion an unsuitable test for the validity of the proposals and that on these grounds alone there is a strong case for a referendum campaign, in the course of which the voters can perhaps be expected to educate themselves sufficiently to come to a reasoned decision in their own best interests and those of the country. But failing that, many would argue that it would be wrong to allow decisions to be driven by the views of the public when this would neither be in their own best interests nor would reflect the decisions that the public themselves would make, were they better

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\(^{625}\) Ipsos MORI’s archive of past polls (www.ipsos-mori.com) includes 14 questions since 1991 on holding a referendum on EU membership, on joining the Euro or on changes to the EU constitution, all finding support for a referendum standing between 54% and 74%.
informed. However, this circle can perhaps be squared if it is possible to divine what the considered opinions of a better-informed public would be, although gaining the consent of the public themselves such a contention is by no means assured.

The low public salience of constitutional issues

Conventional opinion polls are of limited use in exploring public opinion on issues of low salience: they can measure the extent of the public’s low understanding or interest, but their opinions on the substantive issues are likely to be unhelpful – opinions expressed will be superficial, may be greatly influenced by question wording or context, and might change dramatically once any public campaign on the issue gets underway. The public’s thinking on such issues may well be confused, perhaps even formally contradictory, and certainly in this raw form offers little guidance to policy makers. Past opinion polls in Britain have frequently found that manipulation of question wording or placing emphasis on different aspects of an issue can cause dramatic differences in poll responses on constitutional issues.

For example, polls on electoral reform have frequently found a convincing majority in favour of change with questions that emphasise the disproportionality of seats to votes under the current system, but opinions much more favourable to the status quo when the question asserts that First Past The Post produces more decisive results (even though this, of course, could be taken as simply another way of stating that the results are disproportional). Similarly, in the 1990s MORI found support for “a United States of Europe” 12 percentage points higher than support for “a United States of Europe with a federal government”626, almost certainly because the term “federal” had negative connotations to many of the public which were not evoked by the phrase “United States”, even though the one presumably implied the other.

Few of the public have much knowledge about or understanding of the Constitution, a fact that they freely admit. When asked in 2007 (in the Audit of Political Engagement survey) how much they felt they knew about “the constitutional arrangements governing Britain”, only one in five felt that they knew at least “a fair amount”; about half knew “hardly anything at all” or said they had “never heard of it”627. Nor was this low level of claimed understanding simply a matter of the public not knowing what “constitutional arrangements” were. When the survey went on to ask about several specific issues, the number claiming to understand them were mostly at a similar level. (See Figure 1). The exceptions were instructive in themselves: the three issues where claimed understanding of at least “a fair amount” reached half were lowering the voting age (arguably an issue of straight principle with little complex to understand), but also “English votes on English issues” (which had received vocal coverage but on a fairly simplistic level in the tabloid press) and “How votes cast in a general election translate into seats in the House of Commons”. This last is a notoriously complex issue, suggesting that the public’s understanding may have been much less than they supposed, especially in the light of events during the referendum on the electoral system four years later. (It is perhaps also worth noting that two of the three issues on which the public felt least uninformed concerned voting in a General Election, where the public have direct contact with constitutional

arrangements and perhaps for that reason may tend to suppose that they know as much as they need to know.)

**Understanding constitutional issues**

Q  *How well, if at all, do you feel you understand each of the following issues?*

<table>
<thead>
<tr>
<th>Issue</th>
<th>% Fairly well</th>
<th>% Very well</th>
</tr>
</thead>
<tbody>
<tr>
<td>How votes cast in a General Election translate into seats in the House of Commons</td>
<td>34%</td>
<td>15%</td>
</tr>
<tr>
<td>Whether only English MPs should vote on English issues in the House of Commons</td>
<td>34%</td>
<td>14%</td>
</tr>
<tr>
<td>Lowering the age at which people are eligible to vote in a UK General Election from 18 to 16</td>
<td>36%</td>
<td>12%</td>
</tr>
<tr>
<td>How political parties are funded</td>
<td>32%</td>
<td>7%</td>
</tr>
<tr>
<td>How the date of a General Election is chosen</td>
<td>29%</td>
<td>9%</td>
</tr>
<tr>
<td>How the Human Rights Act works in practice</td>
<td>29%</td>
<td>5%</td>
</tr>
<tr>
<td>Whether Britain needs a new Bill of Rights</td>
<td>23%</td>
<td>5%</td>
</tr>
<tr>
<td>Proposed reforms of the membership of the House of Lords</td>
<td>22%</td>
<td>4%</td>
</tr>
<tr>
<td>The powers that government can currently exercise without Parliament’s approval</td>
<td>19%</td>
<td>3%</td>
</tr>
</tbody>
</table>

Base: 1,073 GB adults 18+. Fieldwork dates: 29 November – 7 December 2007  Source: Ipsos MORI

**Figure 1**

It may be helpful at this stage to consider the nature of public opinion. Robert Worcester has distinguished between three levels of views – opinions, attitudes and values, which he characterises respectively as “the ripples on the surface”, “currents below the surface” and “deep tides of public mood”.\(^{628}\) Opinions are the weakest of these, lightly-held and volatile, covering issues people may have thought little about and perhaps based on snap judgments or driven by trivial causes rather than any real deliberation. Attitudes are more stable and more thought-through, probably based on a rational process of decision-making and also liable to be changed by rational argument if the facts that underlie change or come to be seen differently. Values are the most stable of all, often learned in childhood and only likely to change thereafter in very rare circumstances; unlike attitudes, values are not normally susceptible to rational argument.

Views on different subjects are held at different levels by different people. For a few, no doubt, views on constitutional reform amount to a value, but probably for the majority of the public it is an issue of such low salience that they hold only easily-swayed opinions on it. As they learn more, if they become persuaded that the issue is of sufficient relevance to merit thought, they may develop attitudes, based on their understanding of the questions involved and reflecting their underlying values. But these attitudes may bear little resemblance to the opinions they expressed when polled on the issue before they had given it much thought; and attitudes may also change if new knowledge or new arguments change people’s perspectives on the issue or their understanding of how it relates to their values.

An important factor in low knowledge is the low salience and perceived urgency of the issue. Ipsos MORI’s monthly Issues Index\(^6\) measures the proportion of the public naming different issues, unprompted, as among the “most important issues facing Britain”: constitutional issues (including Scottish and Welsh devolution) have not been mentioned by more than 1% in any poll since 1999. A similar lack of concern

about existing arrangements was evident on the issues covered in the 2007 Audit of Political Engagement survey (Figure 2): although those who said they were dissatisfied outnumbered those who were satisfied on seven of the eleven issues listed, there was no case where as many as half the public felt dissatisfied, and the only issue that came close was the West Lothian Question. More significant, though, was the high proportion of the public who either said they were “neither satisfied nor dissatisfied” or that they didn’t know, reaching almost two-thirds of all those asked about “Britain’s unwritten constitution” and “Britain not having a new Bill of Rights”. 630

Public opinion on this sort of subject will naturally tend to be volatile: people may change their minds as they learn more, but if they are not fully informed or have not considered the question in detail, their opinions may also be irrational or internally contradictory and therefore easily manipulated by different framing of the issue or by different wording of opinion poll questions. While a referendum campaign, should there be one, may persuade some voters to engage with the issues more seriously, many others may still be left with only a shaky understanding of the issue, especially if the referendum campaign itself does not succeed in convincing them that the issues in question are important and that both sides have a case that needs to be taken seriously.

Two British referendums in the past decade on issues that could be broadly considered constitutional – the national referendum on the electoral system in 2011 and the referendum in the North-East of England on regional devolution in 2004 – both illustrate this. In both cases the campaign became bogged down in detail, probably succeeding in giving few of the voters much depth of understanding of the issues on which they were voting. A week before the 2011 referendum, a poll found that half the electorate (51%) said either that they only partly understood the AV electoral system on which they were being asked to vote, or that they did not understand it at all. 631 In 2004, arguments over the details distracted attention from the principles: voters had to decide between alternatives for restructuring local government in the event that a regional assembly was approved as well as voting on the question of the assembly itself, and the arguments on this point between the existing county and district councils dominated early local coverage of the referendum. 632

In both cases, perhaps as a result of this, the “No” campaign proved most effective, and achieved it by use of dismissive slogans about the cost of an unnecessary change - memorably symbolised in 2004 by producing a 15-foot inflatable White Elephant 633; and, predictably, this resulted in a substantial swing towards the status quo over the course of both campaigns. (In 2004, early polls indicated a “Yes” lead, but the eventual “No” vote was 78%). But such swings are not confined to referendums on low salience issues. In the 1975 UK referendum on Europe, there was a 22% swing to the “Yes” campaign over six months. 634

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Current opinion on many constitutional issues is likely therefore to be a poor indicator of future opinion. For the same reason, the value of public input into formal consultations may be limited, being neither a reliable guide to what may eventually prove acceptable to public opinion nor necessarily expressing considered opinions which can usefully contribute to debate as proposals are being formulated.

Low levels of engagement with the issue may raise other democratic problems beyond the mere unpredictability of opinions. Obviously, interest in politics and political issues in general, and in constitutional matters in particular, is not randomly distributed throughout the population. Interest is higher among those with a higher level of education and those in professional occupations, and also higher among older than younger voters. This also implies, as a consequence, that a greater proportion of Conservatives take an interest than of Labour supporters or Liberal Democrats. Interest is also higher among men than among women, and among white citizens than among members of ethnic minority groups.

All of these factors mean that giving greater weight to the opinions of the interested and well-informed, in itself natural enough, creates potentially disturbing biases in the influences on the decision-making process. If voters feel that political knowledge or understanding is necessary to participate in consultations about the constitution, or perhaps even to contribute to discussions outside any formal context, part of the public will be excluded, and in particular the views and interests of the young, of women and of those with recent immigrant heritage may be under-represented. Recent research has shown that the perception that women are less knowledgeable about politics, shared by both men and women, can lead to their contributing less to political discussion even when their objective level of knowledge is as high as that of men, perhaps simply because men and women understand the concept of “political knowledge” differently.

**Formal consultations**

A consultation with the public, businesses and other stakeholders is now a common feature in policy-making decisions, routinely required for many decisions by public bodies as well as for governmental policy decisions at both local and national level. It allows those affected by proposed policies an opportunity to express their views on proposals, and to have an input into the decision-making process. Official government guidance on consultations published in 2012 lists as possible objectives: to garner views and preferences, to understand possible unintended consequences of a policy or to get views on implementation.

Consultations are intended to improve the quality and transparency of decision making, but also by securing public involvement may be considered to make the decisions more directly democratic (although the input to such decisions from the consultations is normally qualitative rather than quantitative – that is, the function of the consultation is not to count heads but to elicit facts, arguments or opinions that may be relevant to the decision being made and the merits of the various options being considered). Further, by involving the public at an early stage, the acceptability to the public of the eventual decision may be increased.

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However, it is less obvious how far these aims are achieved in practice. Increasing concern has been recently expressed at the number of government consultations being conducted and their value. It should also be noted that many consultations on contentious issues have in themselves proved contentious, have not placated those opposed to the final decisions reached, and have been subject to judicial review in a number of cases.

The government’s Code of Practice on Consultation used to lay down guidelines on the approach to be adopted in formal consultations of the public by government bodies, although these guidelines are sometimes overridden by the statutory provisions in particular cases. Other public sector organisations were free to adopt the guidelines for their own consultations, but not bound to do so. These guidelines provided that consultations should: be conducted on a settled and realistic timescale, allowing plenty of time for each stage in the process; be clear as to who is being consulted, about what questions and for what purpose; use a consultation document that is as clear and concise as possible, and making it as easy as possible to respond; be effectively drawn to the attention of all interested groups and individuals (for which electronic distribution of the documents was prescribed, although not to the exclusion of other means); make sure that all responses are “carefully and open-mindedly analysed”; and ensure that the results of the consultation are “made widely available, with an account of the views expressed and the reasons for decisions finally taken”. All of the guidelines are clearly good practice and appropriate in most cases.

Many of these consultations can be on an extremely large scale: for example the Greater Manchester Transport consultation in 2008, which included the possible introduction of a congestion charge, drew 85,000 responses from the public as well as more than a hundred from organisations or companies. The conduct of many of these consultations is now contracted out to market or opinion research companies, who are accustomed to handling the high volumes of data involved and reporting on public opinion to a high standard.

A consultation is not an opinion poll; it is a tool to allow those who want to express an opinion to have their say. Consultations are not carried out among representative samples of those in a target audience, nor are the responses able to fully explain the views of those responding on every relevant matter contained within the proposals. A consultation should not, therefore, be taken as a comprehensive statement of public, business or stakeholder opinion – it simply harvests a wide range of views and opinions among interested parties on given proposals. As compared with the results of a representative survey of opinion on the same subject, it will tend to over-represent the opinions of those who feel most strongly about the subject, since they will have the strongest incentive to respond. This may also mean that it gives greatest weight to those with the greatest knowledge or understanding of the subject.

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636 The 2009-11 Pathways Through Participation project for NCVO, the Institute for Volunteering Research and Involve, a qualitative study of people’s experience of participation, reported that “Interviewees’ experiences of formal public consultations were almost entirely negative” and that “For many interviewees, these negative experiences reinforced an existing ambivalence and lack of trust in political processes in general.” (Pathways through Participation Briefing Paper Local Engagement in Democracy, p3).

637 Jill Sherman and Tom Knowles, ‘Millions are squandered as red tape chokes action’, The Times, 10 January 2013.

638 The Code of Practice was superseded in 2012 by a less-specific three-page guidance document.

639 Cabinet Office: Code of Practice on Written Consultation, November 2000.
but there is no guarantee of this, especially on topics that elicit a strong emotional response.

Consultation exercises are therefore quite different from and serve a different purpose to sample survey research (opinion polls, discussed below). Sample surveys are generally carried out among representative samples of people belonging to clearly-defined audiences and the results (within their margins of error) can be extrapolated to the population of a given audience. When running a parallel sample survey with a consultation, results can and frequently do differ – simply because they are measurements of different things. In fact it is safer not to think of consultations as being measurements; rather, they are exercises that gather qualitative data.

**Opinion polling: measuring current opinion**

Representative sample surveys of public opinion, coming under the broad heading of “opinion polls”\(^640\), are conducted for various reasons. Among those who may commission surveys are: journalists, for whom the state of public opinion on a given issue is often relevant to the reporting of news stories, particularly political ones, and may constitute a story in itself; companies, campaigning groups or their public relations agencies, for whom a newsworthy poll result can offer an opportunity to gain media attention for a message they want to put across; political parties, candidates or institutions, for whom understanding of the state of public opinion is management information vital to their campaign planning (and, beyond the realms of political opinion, companies engage in market research of all types for similar reasons); public bodies, including government departments, that wish to test public reaction to future policy options, monitor the success of existing policies or use public satisfaction as a performance indicator; and universities or other research organisations, collecting information for academic or scientific purposes. As would be expected with such a range of purposes, there is a wide variety both in the methods used and the scale of the exercise. Nevertheless, the broad principle is common to all: they set out to gather the opinions of a clearly-defined group (whether the whole public or some subset of them), by selecting a representative sample of the group and asking them to complete a questionnaire.

The value of polls is not simply confined to counting heads. We can examine differences in responses based on factors such as attitudes or age or political persuasion. We can look at the relationship between answers to different questions, and infer the connections between them. We can use sophisticated statistical techniques to explore the relationship between different opinions and their causes, how far the public distinguishes between different (or differently expressed) concepts, and identify those members of the public who think in similar ways to each other. We can examine the media consumption habits of those holding different opinions so as to evaluate the different channels for attempting to persuade them to change their minds. We can also track changes in opinions, and by using panel studies (where the same respondents are interviewed more than once) we can identify whose opinions have changed, which can go a long way towards helping understand why they have changed and what might cause further changes.

\(^640\) Opinions differ as to whether the term “opinion poll” should be regarded as a specific one, restricted to a particular class of surveys, or is a more general term that can properly be applied to any survey of public opinion. It is used here as a general term with no specific meaning intended.
However, there is an important limitation. Polls are, normally, top-of-the-mind measures: they elicit the immediate reaction of the respondent to the question being asked. If there is a knee-jerk reaction to be had, the knee will jerk. They are not binding, and the respondent knows that they are not, so they may encourage respondents to exaggerate their certainty or to express an opinion on a matter they have not really considered – voters discontented with the party they usually support may give as their voting intention a protest vote that they are only considering rather than having resolved to cast, those who are in reality “don’t knows” on an issue may give the opinion to which they are most tempted to lean. While the information collected from polls may be of the highest value, therefore, the poll reader must consider very carefully how fully it should be taken at its face value, and this is particularly true where the poll questions are ones to which most of the public will not have given much previous thought. The man-in-the-street may already know, before a pollster approaches him, which supermarkets he most trusts, whether his local resident’s parking arrangements are satisfactory, and even whether he is satisfied with the way the Prime Minister is doing his job. He is less likely to have a firm opinion on the provisions of the Parliament Act or the political neutrality of the civil service, and his responses to opinion polls on such matters may not measure something that really exists in public opinion.

With these reservations in mind, we can consider the findings of past polls on the issue in Britain. Polling on constitutional issues was conducted for the Royal Commission on the Constitution (the Kilbrandon Commission, originally the Crowther Commission) and for Granada TV’s investigative State of the Nation series, both reporting in 1973. More recently, in 1991 the Joseph Rowntree Reform Trust initiated a series of surveys, also under the title State of the Nation, which have been conducted every few years since then, and on four occasions this has included a direct question on support for a written constitution, finding each time that at least two-thirds of the public agreed that “Britain needs a written constitution, providing clear legal rules within which government ministers and civil servants are forced to operate.” The consistency of these findings over a fairly lengthy period of time makes clear that the public’s initial reaction to the idea of a written constitution is favourable, but bearing in mind their admitted low levels of interest and knowledge, this is no guarantee that their opinions may not change dramatically if they begin to learn more and think more about the issues.

Measuring potential opinion and considered opinion

However, public opinion research is by no means restricted solely to measuring current opinions. One obvious wish is to anticipate how public opinion might change. Where there is a sufficient level of public knowledge and understanding to assume that respondents will be able to answer a hypothetical poll question realistically, conventional quantitative polling can indicate the likely impact of different messages or approaches. Such techniques, indeed, are the bread-and-butter of political marketing consultants in countries such as the USA where more money is available for private polling. In Britain in 1975, a hypothetical question in a Gallup poll predicted months in advance of the referendum the huge swing in opinions that could

641 The first two State of the Nation surveys, in 1991 and 1995, were conducted by MORI; the last few in the series have been conducted by ICM Research. The written constitution question appeared in polls taken in 1995, 2000, 2006 and 2010: see Ipsos MORI and Joseph Rowntree websites for full polling results.
be achieved by renegotiating the terms of EEC membership, to within a couple of percentage points of the eventual outcome; Worcester reports that it was partly knowledge of this poll finding that gave Harold Wilson confidence to press ahead with his strategy and risk the political consequences of holding a referendum.\(^{642}\)

Where the public’s views are based on too shallow a foundation of knowledge of the issues or understanding of the context to be a useful indication of their likely future opinions, there are various research techniques which can explore the underlying factors in greater depth, with the objective of predicting what the public “would” think if better informed or will think once an issue has become more salient and received greater public consideration. As Luskin et al. put it, they offer “a glimpse of a hypothetical public, one much more engaged with and better informed about politics than citizens in their natural surroundings actually are”.\(^{643}\) (Luskin et al. were advocating a specific methodology, deliberative polling, but the same broad aspiration applies to this whole family of research techniques.)

Such techniques can be of particular value in research related to political process, where the public’s pre-existing prejudices can cloud their judgment in instant-reaction opinion polls, but where they are perfectly capable of putting these aside and reaching a different decision once they consider the issues in the light of basic background information and understanding of the consequences that follow from different options. As the Chief Executive of the Electoral Commission said of research on attitudes to party political funding, conducted for the Commission in 2006, “One of the key aims of this research was to get the public to think beyond their initial gut reactions to the question of party funding, and consider the various options available in greater depth. For the vast majority of participants, the deliberative process took them from a situation of knowing little about party funding and having no opinion on the issue at the beginning of the day, to a situation where they felt better able to express a view on the subject.”

But the usefulness of these techniques also goes beyond the collection of management information and offers a means by which the public can have an input into decisions if decision-makers take the findings into account. Further, if such events are publicised, for example by securing media coverage, this can help raise public awareness of the issues being discussed. Indeed, the entire event could be televised or webcast, or filmed for future use (and for the historical record). The presence and involvement of senior recognisable figures – in this case, for example, leading politicians of all parties –could also reinforce the public’s belief that results will be taken seriously.

Some theorists also argue for “deliberative democracy”, holding that political decisions reached by such a process are normatively better than those reached in other ways\(^{644}\). Deliberative research therefore, according to these theories, offers not only the possibility of anticipating what decisions might be publicly acceptable should the public eventually become better informed on the issue, but also improving the quality of those decisions.


Most methodologies for deriving “informed opinions” are deliberative, involving the presentation of information and/or arguments to group participants and encouraging them to discuss them before gauging how this changes their views. Both live events and online discussion forums have been used. At the smallest scale, this can be confined to focus groups and produce purely qualitative findings; but more ambitious exercises involving representative samples and aimed at drawing quantitative conclusions are also possible.

Constitutional reform might be a topic well suited to deliberative research645. As already noted, this is an area that many people know little about, and what they do know can sometimes be partial or misguided; but it is also one which they are likely to recognise as important, and in which it should be possible to engage their interest and co-operation with the right approach. The issues to be tackled are complex. The exercise would involve asking members of the public to discuss a subject that may be both unfamiliar to them and difficult to contemplate. It would be important to ensure that participants grasp the difficulties of the subject area and are able to make informed choices based on evidence presented to them. Therefore, it can reward a research approach that allows participants the opportunity to become informed on context, options and consequences, and gives them time to reflect and consider the information within their everyday social context, in order for them to provide sophisticated, informed feedback.

**Democratic claims for deliberative polling and citizens’ juries**

“Deliberative polling” and “citizens’ juries” are both in effect proprietary forms of opinion research646 for which claims of legitimacy as a process for democratic decision-making have been made. Deliberative polls involve a large sample and are directed towards achieving a quantitative outcome, typically in the form of “before-and-after” polling results; citizens’ juries use a much smaller number of participants and deliberate towards a consensus verdict on each of the questions before them.

The basic concept in both cases is that a representative sample of the public are presented with information and a balanced view of expert opinion on an issue and that, after time to deliberate, their opinions are better informed and better considered, and hence more valuable than the raw opinions that can be obtained from the public in a conventional “top-of-the-mind” opinion poll. Such outcomes can be presented to policy-makers as representing the conclusions that the whole public would come to had they the leisure to research and consider the issues in more depth, or to the public themselves as a guide to their voting (and several of James Fishkin’s deliberative polls have been televised with precisely that possibility in view).

But it is also possible to go further and to view such exercises, properly conducted, as a procedural means of democratic decision-making; with respondents selected randomly from the population, it could be considered to be representative in the

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646 “Deliberative polling” was devised by Professor James Fishkin and the phrase has been registered by him as a trademark; Ned Crosby has copyright of the term “citizens’ jury”. (See Damien French and Michael Laver, ‘Participation bias, durable opinion shifts and sabotage through withdrawal in citizens’ juries’, *Political Studies*, 57 (2009), pp. 422–50.)
functional democratic sense as well the purely reflective sense, and qualified to make decisions on behalf of the public as a whole and to be regarded as sufficient in itself to provide the democratic mandate to carry out the policies it approves. Similar thinking underpins the coining of the term “citizens’ jury” by the Jefferson Center in the 1980s.

**How deliberative research works**

Deliberative research exercises of various sorts are now an established part of the public opinion research scene, though with many variations in the precise procedures, and have been frequently commissioned by governmental or public-sector bodies.

These exercises can vary in size and length. Typically in a workshop format they will last between 3 to 6 hours, often with around 16 participants, although the number can be higher. A deliberative forum is bigger, typically a full-day event or even reconvened on several separate days, with anything from 50 participants upwards. (Some successful events for UK government departments have involved over 1,000 participants, either in a single venue or simultaneously at several sites joined by satellite links.)

Participants might be selected to be representative of the public, but this will depend on the exact objectives. In fact, as with other types of qualitative research, it is sometimes preferable to over-represent certain groups to ensure that particular viewpoints or experiences are heard, or even to hold separate events for particular subgroups. In some circumstances, ensuring that participants come from different backgrounds or have different perspectives may help stimulate discussion; in other cases, homogeneous groups may be less inhibited than mixed groups. Both approaches can easily be used in a large event (mixing discussion in small segmented breakout groups with plenary sessions where all deliberate together), but is often preferred to hold a series of events, each concentrating on a different section of the public, allowing comparisons to be made between the ways that each group approaches the issue in a way that might not be possible with a single, large, representative group. However, where part of the aim is to generate some form of quantitative findings, it is of course necessary for participants to be representative of the population being studied if they are to be meaningful.

A further option, particularly useful for events exploring local issues, is the entirely open forum. This offers those interested a chance to attend at will, and ensure that local people, in as much as possible, set the agenda for discussions; it is an effective way of making the study inclusive, and ensuring residents feel that a broad and fair range of opinion has been sought. It may be less practical for national issues, where the potential group of interested parties runs into millions, unless it is envisaged to hold a great many local events; but the success of the format points towards the possibilities which might be offered by its online equivalent.

Participants go through series of sessions during the event designed to help them develop their understanding of the issues, but again the details can vary considerably. They will normally include some form of briefing sessions, in which the moderators introduce briefing materials with background information for participants, and often sessions when expert witnesses are brought in to present their opinions on the topic up for debate. (They would usually each give a brief presentation and then open up discussion to the floor for a Q&A session.) As already mentioned, the discussion sessions themselves might involve all the participants together, or may break them up into smaller groups. Discussion can be stimulated in various ways, for
example through projective techniques (which can be used to draw out underlying feelings on particular issues) or scenario planning techniques (which involve constructing different scenarios in which to explore participants’ responses and help them to evaluate them).

Central to the technique and to the validity of its findings is the material provided to inform the participants. This may take many forms – videos or press cuttings, for example - but the main elements are usually written material (which may be provided to participants in advance of the event itself) and evidence from expert witnesses. It is vital that materials are fair and balanced in order not to bias the research (and to achieve this not only requires a strong understanding of the key issues but also an insight into how people understand and assimilate new information). This does not imply that all the materials need to be neutral – on the contrary, it is usually most effective to allow proponents of each side of the argument to present their own case in their own way – but it is essential that the totality of the evidence presented is balanced, and that all relevant viewpoints are aired.

The outputs of such research can throw light on a number of different aspects of the way the public approach these issues. Throughout the event the opinion of each participant can be tracked to pin-point powerful arguments and key turning-points in order to evaluate the effectiveness or importance of particular arguments and messages, exploring how people absorb the information they are given and which information influences their opinions. The changes in their opinions during the course of the event may indicate the way in which public opinion will move in the future as the issues become better known. But because participants are in a better position to make informed choices once they have received new information, have had their opinions challenged and have been able to discuss and debate what they have learned with their peers, their final opinions can also be viewed as representing the views of a hypothetical, informed public better qualified to judge the public good than their real, uninformed counterparts. A qualitative assessment of the event’s progress can help to move the debate forward, and to set the agenda for the future; but it is also possible to take quantitative measures of opinion, provided the group is large enough and representative enough for these to be meaningful, although this is a less widely accepted approach.

While not a routine part of the governmental policy-making process in Britain, such events have been used for the purpose on occasion, although not without controversy. Tony Blair’s government used deliberative forms of consultation for a number of purposes. After taking over as Prime Minister, Gordon Brown promised greater use of citizens’ juries so that “the wisdom and experience that resides within the British people will be better put to use in the future”, and a number of such events were held, especially in the second half of 2007. Large deliberative events were held as part of a wider programme of consultation on the government’s legislative programme for 2007–8 and 2008–9, including a “National Workshop” conducted by Ipsos MORI, in which 76 members of the public took part. But there was also vocal opposition to the device amid criticism of the cost and of the representativeness of the decisions, and by the end of September 2007 the Observer was reporting that

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647 Mr Brown’s speech in September 2007 setting out his proposals, together with a brief history of earlier British experience of deliberative research for central and local government and an outline of the exercises conducted between September and December 2007, are included in a House of Commons Library briefing SN/PC/04546 (14 December 2007).

“Citizens’ juries and other forms of research into public attitudes are to be more tightly controlled amid growing concerns that they are a ‘sham’ listening exercise used for political purposes, rather than a genuine way of canvassing opinion”.

Online deliberation

An additional option that is now available for gauging public opinion is to use online methods. The use of online means for consultations has already been mentioned, but qualitative and deliberative research is also possible using the internet. This has a number of advantages beyond the obvious one of cost. Research exercises of this sort can take place on a much-larger scale than is practical with any form of offline discussion, allowing much wider access (indeed, universal access to all internet users is possible), and participants can contribute whenever and wherever is convenient to them. The advent of smart-phones and similar technology may make access even easier, (although if the effect is to limit the length of contributions or encourage users to limit themselves, the quality of debate may suffer - it seems unlikely that useful deliberation can be conducted through tweets.) Opening access as widely as possible is important to the democratic credentials of the exercise (and it is worth noting that the population group to which online methods will appeal the most – the young – is one of the groups known to have least interest in constitutional and political issues and who may therefore be a challenge to recruit representatively for research by other methods.

On the other hand, online methods have their disadvantages. Most obviously, internet access is not universal, and particular population groups are disproportionately excluded; online research could therefore lack credibility if it were the sole method used. Online deliberative exercises are also more reliant on their moderators than offline groups, and arguably their moderators’ performance can have a greater influence on the findings than in offline groups.

Criticisms of deliberative or qualitative methods

It must be recognised that deliberative methods are not uncontroversial, and even the legitimacy or value of qualitative research as a whole is questioned by some theorists.

One critic, considering in particular the use of focus groups by the Labour Party in Britain, criticises the methodology as not “scientific”, not least because they were not conducted by a neutral moderator. But she also argues that – because they allow only a small unrepresentative group to have a say – over-reliance on focus group findings can have a fundamentally undemocratic effect, even when only used by the public.


650 See, for example Peter M. Shane, Democracy Online: The Prospects for Political Renewal Through the Internet (London: Routledge, 2004), which covers a range of online deliberative experiments, mostly in the USA, and Scott Wright, ‘Government-run Online Discussion Fora: Moderation, Censorship and the Shadow of Control’, The British Journal of Politics and International Relations, 8 (2006), pp. 550–68., which discusses the experience of two British government-run discussion forums.

political parties to help guide their own internal decision-making, decisions which must still face the democratic test of approval at the ballot box.652

It can perhaps be argued that any qualitative exercise has the inherent weakness when viewed as a potential process for expression of the democratic will that its procedures are necessarily flexible and subjectively-controlled, and that they therefore lack the ability to demonstrate procedural fairness that is possible in a purely quantitative exercise such as a referendum or even an opinion poll. Deliberative polling, citizens’ juries and similar exercises can attempt to avoid this problem by rigorous selection of a representative sample and strict criteria for reaching decisions on a quantitative basis, but arguably fail because of the reliance on subjectively-selected stimulus material and the direction of the deliberation by the moderators.

Most deliberative or discussion methods are to some extent reliant on the moderators who run the exercises, although there is great variation in moderation practices between different deliberative exercises.653 Their role if abused or poorly performed can substantially influence the findings. Their functions will usually include “facilitating the discussions, encouraging an ethos of mutual respect and guiding decision-making processes”654, and they may also be involved in presenting the information or stimulus materials to participants.

Equally central is the quality of this material itself. In the case of an issue such as constitutional reform, where many participants may at the outset have no opinion on the matters to be discussed or knowledge of the background, they are almost certain to be highly influential; for that matter, it is intended that they should be. It is therefore essential that they are balanced, accurate and comprehensive – the truth, the whole truth and nothing but the truth. The least weakness or scope for criticism will open the validity of the whole exercise to question, and offer ammunition to opponents who wish to discredit it.

But balance and relevance in a political argument are subjective phenomena, and if – as seems likely to be the case – some of the evidence to be presented would necessarily be speculative (i.e. the likely practical effects of different constitutional provisions) it may be wholly impossible to produce entirely uncontroversial materials that will meet their purpose. It is open, therefore, for critics to claim that deliberative findings can never be considered entirely objective and scientific.

There is also a practical problem in the reliance on experts which may make the method procedurally fragile. French and Laver report a citizens’ jury exercise conducted in Ireland, in which they found that some interested parties such as public representatives and officials were unwilling to co-operate if they expected to be on the ‘losing’ side; they conclude that “the jurors’ verdict was ultimately driven by this unwillingness [of key stakeholders] to participate”, which plainly undermines the legitimacy of the exercise as a form of democratic consultation.655

A subtly different critique is that in a deliberative exercise, but particularly in formalised events such as deliberative polls, the findings are inevitably directed by the way in which the questions to be answered are framed and in the selection of evidence to be presented (depending in this case not on its neutrality with regard to the

questions it does address but on the choice of those questions in themselves). This challenges one of the claims of deliberative polling that providing participants with better information and understanding increases their “autonomy” in thinking about the issue. It is suggested that some of the empirical evidence put forward to demonstrate that the method produces a normatively desirable gain in decision quality in fact only demonstrates greater “ideological constraint”, i.e. participants’ thinking is found to be more ideologically consistent after than before the exercise, but only on the researchers’ own definition of consistency, towards which participants have been guided by the arguments that the researchers have chosen to present to them.656

Another challenge to the claim that deliberation leads to better decision-making posits a different cause, and raises the possibility that the process of deliberation in groups may in fact impose pressures that lead to consensus on falsehood rather than truth. Cass Sunstein has argued657 both that deliberation can lead to “groupthink” and that there is a tendency to group polarization. “Groupthink” is a term for the phenomenon whereby groups tend implicitly towards uniform views: group members become reluctant to dissent from the consensus, censoring their own opinion; as a consequence the group may fail to combine the information its members could provide or to enlarge the range of arguments. It is a common feature of discussion groups and familiar to any qualitative researcher.658 Group polarization is a process by which members of a deliberating group end up in a more extreme position, in line with their tendencies before deliberation began, and Sunstein regards it as so inevitable as to talk of a “Law of Group Polarization”. However, most researchers would claim that well-designed and well moderated exercises can avoid both of these perils; the proponents of Deliberative Polls have argued659 that they find no evidence of groupthink and that the design of their events minimises the dangers of polarization (although that of mock juries, they believe, increases them).

There is also room to criticise the likely representativeness of deliberative groups, especially if it is proposed to extrapolate the findings to produce quantitative conclusions. It is highly likely that people who are willing to take part in an exercise involving such a time commitment will not represent the population as a whole: probably, people who do not want to take part may be less engaged with the subject area or indeed less engaged generally with societal issues. As a result this means that the sample will tend to reflect, or at least give disproportionate weight to, the views of a particular segment of society who are more interested in politics or government, or who have a better understanding of the relevance of the political process to their everyday concerns. Of course, all opinion polls are subject to non-response bias, but the circumstances of a deliberative event may create a particularly extreme bias. Moreover, with a well-designed quantitative survey it is possible to minimise this, and to try to correct for it, but it is not obvious how an equivalent exercise could correct the findings of a deliberative poll (bearing in mind that it would not simply be a matter of adjusting the weighting of particular respondents’ views, since the non-

658 Indeed, the same process operates widely in social situations away from the artificial research setting: it is at the heart of phenomena such as the Spiral of Silence - see Elisabeth Noelle-Neumann, The Spiral of Silence (Chicago: University of Chicago Press, 1984). - and an important element in the formation of public opinion.
participants would have been excluded from taking part in and influencing the discussion as well as from contributing to the quantitative totals of opinions before and after the deliberation.)

Non-deliberative techniques

Opinion research which attempts to inform or educate respondents before testing their opinions is also possible using conventional polling methods with no deliberative elements, and can include depth interviewing (in which the respondent discusses the issues with the interviewer, although not with other respondents) as well as quantitative polls. Even conventional opinion polls can contain a limited degree of information in their question wording, though there is obviously a limit to how much respondents can realistically be expected to assimilate, especially under the time pressure of a telephone poll. Face-to-face polls or online polls, where respondents can be asked to read something before answering questions, have greater scope for such a technique, but may give only the illusion rather than the reality of eliciting considered opinions if the subject is too far removed from matters which the respondent has thought about in the past – which may well be the case for most people on details of constitutional procedure.

Where conventional opinion polling does not fit the bill, techniques which give respondents more information and time to think about the issues, but without any element of discussion between respondents, is possible. For example, Neijens and De Vreese have reported satisfactory results with the Information and Choice Questionnaire (ICQ), in which respondents are provided with a range of expert opinions, and which was used in Dutch survey about constitutional issues surrounding the 2005 referendum on the European Constitutional Treaty, on which many voters had low levels of knowledge. They found that the ICQ increased the consistency of respondents’ answers and could “narrow the gap between the politically sophisticated and the politically less sophisticated”. However, criticisms of deliberative methods for their reliance on the information provided to participants would presumably apply equally here, and it could clearly be argued that the increased “consistency” identified in respondents’ answers exists merely in their corresponding more closely to the researchers’ own opinions rather than to any objectively-justifiable normative standard.

Where the aim is only to explore and understand public opinion, rather than to measure it, another possibility is to drop the assumption that materials provided to respondents should be balanced. Message-testing research is a familiar tool in political marketing as well as in the commercial advertising world, and measures the differential impact of introducing different ideas or formulations of ideas, not necessarily in a balanced way. For anticipating the final state of public opinion in a situation where there is no guarantee that public debate will be comprehensive, balanced or well-judged, this may have some advantages over the deliberative techniques which attempt to stimulate participants with balanced materials, although of course its value would be purely predictive or of management value and would have no normative force as is claimed for deliberative polling, let alone any democratic credentials. (It should also be borne in mind that the use of unbalanced

stimulus material can raise ethical problems, and might even risk being confused with “push-polling” and other disreputable practices.)

Finally, where the existing opinions of the public are of interest but their low level of understanding or familiarity with concepts and terminology may reduce the value of structured opinion poll questions with closed answer categories, it is possible to gain useful insights from the analysis of responses to open-ended questions. Recent research has demonstrated refined methods for exploring public understanding of difficult scientific concepts by examining statistical clustering in answers to open-ended questions, and the problems of that field are sufficiently analogous to those related to constitutional issues to suggest that a similar approach could be useful here too.

What might sway public opinion on the constitution?

As already noted, referendum campaigns can achieve huge swings; and this, of course, suggests that similar shifts in public opinion are possible, given the right stimulus, even in the absence of a referendum.

The relative credibility of the politicians on either side may be vital. Worcester has argued that in 1975 it was the unity behind the “Yes” campaign of the best-known figures in all the major political parties together with business and trade union leaders, opposed only by fringe figures such as Tony Benn and Enoch Powell, that achieved the swing of opinion that kept Britain in the Common Market, and that in any future referendum on Europe political leadership would be the key to success. In the 2011 referendum on the electoral system, attacks on Nick Clegg as the main supporter of the proposals formed an important part of the “No” campaign’s strategy.

Who does the public trust most today? Certainly none of the best-known politicians. In 1975 business and union leaders were of clear importance as the issue had obvious economic ramifications, but they might be of much less relevance in a constitutional debate. In the 2004 devolution in the North East, the endorsements publicised during the campaign were mainly from “celebrities”, notably locally-connected sportsmen and entertainers. (One local businessman, Sir John Hall, was prominent, but he was probably better known as the former chairman of Newcastle United Football Club than for his other business activities.) Survey evidence showed that many electors were aware of the stance these figures were taking, but they can have had little impact on the result since the vote was four-to-one for “No” even though all the prominent celebrities were campaigning on the “Yes” side. However, turnout in that referendum was only 47% and was strongly tilted towards those strongly engaged with the issues, which probably meant that those most likely to take their voting cue from the campaign endorsements of those people they trusted tended in the end not to vote at all. In the 2011 referendum on AV, both sides again concentrated on endorsements from sportsmen and actors.

Regular polling on the public’s trust of various groups consistently finds professionals such as doctors and teachers among the most highly trusted groups, while both journalists and politicians are widely mistrusted. In Ipsos MORI’s 2011 survey, 88% said they generally trusted doctors to tell the truth and 81% that they trusted teachers. Academics also scored well, with 74% saying that they trusted professors. By contrast, only 14% trusted “politicians generally”, 17% government ministers and 19% journalists.

But this can be misleading – the public’s regard for their own MP is always higher than for MPs in general, and they make some dramatic distinctions between journalists. In a referendum the opinions of the press may well be significant. Readers of many Fleet Street titles have much higher trust for the publication they read regularly than for the press in general, and broadcast journalists score higher than tabloid journalists, although TV news journalists score better still. Do not overestimate the importance of Fleet Street except in a very tight contest: around half the adult public now read no Fleet Street title regularly, and many of those who do see only “red-top” tabloids or commuter freesheets which are unlikely to devote many column inches to an issue such as this.

Higher trust for broadcast than for print journalists, and more generally for television and radio than for the press, is of long standing (and distinctive to Britain – surveys have found trust for the press much higher, and the gap between trust in the press and trust in television lower, in most other countries in Europe). Familiar BBC faces have particularly been able to rely on public trust, and this is unlikely to have been much dented by the Jimmy Savile and tax avoidance controversies of 2012. In particular those journalists who will be called upon to analyse and explain the issues involved in constitutional codification can be expected to have a very significant influence on public opinion, whether or not matters are ever taken as far as holding a referendum. This will be all the more true if debate between those responsible for producing proposals is on a rarefied level of academic principles or legal technicalities.

Another factor to bear in mind is the increasing influence on public opinion of new media, especially social networking media, although developments in this field are so fast that so far little detailed study of its overall impact has been published. Surveys have generally found trust in the internet lower than trust in broadcasters, and the influence of online sources on British elections has so far been judged to be limited but the number who rely on online sources as their main source of news is steadily increasing and, while the codification of the British constitution is unlikely to evoke the same degree of fervent interest as did the events of the Arab Spring among

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665 Ipsos MORI interviewed 1,026 GB adults, face-to-face, in home, on 10-16 June 2011. The survey was conducted on behalf of the BMA.

666 In the Committee on Standards in Public Life’s 2010-11 survey, conducted by TNS-BMRB, 58% said that they generally trusted TV news journalists to tell the truth, 41% that they trusted broadsheet journalists and 16% tabloid journalists. (http://www.public-standards.org.uk/Library/CSPL_survey_Final_web_version.pdf).

667 In the European Commission’s Spring 2007 Eurobarometer survey, 47% of the public across the EU, but only 18% of the UK public, said they tended to trust the press. 58% across the EU and 51% in the UK trusted television. The lowest national figure for trust in the press outside Britain was almost double the UK figure (35% in Sweden).

the public of those countries, the potential power of these channels is now clear. The viral spread of opinions between strangers by the internet, without any intervening filtering or interpretation by professional journalists and commentators, offers the possibility of a new dynamic in political public opinion. Since much of this discussion seems likely to be uninformed or misinformed, it may pose a new challenge to persuading the public as a whole to take a reasoned and considered view of the issues, but the direction in which it might mislead them is plainly unpredictable.

If the issues are not in themselves of core importance to voters, the movement of public opinion may depend on whether those issues become associated with other issues that are more important. Worcester argues in discussing the 1975 referendum “How did the government get public opinion to swing round? They did it by realising that Britain’s staying in Europe, or not, was not a deep core value for most people so that by ‘renegotiating the terms and strongly urging that Britain stay in’ they could sway enough voters to carry the day.” However, since 1975 opinions on the EU have been shaped by the issues having become attached in the minds of many voters to different issues on which opinions are much more powerful (for example, by Eurosceptics equating issues of EU governance with issues of British national identity). Whether these associations of ideas would survive the public reflection on the issues that would precede any future referendum on Europe is a moot point, but it is certainly true that public opinion on Europe at the moment is subject to a very different dynamic from that which drove voters in 1975.

Similar changes in the significance of other issues as public debate develops are equally possible. For the vast majority of the public, their views on Britain’s constitutional machinery are much more superficial and lightly held. This might mean that if their interest can be aroused they can be persuadable and can engage in rational debate to reach a reasoned consensus. But it could also mean that opinion will move more unpredictably. Constitutional issues which at present arouse few strong feelings might come to be entangled with other issues on which opinion is far more immutable, especially should campaigners on one side or another see advantages in achieving such an entanglement. Ultimately, public support or opposition will not rest upon detailed consideration of the issues, but upon “image”.

These factors in turn suggest that it is impossible to gain a full understanding of the public opinion situation or its likely future course without examining the factors that will be influential upon it, and in particular the views and likely behaviour of key opinion leaders, among whom journalists are perhaps the most obvious example.

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Constitutional Codification and Deliberative Voting

1. ‘Deliberative Voting’: An Introduction

In any lawmaking process, citizen participation and robust deliberation lie in tension. While it is desirable for citizens to participate in the passage of new laws, few people outside of government have the time or expertise for well-informed, rigorous and reflective deliberation over lawmaking. Normally we resolve this tension by delegating lawmaking to elected representatives, who we expect will be suitably informed. Yet the solution of delegation is increasingly untenable – and indeed undesirable – in the unique case of constitutional lawmaking. Major constitutional reforms now often require voters to exercise direct roles in the process. In Europe and elsewhere, referendums on key constitutional amendments became more common in recent decades, and are now legally obligatory in many states.670 More generally, leaving voters out of a reform process attracts convincing charges that both the process and the constitution it yields lack legitimacy.

On the other hand, while referendums might improve legitimacy, they frequently thwart reform in practice. Constitutional referendums ask citizens to express opinions on matters both arcane and unintuitive, such as electoral systems and legislative or judicial powers. Asked to consent to constitutional changes they may not understand, by a political class they generally do not trust,671 citizens tend to favour the status quo. Jurisdictions such as Australia, Canada and the UK have therefore struggled, often in vain, to win public consent for reforms. For example, in Australia, which introduced mandatory constitutional referendums over a century ago, it is now three-and-a-half decades since the last successful attempt to amend the federal Constitution.

Facing similar problems, a number of countries have experimented with a promising new set of ‘deliberative democratic’ procedures for reform. These unorthodox models involve citizens in a reform process while also attempting to structure citizen engagement to be rigorously deliberative. A prominent example is the Citizens’ Assembly (‘CA’) model introduced in British Columbia in 2004. CAs comprise 100+ citizens randomly-selected from the public voter rolls. CA members undertake several months of intensive learning, discussion and public consultation before recommending a discrete reform. Empirical political scientists – usually a circumspect group – now often highlight the promise of CAs.672 As a CA’s small and demographically diverse collection of citizens learn from an array of experts and exchange views, they often deliberate carefully, collaboratively and without the partisan divisions typical of elected elites. CAs also attract markedly greater public trust than traditional models led by parliamentarians.673

671 eg, International Social Survey Programme, ‘Citizenship’ (2004), indicating only 29% of UK citizens agree that government can be trusted.
672 Mark E Warren and Hilary Pearse (eds), Designing Deliberative Democracy (2008).
Nevertheless, these deliberative democratic innovations do not wholly resolve the tension between participation and deliberation. A key remaining difficulty is that constitutional reform is still largely non-deliberative at the final and most important stage, the public vote itself. Once a CA has deliberated, a referendum must still be called to allow all eligible voters to consent to (or reject) the CA’s recommended reform. Here the challenge therefore becomes encouraging deliberation not merely in a small and carefully-structured assembly, but amid the far larger population that will cast ballots in the referendum. Enhancing deliberation during the ‘purely private act of voting’, as each citizen stands alone in a polling booth, is no simple task.

Yet to be legitimate the referendum vote itself should be significantly deliberative. In recent work, I offered several arguments in support of this assertion, the simplest being that only robustly deliberative decision-making sees voters give informed consent to constitutional change. Consent (literally, ‘feeling together’) implies wilful agreement to go along with a planned course of conduct known to the consenter. Similar requirements of informed consent arise across many other areas of law. Given the comparative importance of constitutions, it is anomalous that constitutional referendums generally omit the same consent standard. But this omission helps to explain voters’ continuing reluctance to go along with constitutional reform proposals; voters may perceive their consent as a fiction if they do not understand the nature, implications and essential details of the norms they are asked to approve.

In the same work I also therefore described a new set of efforts to design deliberative democracy into the final stage of the referendum. We may call this approach ‘Deliberative Voting’ (‘DV’). DV referendum models pursue at least three deliberative goals. First, they aim to make voting more well-informed by providing background information on constitutional basics or on the specifics of a given reform. Second, DV models encourage purposive voter reasoning, by illustrating values or aims pursued by each reform option and by the status quo. Third, DV referendums encourage voters to reason about constitutional trade-offs by providing a fuller picture of costs and benefits associated with reform and status quo options; thus voters’ referendum selections can be more realistic and grounded, rather than free of either cost or context. To be sure, it remains difficult to achieve any of these deliberative goals in practice. One particular constraint is that DV methods must give no preference to a particular referendum outcome, and must only provide the background necessary for voters to reason through options themselves. Yet despite such challenges, at least four distinct DV models can be imagined, some of which have been trialled in rudimentary form.

Mandatory Preliminary Instruction

A first option is mandatory instruction prior to voting. For example, in a non-constitutional context the New South Wales Electoral Commission recently proposed

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677 eg, Ex parte Ford; re Caughey (1876) 1 Ch D 521 at 528 (Jessell MR). See more generally Levy (2013) ibid.
678 I coin the term in Levy (2013) n 676.
a requirement that voters ‘acknowledge that they have read the cases for and against’ a matter up for consideration.\textsuperscript{679} Voters who decline all formal opportunities to become, in this way, minimally informed could not cast ballots. Methods of preliminary instruction could include traditional approaches, such as distributing information booklets prepared by both advocates and opponents of reform. With the rise of electronic voting models (including online participation), however, a host of authors have also suggested how to use computers to illustrate complex policy issues clearly, and often interactively. Applied to constitutional referendum practice, interactive online tutorials might facilitate a voter’s introduction to constitutional referendum options (eg, secession, further devolution or the status quo in Scotland) and their aims, methods and possible consequences. This option is workable, most of all, when the referendum vote itself thereafter occurs online – an increasingly common option globally.\textsuperscript{680} Of course, in practice voters still may decline to devote more than passive or superficial attention to the instructional materials. We may therefore question the depth of comprehension conferred by even a mandatory text or interactive tutorial.

\textit{Scaled Referendums}

An additional technique aims to help voters consider legal and policy trade-offs. Scaled referendums ask voters to indicate support for reform options on a sliding quantitative scale, with the values, costs and benefits associated with each option clearly listed in the referendum ballot itself. This approach has not been attempted in constitutional referendums. However, in a non-constitutional example in the 1990s, a paper ballot asked voters in Victoria, British Columbia, to choose among options for treating municipal waste, with each option listing likely costs to taxpayers.\textsuperscript{681} This somewhat crude method aimed to encourage voters to view policy options not in isolation, but as products of the interaction of complex factors. Computerised ballots would likely enable more sophisticated approaches on similar lines. However, to the extent that constitutional referendum options (eg, for state secession or voting systems) require trading-off judgments that are normative rather than financial, this option may find limited use in the constitutional context. Providing a rather arbitrary quantification of values, and perhaps overstating the accuracy of cost and benefit predictions, the scaled referendum risks distorting or predetermining constitutional referendum outcomes.

\textit{Preliminary Values Questioning}

A third DV model therefore gives to voters themselves the task of weighting values. Preliminary values questioning would begin with an initial series of questions meant to turn voters’ attention to the values they already hold, and which they believe should drive constitutional reform. In this way the model could encourage purposive reasoning. For example, voters in a secession referendum could be asked to rank a


\textsuperscript{680} Levy (2013) n 676, noting the use of e-voting in Belgium, Estonia, France, Germany, Italy, Japan, South Korea, Spain, Switzerland, the United Kingdom, the United States.

number of values (eg, ‘national identity’, ‘independence’, ‘cooperation’, ‘economic security’, ‘economic fairness’, ‘economic partnership’, ‘national defence’), determined initially by citizen focus groups.\(^682\) Immediately after, the referendum would turn to the main task of asking voters to choose institutional options (eg, ‘an Independent Scotland’, continued ‘membership in the United Kingdom’ and intermediate models of shared sovereignty).\(^683\) Notably, preliminary results on values would be publicised and could help to guide parliamentarians later as they implement the main referendum result in concrete detail. Preliminary values questions are in this sense ‘binding’ and likely to inspire serious consideration from voters. In turn, voters’ own initial choices at the values questioning stage would likely inform their ultimate choices among institutional options.

**Integrated Referendums.**

A final DV model builds on existing models such as CAs by expanding the latter to involve far larger numbers – or even the majority – of voting citizens. As noted, a small deliberative body such as a CA engages a discrete group of citizens in several months’ learning, discussion and reflection, during which successive constitutional options are considered and rejected. At a CA’s conclusion, members vote on a handful of remaining options; the wider public becomes involved only at the final, referendum voting stage. By contrast, to encourage large-scale public participation in a deliberative drafting process itself, ‘integrated referendums’ would see CA-style drafting overlap with referendum voting. Public audiences would directly view or hear deliberative proceedings by television, radio and web, and interact with the proceedings through comments, questions and readings. While the prevalence such ‘crowd-sourced’ public participation in constitutional reform is growing,\(^684\) experiments thus far remain loosely structured and mostly non-deliberative. Integrated referendums would uniquely run a deliberative drafting process along the robust deliberative lines of a CA, while inviting all eligible voters to participate in a series of binding public votes on options considered by the CA. Citizens would therefore eliminate constitutional options progressively from an initial array.

**2. Deliberative Voting and Constitutional Codification**

Whether it proceeds by DV or by another approach, constitutional codification raises special problems for reform. In the UK it is increasingly accepted that major constitutional reforms require public consent via referendum voting.\(^685\) Yet codification – by any measure a major reform – would create a text of myriad particulars, touching on the arcana of parliamentary procedure, judicial functions and much else. Even with DV, few voters can be expected to engage meaningfully with dozens or hundreds of reforms. The DV methods above sought to generate deliberation only around a handful of discrete reforms at any time. It is harder to encourage deliberative participation when detailed and comprehensive reforms tax a voter’s time and capacity for thoughtful consideration. The first consequence of

\(^{682}\) Ibid, 240.

\(^{683}\) The ballot may also incorporate procedures for preferential (instant-runoff) voting.

\(^{684}\) Gylfason, Thor, ‘From Crisis to Constitution’ (11 October 2011) Vox, analysing the dramatically innovative 2011 Icelandic public constitutional consultation.

\(^{685}\) Select Committee on the Constitution, Report on Referendums in the United Kingdom (Chair: Lord Goodlad) (House of Lords Session 2009-10) 45–6, QQ 74, 78.
codification’s wide sweep, then, may be more of the usual democratic difficulty: voters asked to consent to far-ranging reform schemes without adequate information can be expected, as so often in the past, to vote ‘No’.

Is the solution a return to elite-led constitutional lawmaking? Deliberative democrats sometimes presume representative democracy to be the appropriate compromise in situations of complex lawmaking. Delegating constitutional lawmaking to elites might be justified as a division of deliberative labour: citizens are best at deliberating over basic public values (eg, equality, strength, stability, independence), while elite delegates deliberate best over policy- and lawmaking minutiae. As I note elsewhere, ‘[d]emocratically legitimate public decisions arguably therefore emerge from this complementary distribution of elite and public roles’, as elites translate raw public values into workable law. Thus lawmaking takes its main directions from values expressed to elites by citizens. The theory, as Parkinson describes it, is that elite ““knowers” (philosophers, technical experts or bureaucrats) are ... subordinate to “the people affected”’, elites serve mainly to balance competing values and translate them into specific law.

This ideal may of course be over-optimistic. A return to elite-mediated constitutional reform, free of referendums, could be politically untenable. Any theory imagining elites as passive translators of public values would be unconvincing to many, in light of prevailing and deepening public attitudes of distrust in government. Indeed, how governmental insiders are meant to translate public values into concrete decisions is often steeped in vagueness. Unsurprisingly, lawmaking elites therefore habitually substitute their own values for those of voters. Even when past constitutional reforms have featured high public visibility and engagement, the processes followed often were not merely elite-mediated, but elite-driven. For example, in the 1998-99 Republic referendum process in Australia, which had a half-elected, half-appointed Constitutional Convention, the end result was a constitutional recommendation widely viewed as the creation of political insiders – and a reflection of their interests. Indeed, it fell to the Prime Minister, an opponent of republicanism, to interpret the Convention’s recommendations. One prominent commentator, echoing others, notes that the ‘ambiguity of [the 1998 Convention]’s ... relationship with both the Parliament and the voters ultimately was reflected in the quality and acceptability of the [referendum] proposal’, which voters rejected.

Thus elite translation, while a useful conceptual conceit, is more problematic as a description of practical realities. Without institutions specifically guaranteeing it, the process remains a fiction. Political elites should perhaps not be faulted: it is generally difficult to translate a message that no one, in the first place, has had the opportunity to express clearly. Past referendums made little provision for voters to

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eg. Habermas, Jürgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Polity 1996) 356, noting that ‘binding decisions, to be legitimate, must be steered by communication flows that start at the periphery and pass through the sluices of democratic and constitutional procedures situated at the entrance to the parliamentary complex or the courts’.

Levy 2013b n 670.


Above n 671.


voice the values that should drive reform. On the other hand, some DV methods identify this problem and aim to realise value translation in practice. In particular, as we saw, Preliminary Values Questioning (hereafter ‘PVQ’) first poses a number of questions about the foundational values that should drive constitutional reforms. This model potentially corrects the usual situation where elite delegates are meant to translate public values, but have no concrete way to gauge what those values may be.

How might a PVQ approach work in practice in a drive for constitutional codification? The approach begins with a set of questions about general values (e.g., stability, human rights, communalism, individualism, and many more). Yet a key question is what comes next: how much voting on outcomes – that is, on partially or fully completed constitutional drafts – should follow? A minimalist approach would see no subsequent outcome voting at all, but would rather leave the task of drafting to delegated elites. Elite drafters would arguably be empowered and directed by the vote on values, allowing them to implement constitutional change without further direct public involvement. This approach should not be discounted. Though it does not include citizen voting on the end-stages of reform, it arguably features enough earlier (values) voting to give legitimacy to the reforms.

PVQ without a vote on outcomes is thus deliberatively democratic: it helps to fulfil the ideal of a division of deliberative labour, by straightforwardly and concretely guaranteeing a public voice on values. The approach potentially improves on the more typical, vaguer relationship between citizens and elites during lawmaking. Nevertheless, it might be argued that this approach is insufficiently democratic. By contrast, some DV methods canvassed above have the potential to give citizens a direct and deliberative vote on draft constitutional texts. At least three further forms of voting via PVQ might allow such public decision-making.

First is the maximalist position, which would give citizens a final vote on the entirety of a new draft constitution. This approach has been followed previously (albeit without PVQ), and even with some success. However, in the modern UK context no draft constitution is likely to gain majority support in a single vote. In recent decades in Europe, Canada, Australia and elsewhere, reforms repeatedly faltered by presenting voters with large-scale revisions in one referendum. Too many details provide too much for citizens or interested parties to dislike. Having found at least one undesirable detail, even voters who are neither purists nor perfectionists are likely to vote against the whole reform plan.

Options short of the maximalist position may therefore meet with more success. A second model is a vote on constitutional outlines. That is, in addition to voting on values, citizens may be asked to rank, in order of preference, their support for a number of different reforms in broad outline (e.g., a bill of rights, an elected upper house). Detailed drafting would then follow after the vote. However, while this option does not carry the same risks of rejection as does the maximalist model, the level of truly deliberative voting involved here may be limited. For example, presented with 10-20 reform options in broad outline, voters are likely once again to be overwhelmed and unable to decide meaningfully on not one but many unfamiliar subjects.

The third option, then, is that of staggered referendum voting over a period of perhaps two years. This solution extends the time for citizens to become informed. For instance, a different vote could be held every two months, and in each case would

692 eg, Australia (1890s), Kenya (2010).
involve both PVQ and one discrete draft reform in outline. Online public engagement, thus far trialled in a dozen democracies, could make this model feasible and cost effective. Rather than an open-ended plan, a set schedule of votes would provide some insurance that every element of the codification plan would be put to the vote. This could also guard against voting events dragging on and disengaging citizens.

Of course, a two-year schedule of voting is a major undertaking. However, it may be impossible to achieve any goal of comprehensive constitutional reform without a comparable commitment of time, cost and effort. More generally, DV solutions may also raise the objection that they are too novel or unfamiliar to be practiced on so large a scale. However, it is precisely the scale of a codification project that requires a novel approach, such as PVQ (perhaps in concert with others, such as mandatory preliminary instruction and some form of CA). If codification is to take place in the UK, for both normative and pragmatic reasons the process will need to be democratically legitimate. The success of a reform of such expansiveness and complexity will hinge, in large part, on finding some as yet untried process to manage the conflicting needs of deliberation and robust public participation.

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Conservatism and the Constitution

An essay on the modern history of Conservative thought and attitudes towards the constitution

British Conservatives have usually eschewed ideological imperatives, seeing their policies as being motivated more by pragmatic and material considerations than by the theoretical. Disraeli advised his contemporaries to confine their reading habits to novels and biographies, and post-war surveys of the reading habits of Conservative MPs show that biography and political history figure far more prominently than do works of theory or ideology (it is very different for Labour MPs). Serious attempts to present a party philosophy, for example in Hugh Cecil's Conservatism or Quintin Hogg's The Case for Conservatism, have almost always been written in periods of opposition, times when it was impossible to show what the party stood for by its actions and when it was therefore necessary to say something. These serious works trace Conservative philosophy back to Richard Hooker, Lord Falkland, John Locke, Edmund Burke and W.H. Mallock, a consistently conservative tradition in British political thought, and therefore useful ammunition for a party that was (in opposition both in 1913 and in 1947) trying to resist changes that were being pushed through from the left.

But it is difficult to find the slightest evidence that any major Conservative politicians have actually been influenced by such a tradition when they were themselves in office; more characteristic perhaps was Baldwin's confession, when asked which political thinker had most influenced him, that he had been much

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\(^{694}\) n 680.

\(^{695}\) H. Cecil, Conservatism (1912); Q. Hogg, The Case for Conservatism (1947).
impressed as an undergraduate by the writings of the constitutional lawyer Sir Henry Maine, but could no longer remember what Maine's ideas were. Equally characteristic was the remark of Lord Salisbury, that Iain Macleod was 'too clever by half', an epithet that stuck to him for life and served as a warning to others. In practice, then, the party's very real tradition of distrusting intellectuals may have led to the deliberate suppression of ideological argument, except in such desperate circumstances as 1947. Historians and political scientists, working on the assumption that everyone has an ideological position even if he or she is not conscious of it, itself something of an unconscious ideology, have not been slow to fill the interpretative gap left by the party's lack of ideological self-assignation.

This whole area of explanation is a minefield. It is after all usually the case that 'ideology' can be assumed to be working on the conscious as well as the unconscious mind, that it is an active and not merely a passive state. It is in practice even more difficult than this suggests, because to analyse unconscious ideology, it is necessary to find that underlying ideology in actual policy, and the Conservative Party does not have any very clear definition of what constitutes official party policy anyway. This is largely a consequence of the party's not having a constitution: there are, of course, sets of rules for constituency parties, for the National Union, standing orders for the 1922 Committee and so on, but no single co-ordinating document that links these separate units into one constitutional entity. (By comparison, all segments of the Labour Party can be assigned defined roles within the 'constitution' of the party as adopted in 1918 and much amended since, there being in that constitution rules about its own amendment.) The problem is particularly acute when it comes to policy, because the rules of the various Conservative bodies do not have much to say on the subject, and those bodies that seem to exist to deal with policy, the Party Conference and the Advisory Committee on Policy, have very well-defined memberships but equally ill-defined powers. It has usually been assumed that when in office the 'policy' of the party may just be what Conservative ministers do (as Herbert Morrison cynically, but in constitutional terms quite incorrectly, observed about Labour: party policy for Labour and the Liberal Democrats is defined by specific constitutional provisions and may or may not be the same as what their leaders do in office). The search for ideology in party policy therefore runs the risk of identifying as underlying ideological changes policy choices that really are no more than the consequences of fashion, of tactics and of new leaders who use a different vocabulary and practise a different style. All the same, ideology has to be defined widely, because it is otherwise impossible to study it at all for a party that has strenuously resisted ideological categorization.

For this paper, 'present' is being taken to include the period since 1965 when the party seemed to shift decisively away from the stance of the previous two generations. In the summer of 1965 Conservative MPs for the first time actually elected their leader (though, confusingly, the word 'election' had often been used in the past to describe the formal enthronement of a single candidate that followed the 'customary

processes'). The new leader, Edward Heath, appeared to mark a real change of mood, generation and social character from the 'grouse-moor' style of the Eden-Macmillan-Home years - a coming into their inheritance of the middle classes, after their permeation of the party for over a century. The first policy document of the new regime, *Putting Britain Right Ahead*, formally committed the party to European integration, to rolling back the State, to lowering taxation, and to curbing the powers of the trades unions. The very title of the document was significant; the final word, *Ahead*, was added at the last moment only when it was pointed out that *Putting Britain Right* would encourage the question 'who had put Britain wrong?' and this would be an inconvenient question for the party that had ruled for the previous 13 years. Adding *Ahead* accorded with the desire to seem modernizing and thrusting, and so compete with Harold Wilson's promises of white-hot technological innovation, but the addition of the word was in part misleading - it accorded with Heath's bluff, no-nonsense introductory statement, but less so with the catalogue of detailed, radical proposals in the document itself.

In effect, the Conservatives did decide in 1965 that they needed to put Britain right and that they were as responsible as anyone for its having gone wrong by 1964 (though most Tories were not yet ready to say quite that). Enoch Powell, the storm petrel of the coming revolution in thinking, was already saying it, for example in his early speeches on the need for a change of monetary policy, speeches collected as early as 1965 in *A Nation Not Afraid*. Sir Keith Joseph, Margaret Thatcher's acknowledged mentor, has now himself acknowledged that Powell led the way for 'Thatcherism' and that it was characteristic of Powell's clear-sightedness that he reached the intellectual conclusion many years ahead of the field. In effect, the Conservative Party set its course for 'Thatcherism' in 1965, even if Margaret Thatcher, like most other MPs, was entirely unaware of the fact. The tactical shifts of the 1970s and the change of leadership style in 1975 served only to conceal continuity over the 25 years of the Heath-Thatcher era.

It seems reasonable to assess this 'present' phase of British Conservatism against the longer context of the historic Conservative tradition.

It is possible to find in the Conservative history of the previous century some principles and practices that were pursued consistently or continuously enough to be free of the danger that they represented only fashion or tactics. The first principle would be that the best should be preserved, since it is both easier and quicker to destroy things than to build them, and that there should therefore be a presumption for continuity and against change: Lord Falkland argued that 'if it is not necessary to change, then it is necessary not to change', and Sir Rhodes Boyson more recently translated this as 'if it ain't bust, don't fix it'. The second principle would be that the present generation is the inheritor of the past and the trustee of the future, a Burkeian concept that is also a powerful argument for continuity and caution. Thirdly, Conservatives have been highly pessimistic about human nature, sometimes rooting their views, as Hogg did, in a theological concept of original sin, and they have been dubious about the possibilities of human improvement; in practical politics this often...

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703 This approach was also taken by R. Hornby, *Political Quarterly* (1961), 229.

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surfaced in fears for the survival of civilization if change were allowed and controls relaxed, all related to arguments about 'slippery slopes' and the 'thin end of the wedge'. Baldwin was haunted by the way in which democracy had arrived 'at the gallop' in Britain (it took five Reform Acts spread over a whole century, one of the slowest transitions to democracy in Europe!) and spoke of the thin crust of civilization covering the seething masses below. Lord Salisbury when prime minister was even more gloomy about the future of 'the race' itself. Fourthly, it was claimed as the Conservatives' special role in British politics to resist fashionable extremes, and Conservative history was raided somewhat selectively to provide evidence for this: so it was argued that in the 1830s and 1840s Conservatives sought to protect the weak and underprivileged against unscrupulous industrial capitalists; in the 1870s and 1880s Conservatives stressed the Tory principle of church and state against the exaggerated Liberal claims for individual liberty; in the inter-war years, the Conservatives championed liberty against socialism.\textsuperscript{705} This is in fact an explicitly anti-ideological principle. Fifthly, and crucially (since it is on this principle that the party claims its name), the Conservatives have been unreactive; from the time that Peel assumed the leadership in 1834 and promised not to repeal the 1832 Reform Act, it was clear that the party would not turn the clock back, that resistance to change would not necessarily involve pledges to reverse the changes that opponents made. The few exceptions rather prove this rule: Bonar Law's promise to repeal the 1913 Trades Union Act caused endless trouble to him and his successor for the next 20 years; Churchill's promise to denationalize the steel industry was no more than a symbolic act, and his rather rash pledge to re-create university constituencies when they were abolished in 1948 was simply ignored when it came to the drafting of the next manifesto. It was generally accepted that a Conservative government took up where its opponents left off, not that it started from where the previous Conservative administration had got to. This was often cited, as for example by Macleod in the 1950s, as the Conservatives' greatest political gift - the ability to learn from their opponents, to recognize that the electorate was always right - and hence claimed as the secret of long-term party survival and success.\textsuperscript{706}

Alongside these clear principles may be cited some continuous practices which amount almost to principle. Firstly, Conservatives have regularly played the role of English nationalists within UK politics, and, when the occasion justified it, argued the case for Britain's power and prestige internationally; they have not generally been squeamish about the military consequences of such attitudes, or even about the financial consequences. From at least the time of Disraeli, Conservatives have fought for the Irish Union (and, when necessary, for the Welsh and Scottish Unions too), have pursued policies in support of British expansionism and imperialism, and even of adventurism, as with Disraeli's Sudanese expedition of 1868.\textsuperscript{707} More negatively, they have not been squeamish either when it came to questioning the patriotic credentials of opponents, Liberals who 'allowed' the death of General Gordon in the 1880s, pro-Boers in 1900, pacifists in 1914-1918, and Labour for questioning the Suez expedition in 1956.

Secondly, the party has supported the preservation of privileges and argued explicitly in favour of equality of opportunity but against egalitarianism; Baldwin once quoted Rousseau's tag about all babies being born equal and challenged all the

\textsuperscript{706} Ramsden, "Churchill to Heath", p. 425.  
mothers in the audience to agree with him that this was nonsense.  

The actual privileges to be supported differed over time, often the consequence of having to give supporters what they most wanted; at different times, landowners, the drink trade, the Church of England, the owners of inherited wealth, and the grammar schools were beneficiaries of this defence of privilege. There is considerable overlap here with my first and second principles outlined above.

The third principle deriving from practice is leadership as such, in the party and in the country at large. Within the party, Conservative leaders have been accorded an astonishing freedom of action in setting the agenda of politics, choosing their ministers and shadow ministers, running the party machine and deciding policy at manifesto time. All hinges, of course, on the ability to win, and those leaders who delivered parliamentary majorities had great freedom of manoeuvre. Churchill summed this up epigrammatically in 1922 when he said of the Conservative leader that 'if he trips he must be sustained, if he sleeps he must not be disturbed, if he makes mistakes they must be covered, but if he is no good he must be pole-axed.'  

There is some obvious logic in this, for the mere winning of an election denies office to the left and prevents them from legislating, and is therefore in itself a major success in the promotion of Conservative objectives. It is no doubt easier for a Conservative grouping to unite around this self-consciously opportunist strategy, for they already have (in the status quo) most of what they want to achieve; on the radical and fissiparous left, it is necessary (and far more difficult) to get agreement on the promotion of something that has never yet existed. As a result of this practical principle, Conservative leaders have almost never been overthrown solely for policy reasons - Neville Chamberlain in 1940 being the clearest exception - but leaders who have lost or seemed likely to lose elections have had a difficult time. Joseph Chamberlain's disruptive campaign for tariff reform was opposed by Conservative free traders partly because they did not like the policy itself, but more because they did not expect to win with it, and so (by losing to the Liberals) they saw the Empire, the House of Lords, the Irish Union and the Welsh Church all being put needlessly at risk. But it was only Balfour's third successive election defeat that brought him down. In the next generation, Baldwin was disliked and distrusted by many of his supporters between 1924 and 1929, but was in no danger until he lost the 1929 general election, and in no further danger after the 1931 election produced another Conservative majority.  

The Fuehrerprinzip is carried beyond the party, too; in both of the World Wars, Conservatives overwhelmingly backed prime ministers that they had previously hated and distrusted, because the national cause seemed to require it. In May 1918 they kept Lloyd George in office while most of them believed him to be a liar and a cheat, simply because they saw him as the best war leader. At the end of that year, they kept him in office for a further term because he seemed more likely than a pure Conservative government to stave off revolution. Outside the party as well as inside, practical principles and tactics overlapped.

The final practical principle lies in simply being in office; not only has the occupation of government denied opponents the chance to legislate changes, it has also left to Conservative ministers the opportunity to administer the country for two-thirds of the last century. Institutions are shaped not only by the Act that creates them but also by what follows: British Coal as an organization owes far more to the (mainly

Conservative) administrations since 1951 than to the Attlee government that nationalized it. Occupying office gives opportunities to make countless appointments in the public sector, as well as the wider patronage opportunities of the Church of England and the honours system. More generally, the occupation of office shapes public perceptions of what office-holding should look like and forces opponents to match it if they want to live up to the apparent needs of the job. In 1924, when Ramsay MacDonald's Labour colleagues donned knee breeches and top hats to visit the Palace, they were anxious to show their fitness to govern (interpreting that idea largely by what they had seen from their predecessors). 712

These five principles of theory and four practical principles having been deduced from Conservative history prior to 1965, the 'present' may be matched against them to see how closely it fits.

It is on the face of it difficult to see how recent Conservatism has practised the first of my theoretical principles. In opposition between 1964 and 1970, almost every area of British policy was subjected to a searching scrutiny, and proposals for change were made in almost every case. The 1966 election manifesto contained 131 specific pledges, and on returning to power in 1970 the party had made unprecedentedly detailed preparations - ministers were ready briefed, bills were drafted, and the first year's parliamentary timetable had been planned. 713 This was not exactly a government proceeding to legislate with caution, but rather one that seemed to think that it had limited time in which to carry out a revolution, albeit one that it described optimistically as a 'quiet revolution'. In opposition again after 1974 the pattern was far more complex; on the one hand the party's desire to make major changes (for example, in trade union law) was even more determined after the failure of the Heath government's initiatives and the humiliations of its end in 1974, but on the other hand it was widely thought that over-preparation before 1970 had been one of the causes of Heath's difficulties in office. The new leader, Margaret Thatcher, had difficulty in establishing her authority in a shadow cabinet most of whose members had not wanted her to be their leader in the first place. For these reasons, the policy strategy adopted between 1975 and 1979 was to 'let a hundred flowers bloom', to let everyone and anyone make policy suggestions but to get committed to none of them before the election; 714 the Maoist language was to turn out to be far more appropriate than anyone foresaw, as Thatcher herself turned into a permanent revolutionary when once in office. Meanwhile, Sir Geoffrey Howe assured a Party Conference that the next Conservative government would introduce a moratorium on legislation, that it would not make changes unless the case for doing so was overwhelming, a commitment for which he was warmly applauded. How wrong he was. In office, Thatcher's team embarked on a torrent of legislative and administrative reform: local government, and especially local government finance, was changed almost every year, there was almost an annual education reform bill, and the National Health Service underwent several structural reorganizations (in all these fields the Heath government had already introduced major changes ten years earlier). It was a far cry from the earlier period in which major education reforms were introduced only cautiously and about once in each generation. Even the vocabulary of Conservatism as the resistance to change was largely dropped, and the prime minister and such close associates as Norman Tebbit cheerfully appropriated the word 'radical' to describe themselves. It

was argued from the platform at Party Conferences that Conservatives were now the force for change, a concept that appears not even to have attracted attention to its sheer illogicality.

In this context, it is not surprising that my second principle has also taken something of a battering. Rhetorically, the idea of the present generation as the bridge between past and present has remained important. The Heath insistence on the historic importance of his European policies and the Thatcher appeal to British history for support for her scepticism about Europe indicate the limited connection between rhetoric and reality here. Thatcher's championing of 'Victorian values' may seem a more valid appeal to history, but her raid on the history books to find ideological ancestors was in fact a highly selective one. There were certainly Victorians who supported the sort of philosophies that Thatcher was articulating on their behalf, but they were not for the most part Conservatives in their own time (they were more likely to have been radical utilitarians) and they were certainly not associated specifically with the Peel/Disraeli Conservative Party. Most of Thatcher's Victorian heroes would have detested all that Victorian Conservatism seemed to them to stand for. Moving on from rhetoric to personnel, the Heath-Thatcher period did see the turning of a social corner by the party, if not as decisively as some observers suggested. By 1990, the Conservative back-benches were far less the preserve of a socially narrow elite than in 1960, and the retirement from the Commons of Jasper More, whose predecessors had sat there more or less continuously since the Long Parliament, and usually for the same Shropshire seat, seemed a milestone on this road. The election of John Major as leader (only the party's second since Bonar Law who had not been to a university) seemed to suggest that this social movement would continue. But the changes were slow and limited; by 1990, there were far fewer Etonians and Harrovians on the backbenches, but still most Conservative MPs and candidates had been to minor public schools and to Oxbridge.

The third principle, the pessimistic view of humanity and the inevitability of things getting worse, had always been one used mainly to resist change when on the opposition benches and it was much in evidence for these reasons in 1964-1970 (when, for example, it was used to deride the National Plan of 1966 or the 'solemn and binding agreement' with the TUC in 1969) and in 1974-1979 (as, for example, over Michael Foot's Employment Protection Act). In the latter period, the party toyed even with ideas for the limitation of parliamentary sovereignty, with several Conservatives putting the case for proportional representation and with Lord Hailsham arguing for a Bill of Rights, but these were little more than products of the party's frustration with a Labour government which had full parliamentary power derived from a historically low share of the vote. As Conservative confidence returned in and after 1979, these ideas withered on the vine, which was just as well when it is remembered that election victories in the 1980s were also won by Conservative governments with rather small shares of the national vote. By 1990, with some considerable irony, it was Labour that was considering both a Bill of Rights and PR. The one constitutional development that can be traced to Conservatives in these years was one that needed no legislation, the refinement of the principle of the mandate. In the past, Conservatives had been reluctant to get committed to policies very closely in periods of opposition: Churchill after 1945

positively refused to bind the hands of the next prime minister (himself) by promising too much before the 1951 election.\textsuperscript{717} As we have seen, this was again the view in 1979. But in 1966, 1970, and especially in the 1980s, Conservative manifestos were very explicit and subsequent Conservative governments justified their prosecution of radical reform programmes on the argument of a contract with the voters. Given the lack of consultation within the party over the content of manifestos, as for example in the abolition of the GLC in 1983 or the introduction of the poll tax in 1987, this new approach became a powerful engine of change in the hands of a prime minister. The engine was usually intended to be turned on cabinet colleagues and Conservative MPs rather than the other parties, but in doing so Thatcher created a formidable weapon that could be used by any party in the future, as Tony Benn pointed out. How would Conservatives resist radical change that had derived from a future Labour government's winning manifesto?

My fourth principle was triumphantly vindicated by recent Conservatism. Both Heath and Thatcher represented themselves as correcting a discredited consensus in British politics - reducing taxation that was too high, reducing the power of the State (though necessarily using the State's power to an unprecedented extent in enforcing change everywhere else, as in local government), and reversing the balance in industrial relations. They both saw themselves as abandoning or at least redefining a failed consensus from the previous generation.\textsuperscript{718} Both saw Britain as a nation in decline, socially, morally, economically and internationally, and saw it as their particular duty to reverse that decline. This principle of correcting the balance has been largely used to justify the profoundly unconservative policies they pursued and which are analysed above.

On the other hand, the fifth principle, being unreactionary, seems hard to apply to the most recent past. Even in vocabulary, such words as 'dismantle', when applied to the public sector, or 'return power to the members', when applied to trade unions, explicitly endorse the idea of reversion rather than progression. Indeed, a key concept in the emergence of Thatcherism was Joseph's enunciation of the 'ratchet effect' whereby (he said) each Labour government had moved Britain towards socialism, and each Conservative administration merely consolidated these changes by braking the wheel, but never changing the direction; in a seminal essay he argued for 'Reversing the Trend' so that Conservatives would henceforth set the direction and their opponents would merely be able to apply the brake.\textsuperscript{719} It was precisely this principle, as applied in a step-by-step reform of trade union law, that moved the fulcrum of political debate so far during the 1980s; by 1990 all the parties accepted as axiomatic in the trade union field ideas that had seemed wildly improbable in the 1970s. As Michael Heseltine said in an election broadcast in 1979, 'Forward or back? Because we cannot go on as we are.'\textsuperscript{720}

My four practical principles are easier to evaluate, relying as they do more on practice than on ideas. There is little need to make the case for Conservatives continuing their nationalist stance. The defeat in 1979 of devolution proposals for Scotland and Wales owed a great deal to the Conservatives' opposition (they were the only party in either country that campaigned unitedly for a 'No' vote in the referenda). The abolition of Stormont and the Anglo-Irish Agreement upset Ulster Unionist allies.

\textsuperscript{717} Lord Butler, \textit{The Art of the Possible} (1971), pp. 132-133.
\textsuperscript{718} E. Heath, \textit{The Great Divide in British Politics}, CPC pamphlet 355 (1966).
\textsuperscript{719} K. Joseph, \textit{Reversing the Trend} (1975).
but the Conservatives have not indicated any weakness on the basic principle of the Union; there have been no 'troops out' supporters on the Tory benches. Likewise, the Falklands War of 1982 provided a chance both to show off Britain's remaining military potential in a mainly post-colonial world, and for the party again to play the patriotic card in domestic politics. With Arthur Scargill substituting for General Galtieri and the South Yorkshire Police for the armed forces, the Orgreave battles of 1984 reinforced the message of Goose Green in 1982.

The question of inequality is a more complex one. In education, there was certainly an attempt to preserve elite institutions and reinforce them through new foundations.\(^721\) The statistics about economic inequality will bear more than one interpretation, but it seems likely that the gaps between rich and poor have increased. In the 1980s, in the rhetoric of the 'enterprise culture', this was an explicitly open reinforcement of success, but such phrases as 'lame duck industries' and 'standing on your own two feet' entered regular political currency in the Heath period. Thatcher's emphasis on wealth creation (as in arguing that the Good Samaritan would have been no use to anyone if he had been bankrupt) and Heath's stressing of the responsibilities that accrued with wealth (as in his attack on 'the unacceptable face of capitalism') conceal a great area of common ground. Any emphasis on removing class barriers has been on removing the barriers as such, not on reducing the distances between social groups, and there is little in this that conflicts with Conservative tradition.

Leadership has certainly been a prominent feature under Thatcher, freely compared during her time as leader to Winston Churchill - for Conservatives the epitome of leadership ever since 1940 - and especially so after the Falklands War. She also pushed the practical powers of the party leader well beyond all precedents, as in the way that she developed personal policy initiatives, sought at times to undermine fellow ministers,\(^722\) and on occasion made policy off the cuff (as, for example, over immigration policy in 1978). Both she and Heath before her were actually strengthened by their having been democratically elected; he, after all, survived the humiliations of early 1974 and was overthrown only when defeated in three elections out of four, and she not only survived the making of an unprecedentedly large number of enemies among MPs but survived to become the longest-serving prime minister of modern times - and fell in the end only because the chances of her winning for the party a fourth election seemed to be fading.

The final practical principle, that of office-holding in itself, may not at first seem strictly relevant since the most recent period has anyway been one of continuous Conservative government. The shifts and changes of policy while in office, like the changes of leader in 1975 and in 1990, owed at least something to the party's desire to win again. The 'U-turn' on economic policy in 1972 certainly owed much to ministers' genuine conviction that both unemployment and social division were reaching unacceptable levels, but they were influenced too by the more mundane indicators - opinion polls, by-elections and the loss of control in town halls. After the indecisive February 1974 election, Heath sought desperately to make a deal with the Liberals that would enable him to stay in office even as a minority prime minister, so anxious was he to deny office to Labour.\(^723\) (Callaghan was to return the compliment by actually making a Lib-Lab pact to keep Thatcher out in 1977.) History did not repeat itself when in 1981 unemployment and social tensions again reached high levels; one

reason was the prime minister's strong nerve and her inflexible determination, but it may nevertheless be the case that a stronger opposition than Labour was in these years would have enforced a change of policy, or that electoral calculations would have enforced one anyway but for the fortuitous 'Falklands factor' of 1982. The redefinition and relaxation of 'monetarism' in the middle years of the Thatcher period certainly owed much to the electoral perspectives.

There is no doubt either that Thatcher understood well, as Heath perhaps did not or did not care to, the value of patronage and of the government machine to the office-holding party. The honours system was plied more systematically in the 1980s than for decades past, and applied to categories of people like working newspaper editors who might have seemed inappropriate recipients of honours to a previous generation. Similarly, the political role of a few key civil servants - Charles Powell or Robert Armstrong - went well beyond most precedents and may demonstrate the considerable strengths that can accrue to a party if it occupies office for a lengthy period and hence appoints over a decade all its own senior professional advisers.²²⁴ It was difficult to see how another party would have worked easily with such a team of advisers had it come to power. There were certainly Conservative precedents for playing the office-holding game in this way, though few that had done it so unashamedly since Disraeli. This was one example of Victorian values.

The tally can now be made. From my list of theoretical principles, the present matches the past on at most two counts out of five and is highly contradictory to at least two of the others. On the practical principles, there is a better score, for on all four counts there is a positive answer, even though on a couple of these the 1980s in particular witness a different way or a different extent of putting the principles into practice. Six out of nine indicates considerable continuity of ideology even if the emphases have sometimes become rather different. (It should be noted that in no previous period of Conservative history would there have been a perfect fit with this deduced tradition.)

The final lesson then is to reinforce the leadership point: with so much depending on who is the leader at a particular time, and with the leader chosen and retained by MPs largely with their own electability in mind, there is bound to be some considerable shift to match the public's changing perceptions, and there is bound to be a shift, too, to reflect the leader's own predilections. Back in 1922 Bonar Law argued that 'this is a question in regard to which our system ... has hitherto gone on this principle: that the party elects a leader, and that the leader chooses the policy, and if the party does not like it, they get themselves another leader'.²²⁵ As for policy, so for ideology?

In conclusion, Conservative attitudes towards the constitution have therefore tended to be pragmatic and based on experience, emphasising virtues of tradition, historical continuity, and nationhood. Though commonly regarded as reactionary on matters of reform, the historical facts do not bear this out. Over the twentieth century Conservatives in government made many progressive changes to the constitution, such as the Representation of the People Act 1918 (universal suffrage and the women's vote) whilst in coalition with Lloyd George in 1918, the Life Peerages Act 1958 (heralding the end of new hereditary peerages in the House), the Peerages Act 1963 (allowing disclaimer of an hereditary peerage), and the European Communities.

Act 1972 (enabling the UK's membership of the EEC, now the EU). Since taking office in 2010, the Conservative led Coalition has either brought in legislation, or advocated policies, for fixed-term Parliaments, substantially reducing the membership of the Commons, ending male preference and Catholic disqualification of spouses in succession the throne, allowing same sex citizens the right to marry, and establishing a British Bill of Rights. In terms of national identity, it has defended the Union but does not seek to unravel devolution, and is broadly sceptical of continuing membership of the EU, setting a limit on granting further powers to Europe without a referendum by the European Union Act 2011. The Conservative leader and Prime Minister, David Cameron, has indicated he will hold a referendum on Europe if his party wins the 2015 election.

It was Conservatives who were in the vanguard of the movement for a written constitution in the later 1970s, during the period Labour was in office, implementing a number of socialist and fiscal policies that outraged the right. The most high profile written constitution advocate was Lord Hailsham, a former party chairman and Lord Chancellor in 1970-74 and 1979-87, who in a high profile television lecture in 1976 referred to the traditional constitution as having worked well in the past, but in the modern era of rigid party loyalties, state intervention, increasing executive power, and the decline in influence of the second chamber, had resulted in a dangerous concentration of power - an effective elective dictatorship - with inadequate checks and balances in the system that could only be remedied by a written constitution that clearly delineated the powers of government.

Similarly, the idea of parliamentary sovereignty, that Parliament had absolute and unlimited powers, had become an anachronism in the interventionist era, and was no longer balanced by the political and moral limitations that had existed in the Victorian era and early twentieth century. "We live under an elective dictatorship, absolute in theory, if hitherto thought tolerable in practice... the absence of any legal limitations on the power of Parliament ahs become unacceptable". His thesis was developed further in his book on the constitution, The Dilemma of Democracy, published in 1978. In government during the 1980s, however, Hailsham found himself in a minority in Cabinet and serving under a Prime Minister, Margaret Thatcher, who was more concerned with public sector management than the structure of the constitution, and accordingly suppressed his views.

However, some Conservatives today remain suspicious of the idea of a codified constitution, instinctively regarding the unwritten nature of the political system as quintessentially British in itself and therefore desirable for that very characteristic. Similarly, the term coined by Professor Dicey in 1885 - "parliamentary sovereignty" - is still regarded as a national characteristic and for that reason alone, some believe, should remain a principle for how the UK system of government should operate. Rather than transfer sovereignty to the electorate and a constitution that would place limits on the power of Parliament, the solution to Hailsham's elective dictatorship thesis is widely viewed as being by way by strengthening the scrutiny procedures of the House of Commons. John Redwood in his book on The Death of Britain? for example attacks Labour's 1997 constitutional reform agenda (devolution, Lords reform, and closer union with Europe) in terms of the damage he sees this having

726 Elective Dictatorship (BBC Richard Dimbleby lecture, 1976), pp.4-5.
brought to the UK Parliament as the sovereign body entrusted by voters to make decisions on their behalf.  

Other Conservatives such as Sir Ferdinand Mount, the head of Mrs Thatcher's policy unit 1980-82 and later Director of the Centre for Policy Studies, however, have continued advocating a Conservative view that a new constitutional structure was needed that entrenched rights and law upon untrammelled parliamentary power, which was simply a legacy of the 1688 revolution asserting its supremacy over the Crown. Others see a close connection between institutional structures and economic performance, including those at the Institute of Economic Affairs who advocated an incremental agenda of constitutional reform leading to a codified constitution.

A codified constitution would be an assertion of national identity and British values, both domestically and in Europe and the UK's international affairs. It has been argued that, "A written basis... for the fundamental values of the British system will help them withstand the bureaucratic and centralising tendencies of the Community [European Union]. It will enable the values of Britain's democratic tradition to be asserted and projected into [Europe]." In many respects, this same view is reflected in recent Conservative proposals for a British Bill of Rights to replace the Council of Europe human rights treaty provisions incorporated in UK law by the Human Rights Act 1998.

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The Left and the Constitution

An essay on the modern history of Liberals and Labour on constitutional ideas and values

Michael Foot used to quote his father Isaac: ‘the real test of a man was to know on which side he would have fought at the Battle of Marston Moor’ (1644). He once asked me that question and I replied that, since I was fairly pacifist, I would not have fought on either side. That was the wrong answer! He also asked me for my views on the execution of Charles I. I responded that I was opposed to capital punishment and that applied to Charles I – again the wrong answer! The Foots show how the mindset of Old Liberals and Old Labour over the constitution was shaped by the seventeenth century – the triumph of parliament in the civil wars, of the common law over royalist tyranny. Their hero was Cromwell, ‘the people’s Oliver’ despite his putting leading

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727 For other Conservative opinions expressed during parliamentary debates held by John Major during his premiership in the 1990s, see Commons Debates, 20 February 1997, cols. 1055-1150; and Lords Debates, 3 and 4 July 1996, cols. 1449-1570 and 1581-1690 (The Constitution).
* This paper is based on a lecture given at King’s College London.
Levellers in the Tower, and subjecting the country to the rule of the Major-Generals. Isaac Foot founded the Cromwell Association and wrote the debatable passage inscribed on the monument put up at Marston Moor in 1938.

Memories of the struggles of the seventeenth-century down to the revolution settlement after 1688 lay at the heart of ideas on constitutional reform promoted by Liberals in the mid- and later-nineteenth century. John Gross rightly declared, in *The Rise and Fall of the English Man of Letters*, that, to Victorian or Edwardian intellectuals like John Morley or Augustine Birrell, the seventeenth century "was alive with an intensity that now seems hard to credit". It helps to confirm how radical reformers committed to constitutional change have tended to be retro-radicals. Thus Sir Edward Coke and the makers of the Petition of Right in 1628 looked back romantically to Magna Carta four centuries earlier. At the time of Magna Carta, critics of the Crown were looking back to the good old days of the Anglo-Saxon Witan and the horrors of the Norman Yoke. Over the centuries, critics of the constitutional order always tend to be practitioners in the politics of nostalgia.

To Liberals in the mid-nineteenth century, constitutional reform was focussed on parliament, and more especially the House of Commons. Despite the disappointing events that followed the Reform Act of 1832, such as the new Poor Law, parliament still remained the glory of the nation, a model for less fortunate continental peoples such as the French or the Italians. The Chartists’ Six Points were all about the reform of parliament. They are six political points, not a clarion call for social change. If the adult (male) populace received the vote, and parliament adopted measures like the secret ballot, redrawn constituencies and more frequent elections, a better society would surely follow.

A great inspiration for these mid-Victorian radicals was the democracy of ancient Greece, especially Athens in the time of Pericles, so celebrated as a polis in his famous funeral oration for those killed in the Peloponnesian War. Liberal intellectuals revered it, none more so than George Grote, a radical MP and the author of a standard multi-volume history of Ancient Greece. Grote, a philosophic radical and republican, wrote explicitly to combat the perceived errors of a conservative scholar, William Mitford, who wrote in praise of the stability of Sparta, and believed that Athens anticipated the mob rule of the French Revolution. For Grote, by contrast, Pericles was the great reformer, the inspirational leader of ‘the democratical party’. Liberals’ favourite hero was Pericles but their favourite philosopher, a more cautious Athenian, Aristotle. A later Liberal, Sir Ernest Barker, a former professor of Classics, writing in the early twentieth century, saw Aristotle’s enthusiasm for the mixed polity as reflecting typically English moderation. ‘It hardly seems fanciful’, Barker wrote, ‘to detect more of an English spirit of compromise’ in Aristotle whereas there was ‘something French in Plato’s mind, something of that pushing of a principle to its logical extreme’. Aristotle, wrote Barker in his introduction to the *Politics*, ‘was the first Whig’.

For a mid-Victorian radical, the Athenian constitution had a representative, transparent quality. It embodied open citizenship. Thus Grote campaigned for a secret ballot, voting being conducted in the privacy of the polling booth. Citizenship, indeed, was the mid-Victorians’ big idea. It is a concept seldom discussed nowadays. It has

733 See Arnaldo Momigliano, *George Grote and the Study of Greek History* (H.K. Lewis, London, 1952), and Grote’s own introduction to his *History of Greece*.
been mainly taken up by sociologists following up T.H. Marshall’s famous work on Citizenship, his lectures of 1950, where his advocacy of an evolutionary ‘social citizenship’ reflects the brave-new-world optimism of the post-war Attlee years. 735 Today standard works on the constitution omit the word ‘citizenship’ in their indexes. One index merely states ‘for citizenship, see Citizens’ Advice Bureau’. Thus David Marquand, writing on the public realm in 2005, refers to the ‘hollowing out of citizenship’. 736 Unlike writers in France or the United States, the concept of citizenship is now marginal to our debates. It only emerges in discussion of citizenship tests for immigrants. People resident in Britain tend to be seen not as engaged citizens but passively as subjects of the Crown.

Not so for the mid-Victorians. For them, citizenship was an animating organizing central principle of life. It implied responsibility and involvement. It meant active, educated citizenship, just as the Athenians of Pericles’s time were active, informed voters, legislators and members of juries, reflecting a sense of community. It followed that Victorians radicals more naturally linked citizenship with small, face-to-face communities like ancient Athens, of the kind admired by John Stuart Mill and T.H.Green. As representative democracy expanded, and the adult suffrage was extended, these values were harder to sustain. For radicals, vote-bearing citizens required a variety of arenas in which to act, from the chapels and friendly societies to the Boy Scouts. Radicals welcomed the fact that citizens voted for a wide range of institutions, through a miscellany of voting systems – elections for Poor Law Guardians, for School Boards, for vestries, later for County Councils, and finally for Parish Councils, the great domestic achievement of Gladstone’s last government in 1894. This last was cherished especially by Lib-Lab working men who welcomed the prospect of serving at the local level, perhaps freer from landlord pressure. 737

Those model societies, cherished by later Victorian Liberals from Bright to Lloyd George, reflected this idealization of smaller communities, what Lloyd George during the first world war called in a different connection ‘the little five foot five nations’. 738 The model in Europe was Switzerland, William Tell and all, as admired by schoolchildren. It was endorsed by Liberals like the historian, Edward Freeman, for the representative republican life of its cantons. 739 It was also praised for the solidarity symbolized in its citizens’ armies, an idea celebrated by the French in the Marseillaise – ‘aux armes, citoyens’. Lloyd George’s proposed coalition agenda in 1910 referred to citizens’ armies. 740 It was, of course, necessarily a very male ideal since women did not by definition serve in the armed forces. Along with Switzerland, the Tyrol and Norway (to which Gladstone paid an important visit in 1885) were other favoured political models. It is instructive how the Victorians, not only the Welsh and Scots, linked the idea of citizenship and civic freedom with mountainous communities.

A model more admired still as a model for citizenship was a much larger country – the United States of America. The very idea of citizenship was written into the federal and state constitutions – the basic notion of ‘We the people’ had a legal concreteness lacking in the concept of a British subject. This was given a huge boost by the American Civil War, seen as a victory both for free labour and democracy. Lincoln, a poor boy from a log cabin, had risen to become president, just as David, the shepherd boy, had once become King of Israel. As it happened, the ending of the Civil War led to a very dismal phase in American politics, the so-called Gilded Age when the political process was corrupted by the millions of the ‘robber barons’. But when the Progressive movement campaigned for political reform in the 1890s and 1900s, its message was for more active citizenship and greater transparency and accountability, through the primaries, the initiative, the referendum and the recall. ‘The cure for democracy is more democracy’ declared Progressive radicals such as ‘fighting Bob’ La Follette in Wisconsin. It was music to the ears of Victorian Liberals, none more so than to Gladstone. He had notoriously backed the conservative South at the start of the American Civil war, but now he completely recanted. His passion for the American democracy helped to make him ‘the People’s William’. He cited the United States on how ‘capable citizenship’ could add strength to a state. He said that the North had won the Civil War because ‘every capable citizen’ had a direct stake in the state and in nation-building. (Ironically, some historians have since claimed that the South lost the Civil War because the Confederacy suffered from being too democratic. It ‘died of democracy’.)

Gladstone tended to be cautious and reactive in considering democratic advance – including for Periclean Athens. Unlike Grote, his cherished Greek world was located several hundred years earlier, in Homer’s time, an age of Kingship. Still, Gladstone’s was much the most potent voice of mid- and late-Victorian reform. His later career centred on ideas of constitutional reform, taken still further by his passion for Irish home rule. He advocated extending the franchise into the counties, adopting the secret ballot and attacking corrupt practices at election time. He was inspired by the American constitution, and learnt much from important American contacts such as the industrialist Andrew Carnegie, who tried to persuade him (with strong financial inducement) to write his political autobiography. He also had friendly relations with important American editors, W.H. Rideing of the North American Review, James Knowles of the Fortnightly Review and especially the ‘gilded age’ Liberal Republican, E.L. Godkin, editor of the Nation. He studied widely the role of religion in America, including its role in marriage and family life, and also read on publication Jacob Riis’s famous study of poverty in New York, How the Other Half Lives (1890). In a major article ‘Kin beyond the Sea’ in the North American Review in 1878, he passionately praised the United States as the land of the future. Its constitution was ‘the most wonderful work ever struck off by the brain and purpose of man’. He lavish praise on the account of it given in the celebrated American

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741 Benjamin de Witt, The Progressive Movement (University of Washington Press, new edn., 1968), pp. 213–43, is still the fullest account of this idea.
Commonwealth by the British scholar and jurist, James Bryce. He told his future biographer, John Morley, another enthusiast for the United States, that ‘the history and working of freedom in America’ was ‘the first object and study for every young man’.  

Gladstone’s legacy provided the broad constitutional agenda for Liberals and radicals at the fin de siècle down to 1914. America was central to it. In the United States, active democracy showed the value of active citizenship including in the static and more ‘feudal’ rural areas. Thus the Welsh radical, Henry Richard, condemned pre-1868 Wales as ‘feudal’ and dominated by political landlordism – ‘trech gwlad nag arglwydd’ wrote Richard, a land is mightier than its lord. Another Welshman Lloyd George intended his land duties in his 1909 budget to help revitalise the rural areas of Britain by making them more productive and enterprising. Gladstone also hailed American pluralism and especially the federal system of government, which English authorities like A.V. Dicey had condemned for undermining sovereignty. Gladstone often quoted American federalism, dubiously enough, to justify support for Irish home rule, with future applications perhaps elsewhere in Britain and in the independence already granted to British colonies within the empire. The home rule granted Norway by Sweden, Iceland by Denmark, Belgium by Holland and Hungary by the Austrian Empire illustrated the same beneficent principle. Gladstone also campaigned for the removal of undemocratic obstructions to the people’s will, chiefly of course the hereditary and partisan House of Lords. The Parliament Act of 1911 was Gladstone great posthumous legacy to the constitution. 

But that was about it. Radicalism thereafter moved on elsewhere. New Liberals like Hobson or Hobhouse were social radicals who tended to see constitutional issues as part of the Old Liberalism. The Liberals’ vision of constitutional reform did not go much beyond Gladstone’s legacy, especially curbing the powers of the House of Lords. They made few moves towards devolution or proportional representation. They were cautious on women’s suffrage. They had no wish at all for an elected House of Lords, which could challenge the power of the elected Commons, while its delaying powers remained formidable even after the Parliament Act, Liberals came up with few new constitutional ideas after the first world war. There were moralistic Liberal intellectuals like Ramsay Muir orating at party Summer Schools –

‘My pamphlets ring the souls of men, 
My lectures grip them sure; 
My words are as the words of ten, 
Because I’m Ramsay Muir’.

But his ideas were conventional and uninspired.

Ironically, the greatest constitutional changes now came from a rogue Liberal. This was David Lloyd George, head of a coalition government from 1916 to 1922. He streamlined the Cabinet, shook up parliament, overhauled the civil service, appointed a Cabinet Office and the first array of special advisers, and set up a

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745 For Gladstone’s views in more detail, see Murney Gerlach, British Liberalism and the United States (Palgrave, Basingstoke, 2001).
machine of centralized, presidential-style government. He also passed votes for women, which he had always supported. But as the head of a predominantly Conservative coalition, a reaction against him followed. It led to a return to two-party government of which Lloyd George was the victim. His system seemed too personal, too opportunist, too corrupt. After that the main radical impulse was spent. Liberals now focussed on issues that reflected the self-interest of a smaller third party, such as proportional representation pursued by the Liberals seriously only after the 1929 general election which confirmed their long-term decline.

The Labour Party initially focussed on class not on the constitution. It followed the radicals in concentrating on parliament and its reform. It took much the same line as the Liberals on the Lords, with the extra twist that Labour tended to emphasise also the role of the law lords as in Taff Vale and other cases harmful to the trade unions (an understandable confusion that would not have happened after 2005). The first Labour Party policy statement in June 1918 wanted to abolish the Lords (this disappeared in the election manifesto in December). They also endorsed a stronger House of Commons with Ramsay MacDonald and others advocating proportional representation to help curb the executive.

Two Labour models of parliamentary democracy emerged from its early socialist components, that of the Independent Labour Party and the Fabians. The ILP, men like Hardie, MacDonald and Snowden, viewed constitutional change in terms of greater pluralism. They endorsed community politics and a reinvigorated local government. They feared the social decay of the inactive ‘residuum’. They breathed the spirit of localism. They favoured devolution for Scotland and Wales. Ramsay MacDonald began his political career as a Scottish home ruler. Keir Hardie in Wales wanted to unite the Red Dragon and the Red Flag – Y Ddraig Goch a’r Faner Goch. The ILP was anxious not follow the German Social Democrats in building up a huge bureaucratic juggernaut. The Fabians, such as the Webbs, were also enthusiastic for local government and citizenship: they championed the idea of municipal socialism. But the Fabians took a rather different slant from the organic democracy of the ILP. They saw the citizen as operating within a planned, reformed machinery of government, in which non-elected experts would play an important role. Really they were administrative reformers rather than constitutional reformers. In time both they and the ILP became increasingly unionist.

Labour in its early years devoted only limited attention to constitutional matters. There was no Labour Bagehot or Dicey. Labour believed in the sovereignty of parliament and had no wish to undermine it. J.R. Clynes’s memoirs famously dwell on the formation of the first Labour government in 1924 when the ‘strange turn of fortune’s wheel ..... brought MacDonald the starveling clerk, Thomas the engine driver, Henderson the foundry labourer and Clynes the millhand to this pinnacle beside the man whose forbears had been kings for so many generations’. Frank Hodges’s memoirs speak of serving on the Sankey Commission on the coal mines in 1921 in the King’s Robing Room in the Lords and strolling down the Royal Gallery.

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‘along which kings and queens move with all the regalia of majesty’. John Hodge’s autobiography is significantly entitled ‘From Workman’s Cottage to Windsor Castle’. No sign of revolutionary impulse here.\(^{756}\)

Labour’s main constitutional concern was with the Lords, but it dropped the idea of its abolition other than in its manifestoes of 1935 and (fatally) 1983. Observations by various Labour leaders in 2012 that the party had always supported an all-elected House of Lords were thus totally incorrect: only in 2010 was this the case (with some concessions to the principle in 1992 and 2001). Dalton and Attlee both feared that an elected House of Lords could challenge the authority of the Commons. The Lords at present, he felt, was ‘a drowsy, droning place’.\(^{757}\)

In Labour’s manifestos down to 1997 constitutional issues took a back seat. Attlee in 1937 advocated improvements in Commons procedure and wanted to develop a committee structure much as he did so successfully after 1945.\(^{758}\) Dalton’s Practical Socialism (1935) would largely preserve parliament as it was. He did not favour PR or AV.\(^{759}\)

He wanted a socialist government that could govern. Gradually the original themes of Labour’s constitutional thinking faded away – Laski’s pluralism, Cole’s Guild Socialism, workers’ programmes such as the syndicalism of the Plebs League in South Wales which excited the young Aneurin Bevan.\(^{760}\) George Lansbury still favoured Scottish and Welsh devolution after 1920, along with the initiative, the referendum and recall and other constitutional reforms\(^{761}\) but otherwise Labour in the years of depression and mass unemployment in the years between the wars, became a centralised, highly unionist party. One feature of Labour’s approach, however, might be noted – its strong commitment to civil liberties, notably those of the unions and of unemployed workers, with the members of the National Council of Civil Liberties in 1934 including Attlee, Cripps, Laski and Bevan.\(^{762}\) It was not a zeal that was greatly in evidence in the new Labour world of control orders and greater surveillance installed after 1997.

Labour theorists were concerned with socio-political rather than constitutional change. Laski wrote much on the constitution after 1931 but his general drift was how capitalism, with its links with Crown, civil service and the establishment generally, would make a real socialist government impossible. He followed Stafford Cripps in calling for Emergency Powers for government in the mid-1930s. But his posthumous book *Thoughts on the Constitution* (1951)\(^{763}\) was distinctly supportive of the constitution, even of the civil service he had attacked in 1931. It did not include a call for republicanism. The Labour thinker who wrote most seriously about constitutional matters, however, was a social historian, R.H. Tawney. He revived the dormant notion of citizenship. He regarded the view of pre-1914 Liberals on citizenship as elitist – as well he might, when one reads of Masterman writing of the need for ‘government by an aristocracy of intelligence, of energy, of character’.\(^{764}\)

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citizenship was not moral but political, while also embracing social and economic rights. His model citizen was the unassuming, honest proletarian, Henry Dubb. Tawney saw citizenship not as limited to the local scene, not even to the relationship of the individual to the state, but as operating within civil society as a whole. What Tawney wanted was ‘socialist citizenship’. He emphasized the importance of education for citizenship and public involvement. Education he saw as crucially important for citizenship and social responsibility. Hence his cherished Workers’ Educational Association was seen as a laboratory for citizenship with its members acting as missionaries for the civic gospel within society.

Other than this, constitutional reform was mostly a blank page in Labour thinking. The topic was left to Tories like Leo Amery. What 1931 (correctly) told Labour policy-makers was the vital need for their party to formulate a relevant, contemporary economic policy. Hence the vogue for planning in the 1930s which largely extinguished thinking on the constitution. Douglas Jay in The Socialist Case, Evan Durbin, Hugh Gaitskell showed little interest in it. The planners’ interest in Swedish social democracy, shown in a notable Fabian book of 1938, focussed on economic and fiscal policy, not on the central importance of the Swedish system of governance, the close links of the unions and business with the ‘reform bureaucracy’ which made the economic policy possible. Labour’s election manifesto of 1945 had nothing on the constitution save for a cursory sentence on preventing obstruction of the work of Labour government by the House of the Lords. Attlee’s otherwise dynamic government was cautious in this area, and Herbert Morrison, a supreme party manager, conservative in constitutional matters. The one significant reform was the reduction in 1949 of the Lords’ delaying power over legislation from two years to one year. Any wider agenda for Lords reform, as favoured by Attlee’s leader in the Lords, the ex-Lloyd George Liberal, Lord Addison, who favoured reform of the composition of the Lords including life peers and perhaps some elected peers, was dropped. In the fifties, Gaitskellites and Bevanites were in acrimonious dispute over economic and foreign and defence policy. But both remained cautious on the constitution. Anthony Crosland’s famous work The Future of Socialism (1956) ignores the topic entirely.

Harold Wilson, Jim Callaghan and Michael Foot had no sustained interest in constitutional change. Callaghan tended to be agnostic even on devolution (which his own government had introduced), certainly on Freedom of Information legislation. Foot defended Parliament against the Bennites and the Brussels bureaucrats on much the same grounds as his heroes of the seventeenth century had done. Labour was cautious on constitutional rights or judicial review, partly through suspicion of the class attitudes and backgrounds of high court judges. A lone innovator, to a degree, was Richard Crossman, who endorsed the idea of ‘prime ministerial government’ having replaced ‘Cabinet government’. He did at least see in 1969 what Nick Clegg in 2012 failed to see, that if you wanted to reform parliament, you should begin with the

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767 Margaret Cole and C.Smith (eds.) Democratic Sweden (Routledge, 1938).
reform of the House of Commons. But his proposals to reform the membership of the Lords as well in 1969 was defeated by the backbenchers, headed by the formidable duo of Michael Foot and Enoch Powell. Foot ridiculed his comrade Dick Crossman’s plan as creating ‘a seraglio of eunuchs’ and it fell. There were some constitutional issues listed in Labour’s manifesto of 1983, including the abolition of the Lords once again, but they formed an intrinsic part of the notorious ‘longest suicide note’ and duly collapsed.

Labour started thinking holistically for the first time about the constitution from the late 1980s. It was partly a revulsion against the centralizing impact of Thatcherism as shown in the poll tax, plus the desire of John Smith, who did have a serious interest in constitutional matters, to update the democratic socialist idea. The policy statement of 1989, *Meet the Challenge, Make the Change* included a new emphasis on rights and on the diffusion of power. This document, prepared under Neil Kinnock’s leadership, reflected particularly the outlook of Smith who had handled devolution legislation in the House under Callaghan in 1977–78. The new policy was also influenced by the cross-party Scottish Constitutional Convention of 1990 and ideas of Donald Dewar, Labour’s much under-estimated exponent of devolution in Scotland, and later First Minister. A Joint Consultative Committee was set with the Liberal Democrats, headed by Robin Cook, to take matters further, perhaps to embrace PR.

Since then, as David Lipsey has admirably shown in an important article in *Political Quarterly* (July–September 2011) there has been a total constitutional transformation heralded by Labour’s sweeping election victory of 1997. Labour made for the first time a serious start on Lords reform, removing all save 92 of the hereditary peers. Labour, the most unionist of the parties, was now firmly committed to devolution for Scotland, Wales and Northern Ireland. Labour, the most suspicious of the parties, now emphasised judicial review, the separation of the judiciary from the legislative and the incorporation of the European charter of human rights through the 1998 Human Rights Act. It also created a physically re-located Supreme Court and transformed the role of the Lord Chancellor, which had ambiguously included legislative, executive and judicial functions. Gordon Brown, who took a far more serious attitude towards constitutional matters than Tony Blair had ever done, proposed in his government’s green paper of 2007 a written, codified constitution. This idea, which Labour had long resisted, was put forward as part of a future debate on identity and Britishness, heralded by a proposed British Bill of Rights and Duties. Brown’s earliest pronouncements as prime minister in 2007 included discussion of the notion of citizenship, a theme steadfastly ignored by all previous Labour leaders since Ramsay MacDonald before 1914.

Following its electoral defeat in 2010, Labour now seems compelled to go further. After all, their reforms after 1997 had pointed in different directions. They offered both democracy and managerialism, the doctrine of individual rights and dirigisme, asymmetrical devolution and centralism, a variety of approaches towards Europe. Tony Blair spoke out against some of his own reforms, including aspects of judicially-determined human rights policy on immigrants and asylum-seekers. His memoirs in 2011 fiercely condemned his own Freedom of Information Act for its

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772 Green paper on *The Governance of Britain* (Cm 7170, July 2007), pp. 62-63.
foolishness and irresponsibility – ‘There is really no description of its stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.’773 Under Blair and Brown, parliamentary accountability was undermined by policy being transferred to an army of unelected regulators and ‘czars’, although a welcome reform of the house committee system proposed by a Commons committee chaired by Tony Wright, provided some redress. In the words of Anthony King in a major study of the constitution, the result was simply ‘a mess’.774 Labour also compromised its commitment to the rule of law in its blunt approach to civil liberties which Liberty, Justice and other pressure-groups saw as creating a ‘surveillance society’ of control orders and pre-trial detention. Labour’s legal credentials were further challenged in the field of international law by the invasion of Iraq in alliance with the Americans in March 2003 which most international lawyers saw as criminal, illegal and contemptuous towards the rule of law.775 Citizenship in the Blair years was perhaps most vividly demonstrated in the massive attendance at two huge demonstrations against the war in Iraq in early 2003. With all these contradictions, it is not surprising that Ed Miliband, elected leader in 2010, sought to provide clarity, reverse some of these trends, and to reach back into Labour’s past, perhaps to develop leads to the Liberal Democrats and the Greens. This inevitably opened up constitutional issues.

The constitution will be prominent in Labour’s fresh start. Jon Cruddas’s reappraisal of Labour’s policy and narrative, which got under way in 2011, sought to connect with past traditions, not only democratic socialist but also radical traditions as well. In evoking the famous New Jerusalem, it has highlighted patriotism and nation-building, partly under the stimulus of an innovative young Australian political theorist.776 It seeks to affirm the democracy, no less than the socialism, of democratic socialism. Labour could thus well reclaim the dormant idea of citizenship from the long grass. After all, it conveys values of equality and solidarity which combat the inequality enshrined in the idea of class. Citizenship, hitherto taken up by pressure groups such as Charter 88 in recent years, should therefore naturally appeal to the British left. It would reconnect with the pluralist ideas of Tawney and the early ILP, and the famous ‘Victorian values’. For too long Labour has focussed on the planned efficiency of the state rather than the popular effectiveness of its members. It could now revindicate what Tawney meant by socialist citizenship and perhaps what Marx meant when calling not for for emancipation but for self-emancipation for the working class. In 1945 Labour called its election manifesto Let us Face the Future. Perhaps the left might now see that facing the future, striving for that mythical new Jerusalem, could best be achieved through responding to a very ancient two-thousand-year old clarion call, that of Citizenship in our Time.

Over the past three decades Labour and Liberal Democrats have gradually moved closer in their thinking and policies on constitutional affairs. In 1993 when John Smith was Labour leader, a Labour policy commission report, presented as a National Committee statement to the party conference by the then home affairs spokesman Tony Blair, set out an ambitious programme for constitutional reform, many of whose objectives were implemented in the years following the party taking office in 1997. This document was accompanied by rhetoric and theorising on the need for a new constitutional settlement, a modern notion of citizenship, and the

773 Tony Blair, A Journey (Hutchinson, 2010), pp. 516-17.
775 See e.g. Philippe Sands, Lawless World (Allen Lane, London, 2005) and Marc Weller, Iraq and the use of force in International Law (Oxford University Press, 2010).
creation of a revitalised democracy. It concluded by saying that, "Though these reforms do not mean a formal written constitution, in which every aspects of government and citizens' rights is set out, they are nonetheless a significant step in that direction... We leave open the question of whether at a later date we make progress to formal codification".

When Gordon Brown took office as Prime Minister in 2007, he launched a renewed constitutional reform initiative. This was set out in the Governance of Britain green paper, which sought to address two issues - how should power be held accountable, and how the rights and responsibilities of the citizen should be upheld. It declared the long term aim of forging a new relationship between government and citizen, and "begin a journey towards a new constitutional settlement", namely a written constitution. Mr Brown told the House of Commons he favoured a written constitution for the UK, "I personally favour a written constitution. I recognise that this change would represent a historic shift in our constitutional arrangements, so any such proposals will be subject to wide public debate and the drafting of such a constitution should ultimately be a matter for the widest possible consultation with the British people themselves."

Near the end of his premiership, Mr Brown gave a speech at the Royal Society of Arts, where he announced that he had asked the Cabinet Secretary to lead work on consolidating the unwritten conventions of the constitution "into a single written document", that he wished to have work on a written constitution completed by the time of the 800th anniversary of Magna Carta in 2015, and that he was setting up a working group to identify what aspects of law and relationships between each part of the state, and between the state and the citizen, should be deemed constitutional for the purpose of designing the document. Similar backing for a codified constitution, or for the proposal to be seriously considered, came from several other senior Labour ministers at around the same time, including Ed Balls, Lord Goldsmith (then Attorney General), Jack Straw, and David Miliband.

The debate on possible Scottish independence in the summer of 2014, during which the Scottish government proposed a written, codified constitution, based on the idea of popular sovereignty, stimulated more Labour thinking in this direction, especially from Gordon Brown in a series of cogent speeches. Jon Cruddas's policy review for the Party's election manifesto, also raised this theme, tying in further national and English regional devolution with a general thrust towards decentralisation and grass-roots commitment to the political process. Labour's ideas on citizenship and popular engagement with government, long fairly dormant, could, therefore, be on the cusp of a bracing new stimulus.

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778 CM 7170 (2007).
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784 * This paper is based on a lecture given at King’s College London.