HOUSE OF LORDS

CONSTITUTION COMMITTEE

Constitutional Reform Process

Written Evidence

CONTENTS

Memorandum by Professor Hugh Bochel, Catherine Bochel, Andrew Defty and Jane Kirkpatrick, University of Lincoln (CRP 5)

1. This paper sets out our views, as individuals, on a number of the themes on which the Committee has invited evidence. As the Committee's previous report on constitutional change noted, one of the difficulties in any consideration of constitutional reform is that there is no agreed definition of what constitutes constitutional change, or of what might constitute first or second order change. In addition not all such change requires legislation. As theme 11 of the call for evidence suggests, this continues to be a major challenge. Others are better placed to comment on those issues, and as a result we deal here primarily with those elements that are perhaps generally understood as constitutional change, and which require legislation for their introduction.

2. Theme 2. How would you characterise the constitutional reform process in the UK? What are its strengths and weaknesses? Has the process changed in recent years?

a. The constitutional reform process has varied considerably over the past two decades, but for the most part can hardly be characterised as consensual or as sharing common characteristics. Proposals for constitutional change can clearly be characterised in a number of different ways, but here we highlight four different qualities of proposals for constitutional reform.

b. Some reforms have been the subject of considerable discussion outside Parliament but have arguably been less so inside. An example of this would be the introduction of devolution in Scotland, Wales and Northern Ireland, which while still perhaps controversial in some respects, and certainly lacking consensus between the parties at the time, had been the subject of considerable debate and discussion, particularly in Scotland, not just within the political parties, but also in the Scottish Constitutional Convention and other fora. However, the legislation itself was subject to relatively little consultation and was introduced and passed relatively rapidly, albeit following referendums in the affected nations.

c. A second category might apply, for example, to House of Lords reform, which has been discussed in considerable depth in both Houses over a period of time. However, the lack of clearly thought out proposals and clear underlying principles has made reform problematic. For example, the Labour governments appeared not to have thought beyond the short-term removal of the majority of hereditary peers, and the lack of underlying principles was highlighted in the government's subsequent proposals, with a shift over time from the concept of an upper House which should be more descriptively representative of society, with that representation to be achieved largely

through appointment, to one which drew primarily on the principle of representation through election (Bochel and Defty, forthcoming).

d. Other proposals which have potentially significant impact are subject to very little discussion either within parliament or beyond. Some aspects of constitutional reform may appear somewhat arcane, and as a result generate little interest, whilst the implications of reform may be widespread and significant. It is important that an apparent lack of public, and indeed parliamentary, interest in constitutional reform, does not lead to an assumption that the implications of reform are not in the public interest. For example, whilst the previous Government brought forward proposals to reform the Intelligence and Security Committee, which is itself something of a constitutional anomaly, these were not subject to widespread consultation or debate either within parliament or beyond. In cases such as this it is important to explain the importance of constitutional arrangements and proposed reform, and to engage with all interested parties – in government, parliament and civil society – and not just those parties who are interested by the immediate topic.

e. There are also proposals which appear to be largely populist in nature, and which are not completely thought through, such as the Conservatives' proposal for public petitions to government, which appeared in the party's 2010 general election manifesto and then in the Coalition's Programme for Government. Tellingly, no thought appeared to have been given to how the proposed new system would relate to the existing House of Commons system (nor the introduction of an e-petitions system to the House of Commons implied in the Coalition parties' commitment to accept the Wright Committee's proposals for reform). Indeed, the suggestion that petitions with over 100,000 signatures would be eligible for debate in the House of Commons, and that with the most for introduction as legislation, might, for example, have seen the government supporting a debate on the selling off of some Forestry Commission forests, and could, potentially, see it supporting the introduction of a bill that would conflict with its key policies, and even its own manifesto promises, for which it would presumably claim a mandate. If a government were to be serious about using petitions in a constructive way, then arguably at a minimum existing models should be considered, such as those used by the Scottish Parliament, the National Assembly for Wales, and indeed a number of local authorities.

f. These examples suggest that the Committee's concerns over the nature of proposals, including their implications for other aspects of the constitution and for government policies, and over differential approaches to consultation outside Parliament and to scrutiny within Parliament, are well founded. While it might be argued that recent reforms and current proposals reflect the traditional flexibility of the United Kingdom's constitution, the pace of reform in recent years is arguably such that governments should give broader consideration to these issues.

3. **Theme 3. How would you assess the varying processes by which successive governments have conceived and developed proposals for constitutional reform? What case studies would you cite as examples of good and bad practice?**

    a. As the examples above highlight, some case studies may perhaps be seen as examples of both good and bad practice simultaneously. However, if 'good practice' were to be viewed as involving widespread consultation and debate outside Parliament, and detailed scrutiny inside Parliament, few changes would meet such standards.

    b. The cases of the devolved bodies were in some respects examples of good practice. In Scotland there had been widespread discussion of devolution in the period since 1979, and was arguably, in John Smith's words, the 'settled will' of the Scottish people (Denver et al, 2000). In Northern Ireland the Assembly emerged out of the peace process. In Wales, there had arguably been less discussion and was less political consensus. In all three instances the decision was put to a referendum and approved by a majority of those participating. However, where Parliamentary scrutiny was concerned they were arguably less well served. Similarly, relatively little consideration was given to how future change to the devolved settlements should be managed.

    c. There frequently seems to have been a lack of oversight of a range of proposals, so that the implications of one change do not seem to be reflected in or linked to others. For example, whatever the merits or otherwise of the Alternative Vote system, to have a referendum on it when the same government has proposed a wholly or largely elected upper House, the electoral system for which has not yet been determined, seems somewhat strange. It might be argued that it would be better to determine the functions that each House should fulfil, the desired form and make-up of each, and subsequently the appropriate electoral systems to achieve those ends.

4. **Theme 6. Should the onus for proposing constitutional reform rest (solely) with the Government? What role should Parliament and/or outside bodies and individuals have in initiating proposals for change?**

    a. Clearly in some instances pressure and suggestions for constitutional reform can and should come from outside government – for example in relation to devolution and electoral reform, both of which received significant impetus from organisations outside government and arguably from elements of public opinion. Parliament should also have an important role, both in its own right and as a conduit from the public and civil society. However, ultimately, it should be for governments to formally propose constitutional change, as is the case for other policy areas.

5. Theme 7. In what circumstances should constitutional proposals be set out in green or white papers?

a. Ideally it would be valuable for any significant constitutional reform proposal to be subject to significant and widespread consultation, and where that has not been the case, then a Green Paper or potentially a White Paper would be an appropriate means of doing so. This might be even more the case where a proposal emerges without having been part of the manifesto commitment of any of the major parties, as is the case with the current proposals on AV. Similarly, if there is to be no referendum on a particular reform, the more widespread and formal the consultation should be.

6. Theme 8. In what circumstances should constitutional proposals be subject to public consultation, such as via Citizens' Assemblies? What principles should apply and what form should such consultation take?

a. There are clearly balances to be struck between different aspects of these questions and the consequent responses. Consultation and scrutiny are clearly necessary, although the extent to which each of those should take place inside or outside Parliament.

b. Governments over the past three decades have taken a number of different approaches to consultation, including those set out in the *Governance of Britain* Green Paper. Arguments about public consultation and participation on proposals for constitutional change are broadly similar to those in relation to other areas of policy (for example, Bochel and Evans, 2007), and do not need rehearsing here. There have probably been more widespread and more varied attempts to enable citizen consultation and participation in the policy process at all tiers of government than was traditionally the case. Yet the danger remains that increasing opportunities for participation or consultation can simply reinforce existing social divisions, as well as failing to influence policy.

c. As far as we are aware, there is no evidence that Citizens' Assemblies or Citizens' Juries are any better as a means of public consultation than any other. While we would argue that widespread public consultation should be a key element of any constitutional reform proposals, it is difficult, and potentially dangerous, to argue that it should take one particular form. Whatever the nature of consultation it is of great importance that policy makers and participants are clear about the purposes and contexts of consultation, the roles and limits of the roles of those who participate, and the boundaries of such involvement (Bochel et al, 2008). Similarly, consultation on constitutional change would require governments to listen, rather than treating it as a tokenistic measure or as a means of 'rubber-stamping' their proposals.

7. **Theme 9. Should the Government consult other parties when developing constitutional reform proposals? What importance should be attached to achieving cross-party consensus?**

    a. We hold no particularly strong views on this. It also relates to other arguments, including those about public consultation above. Clearly, in some respects consensus can be advantageous, in terms of improving the quality of proposals, and in relation to increasing their acceptability and potentially longevity. However, there may well be occasions when cross-party consensus is unachievable or inappropriate, and, for example, compromises may not always lead to the best approaches.

    b. Ideally, therefore, governments should seek to establish cross-party consensus, or at least a degree of it. Where that is not possible, and particularly where the degree of constitutional change is significant, it may be appropriate for the proposals to be subject to a referendum.

8. **Theme 10. What role should Parliament play in the scrutiny of constitutional reform proposals?**

    a. Parliament clearly has a major role to play in the scrutiny of constitutional reform proposals. Indeed it has frequently been argued that parliament's role in the scrutiny of all legislation should be greater and could be improved in a number of ways (for example, Fox and Korris, 2010), and we would generally concur with that view.

    b. Both Houses should consider constitutional legislation in depth. This obviously places a considerable burden upon Parliament, and it may be necessary to find ways of dealing with that, but by its nature major constitutional change is important and requires proper scrutiny and approval in both Houses. Whether the nature or balance of this scrutiny should change in the event of further reforms of the House of Lords is something that should perhaps be considered as part of any such proposals.

    c. Depending on the degree of consultation that has already taken place, pre-legislative scrutiny of constitutional change legislation may be appropriate.

9. **Theme 11. Can constitutional legislation be defined? Should its consideration differ from that pertaining to other legislation?**

a. As noted in paragraph 1, others are better placed to consider the definition of constitutional legislation. We therefore provide only limited comments here.

b. There are clearly arguments for approval thresholds in each House, or perhaps only the House of Commons in the absence of an elected upper House, such as a 2/3 majority, particularly in the case of significant reforms. An alternative might be to require a majority in a referendum (with or without a specified minimum level of turnout). However, as the Committee suggested in its 2002 report, without an ability to define constitutional bills, and the ability to identify 'first-class' bills from others, there remain problems with such an approach.

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29 March 2011

Memorandum by Professor Rodney Brazier, University of Manchester (CRP 6)

Introduction

1 I am Professor of Constitutional Law at the University of Manchester. Constitutional reform is one of my main research interests, and indeed chapters 1 and 2 of my book Constitutional Reform (3rd ed., 2008, Oxford University Press) deal with some of the issues raised by this inquiry. Unfortunately I was unable to attend the Committee's earlier seminar.

2 I deliberately use a broad brush in this note. I want to concentrate on what are – and more particularly should be – the governing principles for the process of constitutional reform. This note, therefore, does not seek to answer even a majority of the Committee's questions.

The indictment

3 I have many objections to the traditional British methods of changing the constitution. In summary, they are that reforms (a loaded word) are usually carried out ad hoc, often as a reaction to events, can emerge from the interstices of one political party, can permit of no or no sufficient public consultation and involvement, can be rushed (sometimes for partisan reasons), often lack any attempt to build consensus for changes, and that constitutional law is regarded merely as ordinary law requiring (with exceptions) no different treatment from the most trivial public Bills which are put through Parliament. This is no way to treat something as fundamental to any state as her constitution.

4 In my submission the constitution should be viewed as belonging to and being the business of all interested citizens. It should be recognised as being special (or at least different in nature from) – and I say politically superior to – all other forms of law and public policy. This is because those other laws and policies are formed under the rules of governance set by the constitution itself. Such sentiments would be platitudinous in most states, because they have codified constitutions, and often special mechanisms which must be used to alter them. Britain could address many of my criticisms without codification or resort to entrenchment mechanisms.

The British way of doing it

5 Constitutional reform in the United Kingdom, in the main, has been implemented through ordinary legislation either (i) as a necessary or unavoidable reaction to events, or, in recent years, (ii) on the basis of the manifesto commitment of a political party, or (iii) even out of the blue. Special procedures, such as referendums, have been rare. There is no acceptance that constitutional laws should (in the words of the Committee's Q 1) "be considered to have a special character such that constitutional law-making is given special treatment."

6 As random examples of (i), the Parliament Act 1911, votes for women, various Northern Ireland "constitutions", the Committee on Standards in Public Life, and the Parliamentary Standards Act 2010 all resulted from "events". Regardless of the merits of any of those changes, it is arguable that none of them would have come about other than as a reaction to such events.

7 As examples of (ii) may be cited the Labour Party's long shopping-list of constitutional reforms set out in its 1997 manifesto. Although they had been considered privately with the Liberal Democrats before the General Election, there was no other public involvement than that, no indication that the changes were any different in quality from other pledges in the manifesto, and no special mechanisms were planned to give effect to them (with the exception of the proposed devolution legislation which was to be preceded

by referendums, and a referendum on the voting system – which, of course, never materialised).

8 The notorious example of (iii) is provided by the well-known background to the Constitutional Reform Act 2005. Mr Tony Blair has publicly acknowledged that the process of initiating such major changes – not presaged in a manifesto or otherwise – in a Cabinet reshuffle was a mistake.

9 The strengths as I see them in this traditional process (see the Committee's Q 2) are twofold. First, in theory what voters vote for at a General Election on constitutional matters in the victor's manifesto can be delivered by the resulting Government, without inconvenience and the time which any special procedures might require. This is what parliamentary democracy means in the British context. Secondly, the treatment of constitutional Bills and Acts as ordinary legislation contribute to the famous flexibility of the British constitution. So it is argued that if a piece of the constitution is accepted by Parliament as being in need of repair, it can be put right quickly and efficiently.

10 The process has changed (see the Committee's Q 2) since (say) 1997 in the following ways – although this does not purport to be an exhaustive list.

(i) The Labour Party's 1997 manifesto contained the most far-reaching programme of constitutional reform ever to be put before the British electorate. Indeed, with the exception of the Liberal Democrats and their predecessors, it had been relatively rare for political parties to include much on constitutional policy in their manifestos. (The main examples before 1997 were in 1974 (Labour and devolution), and in 1983 (the Conservative pledge to abolish the GLC and metropolitan county councils). Since 1997 it has been unremarkable for the parties to say something on the constitution to the electorate.

(ii) Parliamentary committees exist (or have existed and been replaced) which have constitutional responsibilities. The main ones are this Committee, PASC, the Justice Committee, the Joint Committee on Human Rights, and the Political and Constitutional Reform Committee. Among other advantages, these committees have been able to carry out pre-legislative scrutiny that was harder to effect before.

(iii) This Committee has fulfilled a special role in pre-legislative scrutiny of Bills with a constitutional consequence. Parliament is put on its guard when legislation would have such a consequence, and to that extent constitutional legislation has been treated "differently", as I argue should be the case.

(iv) Referendums have been held on devolution to Scotland, Wales and Northern Ireland (1998), a North East Regional Assembly (2004), and will be held in May on the voting system. Before 1997, the only referendums in British history had been border polls in Northern Ireland, continued membership of the European Community (1975), and the proposed

Scottish and Welsh Assemblies (1979). It is, of course, argued by some that the two national referendums (in 1975 and on 5 May 2011) were resorted to for party-political as much as, or instead of, primarily constitutional purposes, but there it is.

(v) There have been sporadic attempts at proceeding on a cross-party basis on some constitutional questions. Thus the late Government did this on House of Lords reform, and used what were classified as free votes in the Commons on the vexed question of the composition of a new second chamber. But this is hit-and-miss: no attempts of which I am aware accompanied, for instance, either the Parliamentary Voting System and Constituencies Act 2011 or the Fixed-term Parliaments Bill 2010 – 2011.

11 It follows that I am strongly of the view that constitutional laws should, indeed, be considered special, and that they deserve special treatment. For these purposes, I am happy to adopt the Committee's own working definition of the word "constitution" set out in its report Reviewing the Constitution: Terms of Reference and Method of Working (1st Report, HL 11 (2001 – 2002)), para 50. In essence, that is the rules and practices that create the basic institutions of the state and its component and related parts, and stipulate their powers and the relationship between them and between them and the individual.

12 While it will sometimes be the case that a new constitutional Bill is needed urgently, so that there would be no time for special procedures, I think that any such case should be rigorously tested. Clearly, for example, the parliamentary expenses scandal had to be addressed urgently, but the speed with which the Parliamentary Standards Act 2010 was passed perhaps contributed to the criticism of the regime which was created by it. But there will be cases when constitutional change is needed rapidly.

Is constitutional reform too important to be left to politicians?

13 I turn now to my view on "good practice" for the constitutional reform process (the Committee's Q 4).

14 Obviously parliamentarians – and perhaps especially MPs as elected representatives – must play a key role in the constitution and its development. They are, indeed, part, and a vital part, of the British constitution itself, in both its legislative and executive branches. And obviously if any proposed change to the constitution requires legislation, only Parliament can supply it. The Government's view on any such change, equally clearly, will be of central importance, given that no significant constitutional statute that I can recall has passed into law without at least the tacit support of Ministers.

15 A given constitutional change may be promised in the Government's manifesto. The traditional notion of parliamentary democracy, and the doctrine of the mandate, decree that that constitutes all the authority that is needed to alter the constitution through Parliament. But in keeping with my aspiration that the constitution should be regarded as belonging to –

should be "owned" by – all British citizens, I say that that should not be enough. That traditional approach, I suggest, is defective in three respects.

16 First, and regardless of how important a proposed reform may be, it will emerge from inside one or more of the political parties. There is no guarantee that even the most important changes will be offered for public consultation or, indeed, that cross-party consensus will be sought. Thus, for example, there was no engagement of the public in what became the House of Lords Act 1999, a statute which effectively cut out one potential (albeit possibly unlikely) future, final, model of a second chamber that might have contained some representatives of the hereditaries. The Constitutional Reform Act 2005 provides another notorious example. The key changes of momentous constitutional consequence in it were matters on which the public was not consulted even at a General Election – although they had the opportunity to comment to parliamentarians during the long passage of the 2005 statute.

17 Such central constitutional matters potentially affect all citizens, and there should be some process through which they can be consulted, preferably before constitutional legislation is introduced. Whatever the mechanism might be, I suggest that the strong presumption should be that every major constitutional change should be preceded by appropriate public consultation. Indeed, I can see no reason, other than merely party-political considerations, why, for example, the Parliamentary Voting System and Constituencies Act 2011, and the Fixed-term Parliaments Bill, were rushed, rather than having been put out to consultation first. Of course, what the Government and Parliament make of the results of consultations must be for them. I have no views on the precise mode, or modes, of consultation that might be adopted, as long as it, or they, permit all interested citizens to express a view, within a reasonable period, on proposed major constitutional change.

18 Secondly, leaving constitutional reform entirely to the judgement of politicians can allow constitutional Bills to be enacted without independent and expert scrutiny. Recalling my maxim that constitutional legislation should be regarded as special, I think that ideally major constitutional measures should be subjected to rigorous examination by a body the majority of which was independent of Ministers and Parliament, containing constitutional experts, as well as lay people. I have argued – with a complete lack of success so far – for the setting up for the purpose of a standing Royal Commission on the Constitution – a Constitutional Commission (see Brazier, Constitutional Reform (3rd ed., 2008), pp 16 – 22). Among other possible functions it could receive from the Government draft proposals or ideas for major constitutional changes, and subject them to scrutiny – perhaps itself being responsible for the public consultation already mentioned. Again, the strong presumption should be that every major constitutional change would be referred to the Commission before being put before Parliament. The permanent Constitutional Commission should have a respected public, non-political, figure in the chair, representatives of the three main parties, along with, in the majority, constitutional experts and lay members. It would need adequate

accommodation, official, and research support – not an aspect of any suggestion which is easy to accept in current economic circumstances (which we all hope will not exist forever). I must remind the Committee that it rejected a similar idea in its report Changing the Constitution: The Process of Constitutional Change (4th Report, HL 69 (2001 – 2002)), paras 73 – 78.

19 Thirdly, leaving constitutional reform wholly to politicians obviously gives them complete power over the content of the constitution. Ministers can, of course, consult the public, but equally may ignore the result if they wish. The Government will take account of any relevant parliamentary committee reports, but may find reasons to cherry-pick the results, or even to reject them outright. Ministers can claim manifesto authority for some measures, but some reforms are sprung out of the blue on to an unsuspecting electorate. Constitutional Bills are, certainly, subject to parliamentary approval, but the Government can normally rely on its Commons majority, and if necessary on the Parliament Acts in relation to the House of Lords.

20 Parliament is (within limits not relevant here) sovereign, and should remain so. But I raise, within the context of constitutional law being special and different, and of the constitution belonging to everyone, the question of whether there should be a further strong presumption that major proposals should be required to be put to an advisory national referendum. I acknowledge that referendums are far from being a perfect instrument – indeed, they have innate difficulties. But if we are serious about constitution-making becoming a process inclusive of all those citizens who will live under the constitution, and that the constitution should not be the property of the Government of the day (as it appeared to be especially under the last Government), then there is no better way of establishing this than giving each citizen a vote on whether a given constitutional change should be made.

30 March 2011

Memorandum by the Constitution Society (CRP 11)

1 INTRODUCTION:

1.1 In January 2010, the Better Government Initiative published the report *Good Government*[1]. It included a series of recommendations for improving the formation and delivery of policy and the preparation and scrutiny of legislation.

[1] *Good Government,* Better Government Initiative, January 2010. http://www.bettergovernmentinitiative.co.uk/da/57699

1.2 The report was welcomed by the current Prime Minister and Deputy Prime Minister in August 2010 as a Government "committed to good Government and to strengthening Parliament".

1.3 The recommendations are relevant to all areas of policy and legislation.

1.4 The Committee called for written evidence to consider whether constitutional laws should be considered to have a special character such that constitutional law-making is given special treatment. Before addressing that question, it is useful to enquire whether recent constitutional law-making satisfies even basic standards of good government.

1.5 The assessment given is limited to The Parliamentary Voting System and Constituencies Act. It may be useful as an initial gauge of current practise in the development of constitutional reform.

2 THE PARLIAMENTARY VOTING SYSTEM AND CONSTITUENCIES ACT; ASSESSMENT AGAINST GOOD GOVERNMENT PRINCIPLES:

2.1 PRINCIPLES OF POLICY FORMATION

Was the Bill preceded by public consultation on its proposals or by a Government/Conservative Green Paper?			
	Yes	No	Details
Conservative Green Paper		X	
Government Green Paper		X	
Did consultation comply with Good Government recommendations; *"The need for effective consultation"*[2]?			
	Yes	No	Details

[2] Ibid. Pg. 9.

Description of policy problem.		X	
Description of policy options with social, economic and financial costs and benefits.		X	
Stakeholder consultation.		X	
Select Committee involvement in consultation.		X	The Political and Constitutional Reform Select Committee criticised the "failure to consult on the provisions in this Bill"[3].
Was the Bill preceded by a statement of the Government's policy?			
	Yes	No	Details
Coalition agreement	X		"We will bring forward a Referendum Bill on electoral reform, which includes provision for the introduction of the Alternative Vote in the event of a positive result in the referendum, as well as for the creation of fewer and more equal sized constituencies."[4]
White paper		X	

[3] Political and Constitutional Reform Select Committee Third Report of Session 2010-11 *Parliamentary Voting System and Constituencies Bill.* Page 4.
http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/437/43702.htm

[4] The Coalition: Our programme for Government, page 27.
http://www.cabinetoffice.gov.uk/news/coalition-documents

Did these comply with Good Government *"Justification of policy decisions"*[5]?			
	Yes	No	Details
Statement of policy to be adopted.	X		The policy statement was arguably not comprehensive. It did not, for example, outline the form of the Alternative Vote to be offered in the referendum. It did not specify the amount by which the size of the House of Commons would be reduced.
Statement of proposed legislation.	X		
Statement as to why legislation chosen in preference to other means.		X	There was no explanation as to the requirement of legislation to enact electoral and constituency reform.
Statement of criteria to govern secondary legislation or Ministerial decisions.		X	

2.2 PRINCIPLES OF LEGISLATION

Was the Bill published in draft format and subject to pre-legislative scrutiny?			
	Yes	No	Details

[5] *Good Government*, Better Government Initiative, January 2010, page 10. http://www.bettergovernmentinitiative.co.uk/da/57699

Bill published in draft.		X	
Pre-legislative scrutiny.		X	
Quality of explanatory material accompanying Bill.			
	Yes	No	Details
Impact Assessment.	X	X	An Equality Impact Assessment[6] was published by the Cabinet Office in January 2011. No complete Impact Assessment was produced to demonstrate the policy problem and assess possible solutions.
Estimated fiscal impact / major machinery of government changes.		X	
Demonstration of practicability and available resources.		X	
Intended effects available for post-legislative scrutiny.		X	

2.3 STRENGTHENING PARLIAMENT

Was sufficient time allowed for debate on the Bill in the Commons?

[6] Equality Impact Assessment for the PVSC Bill, The Cabinet Office January 2011 http://www.cabinetoffice.gov.uk/resource-library/equality-impact-assessment-pvsc-bill

	Details
Sufficient time allowed for debate in the Commons.	The original programme motion for the Bill, introduced on 6th September 2010, provided for five days in Committee, with two days for consideration and Third Reading. During the first day of Committee Stage debate on 12th October 2010, a number of Members argued that more time was needed for such a major constitutional measure. A House of Commons Library Note records that "several amendments on the boundary review remained undebated at the end of Day 4 when the end of the Bill was reached and new clauses debated on Day 5 (25 October) did not include any on the boundary review process."[7]
Does the Bill comply with Good Government recommendations *"Effective Parliamentary scrutiny of legislation"*[8]*?*	
	Details
Effective scrutiny by Select Committees.	The Political and Constitutional Reform Select Committee had "two clear sitting days in which to consider and take evidence on the bill before second reading". The Chair of the Committee criticized the legislative timetable as denying the Committee "any adequate opportunity" to conduct the scrutiny for which it was established. [9]

[7] Isobel White and Oonagh Gay, Standard Note SN/PC/05697, Parliamentary Voting System and Constituencies Bill 2010-11: progress of the Bill in the Commons, 9 November 2010. Page 17.

[8] *Good Government*, Better Government Initiative, January 2010. Page 24. http://www.bettergovernmentinitiative.co.uk/da/57699

[9] Political and Constitutional Reform Select Committee First Report of Session 2010-11 *Parliamentary Voting System and Constituencies Bill Report for Second Reading.* Page 4.

http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/422/42202.htm

3 SIGNIFICANT CONTEXT:

3.1 It has been argued that the processes of consultation and pre-legislative scrutiny were necessarily curtailed by the inevitable time pressures exerted on a new Government during its first term in office.

3.2 It is not clear, however, that there were any external factors which dictated necessary haste in implementing the provisions of the Bill.

3.3 The legislative haste experienced has been most widely attributed to political concerns. The Political and Constitutional Reform Select Committee concluded that "the guiding principle behind the Bill is political". [10]

4 CONCLUSIONS:

4.1 The assessment of a single case of constitutional law-making as above is limited in scope and may reflect idiosyncratic circumstances. Nonetheless, it has significant implications.

4.2 It is indicative of a system which permits the disregard of what is widely agreed to be the "proper" law-making process even in cases of constitutional significance.

4.3 The principles against which this example of policy-formation and legislative process has been assessed are applicable to all areas of policy and were welcomed by the current Government.

4.4 The example assessed, however, does not comply with these principles. The policy proposals were not the subject of consultation. The policy statement was incomprehensive and there was no justification made of the policy decision. The Bill was not subject to pre-legislative scrutiny and was not accompanied by a complete Impact Assessment. The time permitted for scrutiny of the Bill by Select Committees and the time permitted for debate in the Commons were both widely criticised.

4.5 In calling for written evidence, the Committee asked whether constitutional laws should be considered to have a special character such that constitutional law-making is given special treatment.

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[10] Political and Constitutional Reform Select Committee Third Report of Session 2010-11 *Parliamentary Voting System and Constituencies Bill.* Page 43.
http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/437/43702.htm

4.6 It is useful to note that even general principles of good policy- and law-making appear not to have been followed in the case of this example of constitutional legislation, which the Deputy Prime Minister regards as "fundamental to this House and to our democracy"[11].

4.7 The rigorous application of an agreed set of principles of good government could be a useful step towards safeguarding the quality of constitutional reform in the UK.

30th March 2011

Memorandum by Democratic Audit (CRP 7)

About Democratic Audit

Democratic Audit is an independent research organisation, based at the University of Liverpool. We are grant funded by the Joseph Rowntree Charitable Trust to conduct research into the quality of democracy in the UK and are currently conducting the fourth full Audit of UK democracy (the previous three Audits were published in 1996, 1999 and 2002).

Summary

- There is a genuine danger that intense periods of piecemeal constitutional reform under successive governments since 1992 have produced a legacy of reforms which lack a consistent or coherent approach or any clear sense of direction.
- There is a strong case to be made, based on general principle as well as international norms, that constitutional law should be considered of a 'special character', with procedures for amending it to involve conditions which go beyond those applying to ordinary legislation.
- UK constitutional law is not guaranteed such 'special treatment' largely because of the peculiarity of the UK constitutional settlement, in which the constitution remains largely uncodified.
- Moreover, there are problems involved in adopting an approach based on 'special character' because: UK constitutional law is not always easy to identify; the doctrine of parliamentary sovereignty would limit any attempt to entrench constitutional law; and the heavy reliance on conventions means that constitutional change does not always involve legislation.

[11] Letter from the Deputy Prime Minister to the Chair of Political and Constitutional Reform Select Committee. Committee First Report of Session 2010-11 *Parliamentary Voting System and Constituencies Bill Report for Second Reading.* Page 4.

http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/422/42202.htm

- The constitutional reform process in the UK in recent decades has been both piecemeal and profound, driven by the executive but also subject, to varying and inconsistent degrees, to greater Parliamentary scrutiny, the influence of judicial decision through the courts and popular consent via referendums.
- As such, there is no clearly established procedure for initiating and taking forward proposals for constitutional reform and it is possible to identify a diverse range of 'good' and 'bad' practice in the way in which recent governments have attempted to introduce constitutional change.
- Despite the difficulties involved in establishing clearly agreed procedures for constitutional change in the absence of a codified constitutional settlement, it is Democratic Audit's view that a number of clear principles can be identified which should guide attempts at constitutional reform.
- These principles include ensuring that constitutional reform proceeds on the basis of broad, rather than sectional, interests, that public involvement should be as extensive as possible, and that both House of Parliament should be fully engaged in the whole process.

Democratic Audit's position on constitutional reform

1. Democratic Audit favours a 'written' constitution for the UK, to be based on a broad and renewed constitutional settlement, rather than an act of codification representing the bringing together of existing laws and conventions in a single document. In the absence of such a settlement, which must clearly be a long-term goal, we advocate specific reforms, based on the evidence drawn from our periodic Audits of UK democracy and other issue-based research studies. Working within our expansive Audit framework, we seek to be conscious of the manner in which reforms in one part of the political system are likely to have consequences, positive and negative, for other aspects of our democratic arrangements. We also take the view that there are very few, if any, constitutional 'quick fixes'; any evaluation of reform options requires a long view - of both the past and the future.

2. We therefore welcome both the greater profile given to constitutional reform in recent decades, as well as many of the individual reforms which have been introduced. However, we tend to be critical of the failure of governments, and opposition parties, to take a 'holistic view' of the reform process. The pace of constitutional reform has accelerated, but reform has tended to be piecemeal, lacking in any consistent or coherent approach or any clear sense of direction. The most obvious overarching objective of recent reforms has been the stated desire of senior figures across all political parties to reverse the decline in public trust and popular participation in UK democracy. Yet, there is little evidence that recent reforms have done anything to restore public faith in political institutions or boost popular engagement with the political process - if anything the reverse is true.

Overview

Should constitutional laws be considered to have a special character such that constitutional law-making is given special treatment? Should the Government apply particular procedures to constitutional policy-making? If so, what should these be?

3. There is a general case to be made that constitutional laws (and other features of the UK constitution not currently embodied in law, that is, conventions) should be considered of a 'special character'; and should be subject to 'special treatment'. In any democratic society, constitutional law helps determine the overall framework within which democracy functions. Constitutional law should not be under the control of groups that are able to muster simple majorities in the legislature (or one chamber within it) in the way that normal legislation is.

4. If constitutional law does not have a special status, there is an obvious danger that there will not be sufficiently broad ownership of the constitutional settlement, and that an individual political party or coalition of parties will be able to skew the process of constitutional change to serve their own interests. Where reforms appears to be motivated by narrowly partisan concerns, there is a related danger that constitutional change may become a 'political football'. It would be a matter of genuine concern if a pattern should develop whereby a change of government results in the overturning, or substantial amendment of, constitutional changes enacted by the previous administration.

5. With these principles in mind, it is an international norm for the constitution to be considered the 'higher law' of a country, with more rigorous standards to be met if it is to be altered in any way. While more regular law may be passed by simple majority votes in the legislature, constitutional law may be subject to various additional conditions, such as:

- Referendums, possibly involving super-majority requirements;
- Super majority requirements in the legislature; and
- Joint-meetings of bicameral legislatures.

6. In addition, the formulation of proposed constitutional law in other countries may often involve special procedures, such as consultation with committees of experts, and the establishment of conventions or assemblies that may include appointed or elected members, or members chosen at random from the general public.

7. However, as is noted below, constitutional law in the UK does not always receive the 'special treatment' it arguably merits; and because of the peculiarity of the UK constitutional settlement, there are problems involved in adopting such an approach.

8. The first difficulty is one of identifying UK 'constitutional' law. Since the UK constitution is un-codified, unlike in virtually all other democracies, there is no single text or group of texts identifying what the constitution is. Therefore, if it were agreed that constitutional law in general was of a 'special character' requiring 'special treatment', it would not always be

possible to establish consensus over whether a particular law, existing or proposed, was 'constitutional', since there is no specific 'constitution' which it would be amending, subtracting from, or adding to. There is a convention in the UK that Bills of 'first class constitutional importance' are considered by a committee of the whole House (of Commons). Yet as one author has noted 'From the inception of this convention, the precise definition of and understanding of "first class constitutional significance" has been highly contested'.[12] We return to this issue in more detail in our answer to a later question (see paragraphs 43-47).

9. The second, and related, difficulty in ensuring that UK constitutional law receives 'special treatment' is that the position of constitutional supremacy is generally regarded as being held by a 'sovereign' Parliament. In virtually all other democracies this position of constitutional supremacy would be seen to be represented by a codified constitutional text (or texts). As noted above, internationally, codified constitutions contain within them specific amendment procedures such as legislative super-majorities and referendums. By this means constitutions are entrenched, with new constitutional law required by the constitution itself to meet special prescribed standards of approval.

10. In the UK, by contrast, the UK doctrine of 'parliamentary sovereignty' creates uncertainty as to whether any 'special treatment' for constitutional law-making can be ultimately enforceable other than by convention. A key tenet of the doctrine of 'parliamentary sovereignty' is often held to be the general principle that Parliament cannot be bound, even by itself – what Parliament can do, it can un-do. We discuss further the issues raised by the current difficulty of 'entrenching' UK constitutional law in paragraphs 36-41.

11. The third difficulty is that the heavy reliance on convention in the UK settlement means that significant constitutional developments can take place that do not involve legislation. A current example of a non-legislative constitutional initiative, the production of the Cabinet Manual, is discussed in more detail in paragraphs 26 and 33.

How would you characterise the constitutional reform process in the UK? What are its strengths and weaknesses? Has the process changed in recent years?

12. The constitutional reform process in the UK is characterised by three key features. First, the process tends to be piecemeal in fashion and driven by the requirements of the party or parties of government, rather than an holistic constitutional overview. Second, while the interest of governments in constitutional reform was limited in most of the post-war period, reform has accelerated considerably since the early 1990s (see figure 1). Third, reform has been driven by the executive. While reform campaigns outside the executive may be

[12] Flinders, Matthew (2010) *Democratic Drift: Majoritarian Modification and Democratic Anomie in the United Kingdom*, Oxford: Oxford University Press, p.219.

influential (such as the Scottish Constitutional Convention or the Campaign for Freedom of Information), they require a sympathetic group to enter into the UK government, as happened in 1997.

Figure 1: Constitutional reform since the 1990s: some selected examples

Conservative government (1990-1997) Publication of Ministerial Code (1992); Intelligence Services Act 1994; promulgation of Civil Service Code (1997)
Labour governments (1997-2010) Devolution (1997 onwards); Human Rights Act 1998; Freedom of Information Act 2000; Constitutional Reform Act 2005; Constitutional Reform and Governance Act 2010
Coalition government (2010 -) Parliamentary Voting System and Constituencies Act 2011; Fixed-term Parliaments Bill; European Union Bill; production of Cabinet Manual.

13. Taking into account these three points, it might be argued that the piecemeal approach was more viable when there was modest and gradual change, but has become problematic as reform has accelerated. For instance, the piecemeal, staggered approach to devolution embarked upon by Labour from 1997, which then stalled in 2004, has left many unanswered questions, with England outside Greater London lacking any form of devolved governance.

14. It should also be noted that, in the area of constitutional convention, change can be brought about by unilateral executive action – as when, before 2010, the government could re-organise the Civil Service under the Royal Prerogative. Conventions may also change without any single specific action being taken, for instance the gradual development of the principle that prime ministers can be appointed only from the House of Commons. It is also arguable that the personal styles of particular politicians – in particular prime ministers – can bring about at least temporary changes to the way in which the constitution operates, possibly with more lasting consequences.

15. It is important to recognise the possibility that judicial decisions can, in effect, bring about constitutional change through impacting practically and theoretically upon existing practice. In countries with written constitutions, judicial decisions can have a radical effect upon the way the constitution is interpreted; but they can make a significant difference in the UK as well. Case law involving the *European Communities Act 1972* and *Human Rights Act 1998* has been particularly important in this respect; as has an increasing judicial willingness to become involved in matters of Royal Prerogative.

16. Finally, another significant development in recent years has been the rise of the referendum as a tool of constitutional decision-making. To some extent this device restricts the discretion of the executive, since it makes change dependent on more than just a

Commons majority. However, the executive will still generally have the ability to determine when and over what issues it holds referendums. (The exception here will be the referendums required under the European Union Bill, if it passes into law).

How would you assess the varying processes by which successive governments have conceived and developed proposals for constitutional reform? What case studies would you cite as examples of good and bad practice?

17. It is clear that there is no set template for conceiving and developing constitutional reform in the UK. Plans can be devised by constitutional assemblies or conventions; using long and wide consultation processes; or during the course of negotiations to form a Coalition government. They may involve referendums, pre-legislative scrutiny, rushed acts of Parliament, press releases, or the publication of documents defining constitutional conventions.

18. Broadly speaking, examples of 'good practice' include:

- the referendums held over devolution in the late 1990s – and outside government, the Scottish Constitutional Convention operating from the late 1980s - that helped develop and campaign for Scottish devolution;
- the extensive consultation processes that preceded the extension of devolution in Wales and Scotland in the following decade;
- the process for the development of a Bill of Rights for Northern Ireland, which was exemplary for its active public engagement, although it has not led to the introduction of a Bill of Rights;
- the wide national policy consultation in 2009 on a possible UK 'Bill of Rights and Responsibilities', including various public events – though the fall of the Labour government meant it was taken no further; and
- pre-legislative scrutiny by joint parliamentary committees, such as used for the Civil *Contingencies Act 2004* and what became the *Constitutional Reform and Governance Act 2010*.

19. Examples of bad practice include:

- the abolition in 1986 of the Greater London Council, without seeking direct approval from the population of Greater London;
- the failure to accompany the *Human Rights Act 1998* with a full public campaign to promote the rights embodied in the European Convention on Human Rights;

- the dilution of what became the *Freedom of Information Act 2000* during its development within government;

- the holding in 2003 of a multi-option vote on the future of the House of Lords, seemingly as a means of dividing supporters of change, rather than genuinely canvassing the views of the Commons;
- the initial announcement in 2003 *in a press release* of a programme that was intended to include the abolition of the office of Lord Chancellor and the establishment of a UK Supreme Court and Judicial Appointments Commission;
- the lack of public consultation or full pre-legislative scrutiny on the *Parliamentary Constituencies and Voting Act 2011* and the *Fixed-term Parliaments Bill*; and
- presenting the public with a choice between only two voting systems in the referendum to be held in May 2011.

How can the constitutional reform process be improved? What "good practice" principles could the Committee recommend in terms of the development of constitutional reform policy?

20. Key 'good practice' principles that can be identified from the above examples include:

- Ensuring that constitutional reform is based around broad interests and – as far as possible – consensus, rather than sectional advantage;
- Seeking genuine involvement from the public in the actual development of constitutional proposals; and
- Seeking full and meaningful engagement from both Houses of Parliament, using all available legislative processes.

How is constitutional reform undertaken in other countries? What can be learned from practice elsewhere in terms of good and bad practice?

21. Reflecting on constitutional reform practice internationally suggests that an important distinction needs to be drawn: between the *development* of proposals and measures for their *approval*.

22. The ways in which constitutional reform is *approved* is often contained in the text of a codified constitution, and involves practices of the sort set out in the answer to Question 1. The use of referendums may be seen as good democratic practice in that it secures wide public involvement in determining constitutional change that placing decisions in the hands of legislators does not, although referendums arguably do not always involve an informed decision being taken by the electorate.

23. The *development* of proposals may be confined predominantly to political and academic elites. The German federal reforms of 2006 were prepared by an expert group during the negotiations leading to the formation of the Grand Coalition the previous year; and published as an appendix to the coalition agreement. The substantial French constitutional reforms of 2008 were mainly based on research work carried out by a *comité des sages*

(expert committee).

24. However, there have been attempts to extend decisions about the packages that may be on offer beyond elite groups, which may be regarded as good democratic practice. They include:

- The referendum on electoral reform held in New Zealand in 1992, which involved citizens in determining the nature of a constitutional package. Voters were given a choice not only about whether they wanted to shift to a parliamentary electoral system other than first-past-the-post, but a range of options about which system they favoured. When the first referendum supported change and identified a favoured system, a second referendum was held on General Election day the following year, delivering a 'yes' vote for change, which was then implemented.
- The Citizens' Assembly, in British Columbia, Canada, which involved deliberation and decision-making responsibilities being handed over to members of the public. The Citizens' Assembly sat over 11 months in 2004. It was established to review and if necessary propose a replacement for the electoral system. The Assembly was established by the government of British Columbia (with the support of the legislature) which committed to holding a referendum on the recommendations of the Assembly. It was composed of 160 randomly selected citizens (a process known as sortition) with a basic quota of one man and one woman from each electoral district plus two aboriginal members.
- In the developing world, the consultation exercises carried out as part of the process leading to the South African constitution in the mid-1990s have been praised for their width and inclusiveness.

The development of constitutional reform proposals

Should the onus for proposing constitutional reform rest (solely) with the Government? What role should Parliament and/or outside bodies and individuals have in initiating proposals for change?

25. The idea of involving Parliament in initiating proposals for constitutional change relates to a broader issue of the legislature's lack of autonomy from the executive in the UK. It is a feature of the UK constitution that the executive is the dominant figure in a variety of areas, including determination of the constitution itself. The sharing of more constitutional authority by the executive would require the executive willingly to surrender some of its control, which it has generally proved reluctant to do.

26. Where Parliament (or the Commons) has clearly expressed a view on a particular non-statutory constitutional issue, the executive should acknowledge that it has done so, perhaps by including a reference in the Cabinet Manual. For instance, the Commons resolution on war powers of May 2007 should be noted in the Manual, with a statement by the

government as to whether it regards itself as bound by it, until such time as the Coalition government makes good its recent pledge to place the role of Parliament in armed conflict on a statutory basis.

27. The success of the Scottish Constitutional Convention in devising a model for Scottish devolution and campaigning for its implementation shows that a broad civil society movement can make a substantial contribution to constitutional change; and that such reform can be strengthened by its origins outside the elite.

28. There may be a case for arguing that a petition of a certain size compiled within a specific time-period could trigger formal consideration of a proposed constitutional change.

In what circumstances should constitutional proposals be set out in green or white papers?

29. In line with our general points about the significance of consultation, white papers should be a *minimum* requirement for constitutional change proposals, with a preference for green papers that leave options more open.

In what circumstances should constitutional proposals be subject to public consultation, such as via Citizens' Assemblies? What principles should apply and what form should such consultation take?

30. We would argue that there should be a practice of always using some form of active public engagement for constitutional proposals. A key principle to apply is that the consultation should be meaningful and able genuinely to influence the proposal under consideration.

31. The UK should have a clearly stipulated body of best practice for constitutional policy development. A minimum consultation period of 6 months (as opposed to the standard recommendation of 3 months) would be advisable. In addition some form of active public engagement would be obligatory, such as open consultation events or deliberative processes.

32. It should be noted that – because of the heavy reliance on convention in the UK settlement - significant constitutional developments can take place that do not involve legislation; and that heightened standards of consultation should be applied in these cases as well.

33. A current example of a non-legislative constitutional initiative is the production of the *Cabinet Manual*. It does not amount to a 'written' constitution for the UK, and purports not to be a 'driver' of change. But it is significant for a number of reasons, including its attempts to formulate certain previously more nebulous constitutional understandings; and the possibility it will be used in future judicial review proceedings. There are grounds for

claiming that a three-month consultation, taking in the Christmas period, was not sufficient for a document of such scope and importance.

Should the Government consult other parties when developing constitutional reform proposals? What importance should be attached to achieving cross-party consensus?

34. There should be a standard practice of directly consulting potentially interested parties early in the process. Potential targets of such consultation would be the devolved assemblies and executives, the Local Government Association and organisations such as the Electoral Commission. Such engagement is desirable from a democratic perspective; and likely to enhance the viability of intended changes.

35. Cross-party consensus is a desirable commodity for the achievement of constitutional reform. It can increase its chances of being implemented – for instance, in the case of the *Political Parties, Elections and Referendums Act 2000*; and of proving viable, as with the Belfast (or 'Good Friday') Agreement of 1998. A lack of cross-party consensus can make constitutional reform difficult – as can be seen with attempts to arrive at a viable settlement over party funding. However, the desire for consensus across parties should not effectively provide one party with a veto on future reform.

The role of Parliament

36. As we noted in paragraphs 9 and 10, the position of Parliament in relation to UK constitutional law is fundamental. Owing to the doctrine of Parliamentary sovereignty, there are grounds to doubt how far it would be possible to establish legal entrenchment. Adherence to this viewpoint may lead to the conclusion that Parliament cannot – or perhaps should not – introduce rules that restrict its future ability to pass legislation.

37. Any consideration of attempts to regulate the way in which Parliament produces legislation must acknowledge that this area is both controversial and theoretically complex. Generally speaking, amongst those who subscribe to the doctrine of parliamentary sovereignty, it is often held that stipulations as to the 'manner and form' in which Parliament legislates are more acceptable than regulations which restrain Parliament in the substance of the legislation it may produce, or make it difficult for it to legislate at all.[13] Any attempt to entrench 'constitutional' legislation runs the risk of being deemed to have gone beyond being a 'manner and form' restraint, and therefore being illegitimate. It is also uncertain whether any legislation setting out special procedures for constitutional legislation could protect itself from amendment or repeal by Parliament on simple majority votes.

[13] See eg: Goldsworthy, Jeffrey (2010) *Parliamentary Sovereignty: Contemporary Debates*, Cambridge: Cambridge University Press, pp.174-201.

38. With these limitations in mind, and assuming a serious attempt to test the traditional doctrine of parliamentary sovereignty in this area is not an immediate proposition, there are some possible options for helping to ensure 'special treatment' for constitutional law in the UK Parliament. These options would go beyond that provided for by the existing 'first class' convention; and to ensure that the policy formation that preceded it was conducted in a democratically appropriate fashion.

39. One approach, although a considerable undertaking and subject to 'manner and form'-related questions, would be for an Act of Parliament identifying the key clauses of the UK constitution as contained in various statutes and attaching special entrenchment provisions (super-majorities, or perhaps more plausibly referendums) to key clauses of UK constitutional law; and perhaps prescribing appropriate heightened forms of parliamentary and other consultation preceding any changes to these clauses.

40. As already noted, even if an Act of this sort might seek to entrench certain clauses, it might not be itself be *formally* entrenched in a way that was effective. However it might be *informally* entrenched by such means as an all-party agreement, un-whipped parliamentary votes, or even a referendum. Possibly the House of Lords could be given the ability to veto changes to this Act, perhaps through amendment to the Parliament acts. The Constitution Committee could have a role in guiding the Lords in its exercise of this function. Another, possibly more straightforward, legislative option would be for the House of Lords might be given, again through amendment to the Parliament acts, the simply ability to veto changes to a set of clauses in legislation that were identified as fundamental components of the UK constitution.

41. A non-legislative route could involve a resolution of both Houses, supported by the government, possibly for subsequent inclusion in the *Ministerial Code* or *Cabinet Manual* when finalised, setting out the principles that should be applied in ascertaining whether a law was 'constitutional'; and requiring that the government make such legislation available in draft form for pre-legislative scrutiny in every case; and possibly stipulating entrenchment methods.

What role should Parliament play in the scrutiny of constitutional reform proposals?

42. The convention of committing 'first class' bills to a committee of the whole House (of Commons) is now insufficient. Pre- and post-legislative scrutiny, and a public reading stage should be standard for all constitutional reform bills. The government should cooperate with such processes, including through making bills available in draft at an early stage.

Can constitutional legislation be defined? Should its consideration differ from that pertaining to other legislation?

43. We highlighted the general difficulty of defining UK constitutional legislation in paragraph 8. An examination of the possibility of applying the label 'constitutional' to existing statute helps illustrate the nature of the problem.

44. There may be general agreement that some laws, such as the Parliament acts, are 'constitutional'; and that any law which amended them in future should also be considered 'constitutional'. But for other legislation there might be less agreement; as we have noted, there is little agreement about which Bills are of 'first class constitutional importance' and therefore merit consideration by a committee of the whole House (of Commons).

45. It is curious, for instance, that legislation such as what became the *Freedom of Information Act 2000* were not classified as 'first class'. Were other procedures beyond this convention to be introduced, it is likely there would continue to be disagreements about definitions, including whether legislation should be classed as constitutional, and if so, how important it was compared to other constitutional law.

46. Such arguments are difficult to resolve, since there is no one standard international model for which issues should be considered 'constitutional'. The only way to ensure it would be possible to settle whether or not any given law was constitutional would be to codify the UK constitution. Were an attempt made to identify an existing body of constitutional law in the UK with a view to making it subject to special amendment procedures, a further problem would arise. Within individual acts of Parliament, there may well be individual clauses that would be deemed 'constitutional', and others that would not.

47. For instance, the *Representation of the People Act 1983* contains provision for adult suffrage – surely 'constitutional' – but also for more detailed voter registration issues, which should not be regarded as in the same category as the delineation of the franchise. Should changes to any part of these acts be considered 'constitutional', or just changes to particular clauses within them? Once again, a codification exercise could be useful for resolving this problem, since it might serve to distil the core values of the UK settlement, separating them from the more minor issues.

Should constitutional reform proposals be subject to parliamentary pre-legislative scrutiny?

48. As stated in paragraph 42 above, pre-legislative scrutiny should be an essential part of constitutional reform legislation.

Post-legislative scrutiny

Is the post-legislative scrutiny model set out by the then Government in March 2008 a sufficiently robust process for both the Government and Parliament to scrutinise constitutional reform legislation effectively?

49. The model set out in March 2008 appears to envisage that initially the government would identify those acts which might be appropriate for post-legislative scrutiny. It might be that all acts identified specifically as constitutional reform proposals by a select committee in either House should automatically be deemed appropriate for this scrutiny, without the need for the government to classify it as such. It would then seem appropriate to establish a joint committee to conduct the post-legislative process, including members from various relevant parliamentary committees, to be determined by the particular issues involved.

Dr Andrew Blick, Senior Research Fellow
Dr Stuart Wilks-Heeg, Executive Director

30 March 2011

Memorandum by Hansard Society (CRP 12)

- Defining what is and what is not constitutional legislation is fraught with difficulty as the Committee found during its last investigation of this issue nearly a decade ago. Bills of first class constitutional significance would in most instances include, for example, reforms affecting the:
    - political and geographical entity of the UK (e.g. devolution legislation, local government structure);
    - the structure, operation and powers of Parliament and Crown (e.g. prerogative powers, emergency powers, bill of rights)
    - running of elections, changes to the franchise or the holding of referendums;
    - remit and structure of the courts (e.g. human rights);
    - UK's role in relation to international institutions (e.g. EU treaties)
- However, there are bills that do not appear to deal with constitutional issues but contain within them issues and questions of constitutional significance: for example, in the last decade, the Control Order provisions in the 2005 Prevention of Terrorism Act, the Freedom of Information Act, and the granting of independence to the Bank of England. To seek to establish special processes and procedures for parliamentary consideration of 'constitutional bills' would exclude these bills from such consideration.
- At present the only procedural difference for constitutional bills is that they are heard by a 'Committee of the Whole House' in the House of Commons. However, not all 'first-class' constitutional bills are necessarily controversial and therefore do not always need to be considered on the floor of the House, taking up valuable time in the Chamber. Conversely, bills that are not deemed to be constitutional legislation but contain within them important and possibly highly controversial constitutional implications do not receive such consideration by the whole House when perhaps the importance of their contents better deserves such consideration. Scrutiny in the

Chamber also means that there is no role for consultation of experts and members of the public at committee stage unlike the usual Public Bill Committee format in the Commons. Time on the floor can sometimes be more readily controlled by the executive than in committee, and often debate can amount to a continuation of second reading consideration of principles rather than detailed line by line examination of the legislation and proposed amendments. A more flexible, split committal approach to bills, would therefore be a more constructive approach.

- We have previously recommended split committal of bills in the House of Lords as well (our evidence to the House of Lords Leaders Group on Reform of Working Practices). The advantage of consideration by the whole House is that all members can participate in the debate. However, there is no reason why, under a new split committal process, although only committee members would retain the right to vote in Grand Committee, all other members who wish to do so might attend and speak during the debates.
- The problems associated with consideration of constitutional bills by Parliament in recent years are largely the same as those for other types of legislation: for example, inadequate consultation; weaknesses in supporting documentation and information (e.g. Impact Assessments and Explanatory Notes); large omnibus and 'Christmas Tree' bills on which hang many, often unrelated, provisions; hasty drafting; lack of pre-legislative scrutiny; Commons programming resulting in many clauses not being properly scrutinised; late amendments often at Commons report stage; increased use of delegated legislation particularly Henry VIII clauses; and lack of post-legislative consideration.
- Parliament is judged, to a significant degree, by the quality of law it produces. Parliamentarians at Westminster must therefore give serious consideration to how long they will continue to do the 'heavy lifting' to improve legislation given the inadequate tools and resources currently at their disposal. As Sir George Young MP said in a lecture to the Hansard Society in March 2010, it is absurd to expect Parliament 'to take the hit for inadequate preparation in Whitehall'.[14] It needs to more strongly assert itself in relation to the executive in order to renew its relevance and legitimacy in the law-making process. If parliamentarians are serious about checking the duplication of law and the growth of the statute book they must be both more imaginative and muscular in asserting their role and function vis-à-vis the executive.
- Rather than focusing on special procedures for constitutional bills it would be better if Parliament, ideally on a bi-cameral basis, were to seek to raise the bar with regard to the consideration and treatment of all legislation. The terms of political engagement between Whitehall and Westminster at present require that Parliament consider whatever legislation the government sends them, whenever they send it, and regardless of the condition in which it is sent. This is a certain recipe for the continued receipt of poorly prepared bills and therefore the production of defective

[14] Sir George Young MP, 'Parliamentary Reform: The Conservative Perspective' lecture delivered on 18 March 2010, in Hansard Society (2010), *The Reform Challenge – Perspectives on Parliament: Past, Present and Future* (London: Hansard Society), p.52.

laws, constitutional or otherwise. Parliament should be a more equal partner in the legislative process.

- What is needed is agreement – by Parliament and Government – to common standards of legislative consultation, preparation and scrutiny. The Cabinet's Parliamentary Business and Legislation Committee (PB Committee, formerly known as the L Committee) does not adequately perform a checking and restraining function with regard to deficient legislation. Its safeguards appear to be regularly bypassed for short-term political advantage.
- A gateway **Legislative Standards Committee** should be established, ideally on a bi-cameral basis, to assess bills against a set of minimum technical preparation standards that all bills should be required to meet before introduction is permitted.[15] The committee should agree those standards – narrow, tightly drawn, objective qualifying criteria that establish a minimum threshold for bill preparation – in consultation with the government.
    - Before legislation is presented to the Committee the relevant departmental Secretary of State or the Leader of the House should be required to certify that they believe the bill does indeed meet those qualifying standards.
    - The Committee should then judge the bill according to the agreed criteria, assessing the legislation purely on the basis of whether the legislative standards of bill preparation have been met, NOT whether they believe the policy objectives are likely to be realised or whether the principles and policies enshrined in the legislation are appropriate.
    - The Legislative Standards Committee would have the option to call ministers to appear before it to account for their department's preparation of the bill. It would then submit a report setting out its recommendations before second reading and it would be for the relevant House to decide whether or not to defer a bill if the preparation criteria are deemed by the Committee not to have been met. In some instances the House may decide to proceed with the bill despite the Committee's concerns: but in these instances the decision will lie with the House and it will have taken the decision in an informed manner.
- As part of this pre-introduction process, Parliament should also require more detailed information from government regarding the bill, as is required, for example, in the Scottish Parliament. At present, impact assessments on equality, competition, and a range of environmental, health and human rights are all required. In addition, we suggest that a new Legislative Impact Assessment should also be demanded by Parliament. This would include a history of past legislation in the area; make clear that the powers requested do not already exist in statute; identify where shortcomings exist and need to be rectified and confirm that these can only be dealt with by new, additional legislation as opposed to other governmental action; and evaluate whether and when consolidation may be required. It should also call the government to account for any delegated legislation proposals – including Henry VIII powers – set out in the bill.

[15] See R. Fox & M. Korris (2010), *Making Better Law: Reform of the legislative process from policy to Act*, (London: Hansard Society) for further information.

- The combined existence of the Committee, coupled with agreed minimum standards for legislative preparation which ministers would have to certify had been met when submitting a bill, should provide, over time, an important restraining influence on government and thereby help to improve legislation and better rebalance the relationship between the executive and Parliament.

30 March 2011

Table by Professor Robert Hazell, Constitution Unit, UCL (CRP 16)

Processes applied to Constitutional Legislation

Constitutional Legislation	Manifesto Commitment	Expert Commission	Constitutional Convention	Cross-Party Talks	Green Paper	White Paper	Referendum	Select Committee or Pre-Legislative Scrutiny	Parliamentary Debate (hours)
Parliament Act 1911	••		•						241
Representation of the People Act 1918				•					299
Government of Ireland Act 1920	•								141
Parliament Act 1949	•			•					50
Life Peerages Act 1958	•			•					38
Peerage Act 1963								•	20
Parliament (No.2) Bill 1968-69	•			•		•			85
European Communities Act 1972	•					••••		••	286
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Memorandum by Dr Alexandra Kelso, University of Southampton (CRP8)

Contested Constitutional Politics

The UK constitution is an essentially *contested* construct, and consequently debates over its reform are frequently heated and passionately argued. **The processes surrounding constitutional change are also hotly contested.** The absence of a clear blueprint for precisely *how* those processes should be conducted is one of the central compelling questions in contemporary UK politics.

The current government's proposals and actions on constitutional change are extensive and have far-reaching consequences. They include creating fixed term parliaments, reforming the electoral system, reducing the size of the House of Commons, introducing the power of recall, and reforming the House of Lords. These reforms, taken together, demonstrate the centrality of our constitutional arrangements in determining how political power is secured, how it is utilised, and the extent to which it might be constrained.

The broad scope of constitutional reform attempted and implemented in recent times demonstrates one key point: **there is no single, 'special' procedure in place for enacting constitutional change in the UK**. The only obvious precondition that must be satisfied in order to secure significant constitutional reform is that the government is able to get parliamentary approval for its proposals.

Referendums and Constitutional Change

To the extent that there are 'special' constitutional measures in place, these are applied at the discretion of the government, and in a decidedly non-uniform manner. However, there may well now be a case for saying that major constitutional change is now in practice dependent on public approval in a referendum.

Yet this leaves the question of what is considered 'major' constitutional change in the hands of government. No referendums have been proposed in relation to fixing the length of parliament or significantly reducing the number of MPs, both arguably major constitutional issues. Yet, the coalition government has promised, via the current European Union Bill, that any significant transfer of power to the EU must be approved in a referendum.

A key question for consideration is the extent to which a referendum is both a *necessary* and a *sufficient* condition for legitimating constitutional change. Its current status is possibly that of a necessary condition (depending on how we define 'major' change). But it is far from clear that is also sufficient.

That it is not sufficient is illustrated by the process of constitutional change surrounding the Parliamentary Voting System and Constituency Act 2011. The referendum scheduled for 5 May 2011 will determine whether there is popular support for changing the electoral system used for UK general elections from Single Member Plurality to the Alternative Vote.

However, this major piece of constitutional change secured legislative approval in the absence of wide-ranging consultation and scrutiny, and within an almost comically hasty timeframe, as noted by the Political and Constitutional Change Select Committee (HC 437, 2010-11). The closed nature of the legislative decision-making process with respect to this bill illustrates how political elites can so easily determine constitutional directions. Public participation comes at the end of the process, through the referendum, rather than at the start in terms of shaping the contours of the debate itself.

This raises important questions. **Is constitutional policy making in the UK a necessarily elite activity, largely involving only politicians and experts? Or should future processes of constitutional change seek to institute new mechanisms and strategies designed to foster broader public involvement?**

Possibilities for Participation

Part of the reason why popular participation in constitutional matters is restricted to, at best, making Yes/No decisions in referendums is because of common assumptions that such issues are simply too complex for most people to understand. Yet this is not the case.

One of the most commonly cited examples of successful participation in decision making is that of the **British Columbia Citizens' Assembly on Electoral Reform** created in 2004, which has been extensively studied by those interested in democratic participation.

This Citizens' Assembly brought together 160 randomly chosen members of the public, who spent eleven months examining electoral systems around the world, and who were charged with making a single recommendation for electoral reform which would then be put to the British Columbia electorate. The subsequent narrow failure of the referendum to secure the required turnout threshold should not obscure the utility of the experiment in demonstrating that not all proposals for constitutional change must necessarily emanate from the government.

Even if a model of the sort adopted in British Columbia proved unpalatable, the fact remains that **processes of constitutional change must expand beyond political and expert elites**. **Constitutional *leadership* may well belong to those who exercise political power, but constitutional *participation* must mean more than turning up to vote in a referendum.**

What might enhanced public participation look like and what would it involve?

First, we should jettison the notion that just because we cannot interest *everyone* in these issues, means we should not try to interest *anyone*. The British Columbia model relied on representative structures invested in non-politicians, and in so doing succeeded in overcoming the cynicism barrier often thrown up the public whenever a politician speaks to an issue.

Constitutional Forums

At the very least, we should consider whether **a specified and extended period of consultation should precede all major processes of constitutional change**. This would in part ensure there is sufficient time for the usual expert and specialist input into legislative/technical proposals. But, if properly designed, **it could also institutionalise processes of public discourse and debate on these major questions.**

This could take many forms. One option involves the creation of a series of **Constitutional Forums**, both physically and online. Members would be chosen randomly, in the style of the British Columbia Citizen's Assembly. These Constitutional Forums would then be exposed to information about the constitutional issue under review, and, through discussion aided by professional facilitators, produce recommendations to the government. These recommendations would come in advance of any legislation and would be advisory, as is all information solicited by government.

The creation of such Constitutional Forums would ensure that the participation of the general public is not restricted to the end of the constitutional reform process by means of a referendum vote (where one is given), and thus make it possible for constitutional policy-making to be influenced at the start when the terms of the debate are still being drawn.

There would of course be much to flesh-out in terms of detail, and I have not gone into specifics in this paper. Such an innovation is not in keeping with the 'British' way of doing constitutional politics. And it would take committed organisation and resources to maximise the chances of adding something meaningful to the process.

Yet we hear much talk about the need for a 'new politics' and to restore the public's trust. If this is to be anything more than just talk, then we need to start thinking far more innovatively about how we enable the public to influence processes of constitutional reform right from the start. Perhaps the time has come to take some risks and think of trying something new.

30 March 2011

Memorandum by the Law Society of England and Wales (CRP 17)

Introduction

This is the Law Society's response to the call for evidence on the constitutional reform process issued by the House of Lords Constitution Committee.

The Law Society is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others. It welcomes the opportunity to respond to this consultation paper.

Overview

Our response to this section encompasses questions 1-4 of the call for evidence.

Should constitutional laws be considered to have a special character such that constitutional law-making is given special treatment? Should the Government apply particular procedures to constitutional policy-making? If so, what should these be?

In principle, the Law Society would support procedures designed to provide additional scrutiny to constitutional law-making, particularly at the pre-legislative and legislative stages.

In a very real sense, the constitution rests heavily on the relationship and mutual respect between the arms of government (the executive, the judiciary and Parliament). As discussed below, there have in recent years been instances where the absence of effective checks and balances on constitutional reform has led to clashes between these arms and the potential for damage to the comity that exists between them, and thus to the fabric of the constitution itself.

The courts have for some time recognised constitutional law to have a special character – for example, constitutional statutes containing principles encompassing aspects of the rule of law may not be impliedly repealed[16]. It would be a logical corollary to have a similar recognition of this special character by Parliament and government through additional scrutiny procedures; provided such procedures were effective, they would go some way to mitigating the risk of further confrontation between arms of government.

How would you characterise the constitutional reform process in the UK? What are its strengths and weaknesses? Has the process changed in recent years?

Traditionally, the constitution has evolved slowly and organically over time. The Society notes however Lord Woolf's observations that the trend of constitutional development was broken during the previous government, referring in particular to the removal of hereditary peers, devolution, the incorporation of the European Convention of Human Rights and the creation of a unified courts administration and noting that "little attention has been paid to their cumulative effect[17]". The concern he expresses is that of ensuring

[16] *Thoburn v Sunderland City Council* [2002] 3 WLR 247

[17] Lord Woolf "The Rule of Law and a Change in the Constitution" (Cambridge Law Journal, March 2004)

those concerned are "retaining or replacing the checks upon which, in the past, the delicate balance of our constitution has depended".

In general terms, the Society would endorse the view that in light of such recent changes, constitutional reform requires a more structured and holistic approach than is presently available.

How would you assess the varying processes by which successive governments have conceived and developed proposals for constitutional reform? What case studies would you cite as examples of good and bad practice? How can the constitutional reform process be improved? What "good practice" principles could the Committee recommend in terms of the development of constitutional reform policy?

Wide and meaningful consultation is extremely important consideration, and consultation of the judiciary and legal professions is a particularly significant concern.

Consideration of constitutional principles often involves controversial and emotive issues (prisoners' voting rights providing one example), which can open judicial decisions up to intense public scrutiny. Successive governments have not been shy in expressing vocal criticism where they disagree with the courts' balancing of constitutional principles in such cases, placing great pressure on the relationship between these two arms of government. Early engagement with the judiciary who apply constitutional principles in practice (and indeed the legal professions who will be working with them) may assist in preventing confrontation and provide a better forum for constitutional reform.

The Asylum and Immigration (Treatment of Claimants, etc) Bill 2003/04 provides an example of why the process requires improvement. The Bill originally proposed an ouster clause which sought to preclude the decisions of the asylum and immigrations tribunals from judicial review by the ordinary courts. In considering the constitutional Impact of the Bill, the House of Commons Constitutional Affairs Committee[18] noted in particular Michael Fordham's submission – that the exclusion of judicial review "strikes at a constitutional right [access to law], but furthermore at a constitutional protection [judicial review] supported by a constitutional imperative', namely the rule of law". The clause was eventually removed before the Bill was passed but only after the strongly worded Constitutional Affairs Committee Report was published and furthermore after extensive protest by the judiciary through both private and public channels[19].

The judiciary is often both unwilling (on the basis of maintaining independence) and ill-equipped to engage in fractious public debate regarding legislative proposals; that they have in the past done so regarding constitutional matters indicates a judgement that the

[18] House of Commons Constitutional Affairs Committee, Second Report Session 2003-04

[19] See note 2. Also, Lord Bingham speech "The Rule of Law" (Cambridge, March 2004)

harm to the constitution and the rule of law posed by such proposals is greater than the potential harm that confrontation on the issue might cause. Similar views (specifically on the concept of ouster clauses) have been expressed by the judiciary in case law[20] (albeit *obiter dicta*).

These instances reflect a failure of the existing processes to address areas of potential constitutional conflict before the risk of confrontation and thus harm arises. In this context, the Law Society would in principle support the use of good practice principles regarding constitutional law reform, in particular, enhanced pre-legislative consultation and scrutiny.

The development of constitutional reform proposals

Our response to this section encompasses questions 6, 7 and 9 of the call for evidence.

Should the onus for proposing constitutional reform rest (solely) with the Government? What role should Parliament and/or outside bodies and individuals have in initiating proposals for change?

The Law Society would in principle support measures designed to enhance Parliament's ability to propose constitutional reform. There are a variety of reasons why Government is not always the best party to initiate constitutional reform, often related but not limited to political expediency or preoccupation with more immediate concerns. In practical terms however, it is difficult to see how constitutional reform could progress past initial proposal without at least the tacit support of the Government; it could however be that allowing Parliament a greater role in the initiation process could assist in overcoming the inherent inertia and conservatism that a Government might present and thus get particular proposals for reform "on the agenda".

The Society would be cautious regarding any proposal to extend a formal process of initiating reform by external bodies, outside of the normal lobbying and petitioning processes. Constitutional reform is necessarily a detailed and involved process for which Parliament has the correct apparatus for initiating and considering. Drawing initiation of reform wider than Parliament carries with it the risk of allowing transient or knee jerk public opinion to dictate the terms of what should be a carefully considered process.

In what circumstances should constitutional proposals be set out in green or white papers?

As stated previously, the Law Society considers public consultation to be a key requirement and cornerstone of good practice in constitutional reform.

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[20] See judgments of Lord Steyn at 102 and Lady Hale at 159 in *R. (on the application of Jackson) v Attorney General* [2005] UKHL 56

However, it is presently not uncommon for green and white papers to be issued when fundamental elements of policy have already been effectively decided and settled within government; in these instances, consultation may effectively relate to seeking the best implementation for a given policy, rather than to the policy itself.

The key point here is that consultation must be meaningful; if green and white papers continue to be used primarily in the way described, then it would only be appropriate for constitutional proposals to be set out in them if there had been ample consultation on the policy behind the proposals beforehand.

Should the Government consult other parties when developing constitutional reform proposals? What importance should be attached to achieving cross-party consensus?

Cross-party consensus is a powerful check against governments pursuing party-political or simply populist changes to the constitution. Achieving consensus should not however be the only such check (consultation and committee scrutiny providing others); in practice, opposition leadership is equally vulnerable to pursuing 'quick-fix' or populist policies that may not reflect the best long-term interests of constitutional integrity. The constitutional reform process should minimise the risk and enticement of parties using reform for tactical advantage or political point-scoring.

The role of Parliament

Our response to this section encompasses questions 10-12 of the call for evidence.

What role should Parliament play in the scrutiny of constitutional reform proposals?

Parliament should have an integral and developed role in scrutinising constitutional reform proposals.

Can constitutional legislation be defined? Should its consideration differ from that pertaining to other legislation?

There is great difficulty in providing a definitive rule to determine the quality of legislation as constitutional or otherwise; in order to afford the protection intended to a concept as pervasive yet multi-faceted as the constitution, such a rule might have to be drawn wide. However, the wider the rule is drawn, the less certainty it provides.

The definition given by Laws LJ in *Thoburn* simply shifts the debate to determining the definition of what classifies as a fundamental constitutional right:

> *"In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a)*

and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). [21]"

The debate over the extent and definition of both terms is beyond the scope of this brief response. More so than any other consideration, determining how constitutional legislation should be defined should be the focus of any substantive proposals for modification of the existing constitutional reform process, and the Society would consider the matter as meriting separate and detailed consultation.

Should constitutional reform proposals be subject to parliamentary pre-legislative scrutiny?

Yes, the Law Society would in principle strongly support such a requirement.

March 2011

Letter from the Law Society of Scotland (CRP 9)

The Law Society of Scotland has a keen interest in the process of constitutional reform and over the past decade has commented on a number of measures which affect the constitution including the Scotland Act 1998, the Human Rights Acts 1998, the Constitutional Reform Act 2005, the Legal Services Act 2007, the European Union (Amendment) Act 2008, the Constitutional Reform and Governance Act 2010 and, most recently, the Parliamentary Voting System and Constituencies Act 2011, the Fixed-term Parliaments Bill and the current Scotland Bill which is waiting for its Report Stage in the House of Commons.

In the light of this engagement with the process of reform of the constitution within the UK, the Society has a number of comments to make on the questions raised by the Committee.

The fact that there is no single constitutional document for the United Kingdom or for the constituent parts of the United Kingdom which can be identified as a constitution, may make it difficult to identify what are "constitutional laws". Dicey's introduction to the study of the law of the constitution stated that "constitutional law… appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state". This description of constitutional law is not however a definition. Some aspects of human rights law are looked upon as matters of fundamental or constitutional right in the context of the growing area of public law.

In "English Public Law" edited by Professor David Feldman, constitutional law is identified as concerning "the distribution of powers between the branches of Government, the general principles governing their relationships and those guaranteeing the fundamental rights of citizens" (Para. 1.07).

Traditionally the view has been taken that there is no strict differentiation between

[21] See footnote 1.

"constitutional" and "ordinary" law albeit there has been reference more recently to 'constitutional statutes' in cases such as Thoburn v Sunderland City Council [2002] 1 CMLR 50 and indeed in Scottish cases dealing with the devolution settlement such as Somerville v Scottish Ministers [2007] UKHL44. The question as to whether constitutional law should be considered to have a special character such that constitutional law is given special treatment, immediately raises the question as to what constitutes a "constitutional law"`. If the category of "constitutional law" can be properly fixed, then there should be no reason why such "constitutional laws" should not be given special treatment in the law making process. Whether they can feasibly be entrenched is another matter – given the constitutional theory of the sovereignty of Parliament and that one Parliament cannot bind a successor Parliament.

Accordingly, subject to the issue of identification, the nature of change to constitutional law is that it affects the relationship between the state and the citizen and Government should recognise that concept at the heart of law making in this area.

This leads to certain conclusions about how change may be made and which principles should apply to constitutional change. The Consultative Steering Group on the Scottish Parliament identified four key principles to guide their work in establishing the way in which the Scottish Parliament should function. These included:-

1. power sharing between the people, the legislators and the Government;

2. accountability by the Government to Parliament and by Parliament and Government to the people;

3. that Parliament should be accessible, open, responsive and participative; and

4. that Parliament should recognise the need to promote equal opportunities for all.

These principles applied to constitutional policy making would infer:-

a) broad consultation prior to introduction of constitutional law measures to ensure that those affected share vision of the constitution put forward by policy makers;

b) accountability of Government and Parliament to the electorate for the changes which are proposed;

c) Openess to debate proposed constitutional change; and

d) Ensuring that changes affect all those affected equally.

In terms of Parliamentary process, this should mean that constitutional law measures should be subject to:-

a) proper and sufficient prelegislative consultation;

b) adequate timetabling to provide appropriate scrutiny;

c) the public bill procedure as adopted in the House of Commons so that witnesses

drawn from the community can express their views about the legislation;

d) both Houses of Parliament being fully engaged in the law making process and that a Joint Committee of both Houses on Constitutional Bills should report to both Houses on the findings which it has reached;

e) adequate time being allowed to debate the legislation and that it should not be subject to either guillotine or timetabling unless the Joint Committee has agreed that; and

f) proper post-legislative review.

The Society would characterise the constitutional reform process in the UK as one of immense change. In the past decade, constitutional law, which was a relatively quiet area, has become a central hub as respects legislative change and development through case law.

The bills to which I referred in paragraph one of this letter are only those in which the Society has taken a particular interest but other bills affecting constitutional aspects in the areas of immigration, asylum, employment and equality law all have had substantial impact on the relationship between the citizen and the state. In terms of legislation in the Scottish Parliament, the issue of competence (or constitutionality) is a matter of prime importance which is considered in connection with every bill.

The principal strengths of the current system are that it can achieve substantial constitutional change (provided political will is available) and that constitutional change can be brought forward and implemented with security and stability. The weaknesses are that policy development can be less than transparent, that legislation receives inadequate scrutiny or that changes are made which do not reflect the settled will of those whom the legislation affects.

There have been some recent developments in relation to constitutional law measures such as the Parliamentary Voting System and Constituencies Bill, the Fixed-term Parliaments Bill and the Scotland Bill which merit discussion. All were introduced without preintroduction scrutiny or consultation on the bill and without receiving the benefit of scrutiny by a joint select committee of both Houses. That lack of preintroduction consultation or joint committee scrutiny has a consequential impact on the Parliamentary process.

The constitutional reform process can be improved by adoption of clear principles for consultation and Parliamentary scrutiny.

There is a role for Parliament and for outside bodies and individuals in initiating proposals for change, for example the Scottish Constitutional Convention was a significant innovation which promoted devolution for Scotland prior to the introduction of the Scotland Bill in 1998. There is clearly a role in an active participatory democracy for organisations and individuals in civic society to make reasoned proposals for change.

The Government should set out all constitutional law proposals in either Green or White

Papers and provide adequate opportunity for these to be consulted upon. These proposals ought to be subject to public consultation and consultation should be designed to obtain a broad base of views from a wide range of people.

In that connection, the Government should develop constitutional reform proposals in concert with other political parties. Changes to the law relating to the creation of a Supreme Court and the abolition of the Office of Lord Chancellor, reform of the House of Lords and Fixed Term Parliaments or the Parliamentary Voting System all would have benefitted from greater consensus building and less partisan exchange.

Constitutional measures should not be subject to strict timetabling or programme motions which might impinge on adequate scrutiny.

Parliament has a supreme role to play in the scrutiny of constitutional reform proposals. This role is however not limited to Parliament and Parliament should consider the views of the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly when contemplating constitutional change. These elected bodies are required to work within a legal structure which gives them a unique perspective on constitutional change which derives from their status and experience. A good example of engagement in relation to constitutional change has been the recent consideration by the Scottish Parliament of the current Scotland Bill where a committee of the Parliament examined the Bill and issued a report prior to the Bill concluding its Committee Stage in the House of Commons.

31 March 2011

Memorandum by Mark Ryan, Coventry University (CRP 4)

1. My name is Mark Ryan and I am a Senior Lecturer in Constitutional and Administrative Law at Coventry University and I have a particular interest in constitutional reform. My submission, however, is made in my personal capacity and indicates my personal observations on the process of constitutional reform and it in no way reflects the views of my employer (Coventry University).

2. Question 1: Constitutional laws, owing to their fundamental importance (at least morally, even if not from a strictly legally perspective), should be considered to comprise a special character. As a result, the law-making process for constitutional legislation should be different from that used for non-constitutional (i.e. non-fundamental) laws. In essence, the process used to enact constitutional laws should be more rigorous, deliberative and consultative than for other 'ordinary' laws. In addition, programme motions should not be applied to constitutional Bills and neither should they be subject to the vagaries of the scramble of the 'wash up' at the end of a parliamentary term (it is rather unfortunate that the recent Constitutional Reform and Governance Bill endured both).

3. Question 2: In the absence of a codified constitution stipulating a special procedure which must be complied with in order to make constitutional amendments, the constitutional reform process in the United Kingdom can be described as *ad hoc* and highly fluid. Furthermore, our constitutional reforms are typically modelled, driven and controlled by the Government of the day. The flexibility of our constitutional reform process (in the absence

of any legal obstacles such as legislative supermajorities or national referendums) is, paradoxically, both the strength and the weakness of our constitution: On the one hand, the constitution can respond positively and efficiently to important events (e.g. the implementation of devolution in Northern Ireland on a cross-party basis following the *Good Friday Agreement*). On the other hand, however, it allows legislation to be passed far too easily without sufficient foresight (e.g. the expeditious passage of the Parliamentary Standards Act 2009 which was then amended shortly afterwards).

4. Question 3: In terms of good practice regarding the overall coherence of legislative measures, the Constitutional Reform Act 2005 can be usefully contrasted with that of the Constitutional Reform and Governance Act 2010. Whereas the former exhibited a general overall theme of realigning the British Constitution in line with a purer separation of powers (i.e., the separation of the Law Lords from the Legislature, the reform of the judicial appointment process and the diminution of the powers of the Lord Chancellor), in contrast, the Constitutional Reform and Governance Act 2010 lacked any such overarching constitutional theme. Instead it was simply a repository for a disparate collection of constitutional reforms which had no real connection to each other.

5. Question 4: Good practice should include the following:

- Wide and meaningful consultation with the public.
- Wide consultation with appropriate expertise and interested parties/organisations.
- An appreciation as to how the proposed reform would fit within the context of our constitutional arrangements. It must be remembered that constitutional reforms cannot be forged in a vacuum oblivious to their secondary effects reverberating elsewhere in the constitution.
- Proposed reforms should be encapsulated in a White Paper (and preferably preceded by a Green Paper as well).
- A draft Bill should be published so that it can be subject to pre-legislative scrutiny.
- Post-legislative scrutiny should be much more rigorous in order to ascertain the effects (unintended or otherwise) of constitutional legislation and to learn any lessons therefrom.

6. Question 5: The lesson to be learned from other countries is that, ideally, amending the constitution *should* be a difficult exercise which requires careful and measured deliberation on the basis of a general consensus (both in and outside of the Legislature).

7. Question 6: It is a maxim of the British Constitution that the constitution does not belong to any one political party (let alone one in Government), and Parliament should be more proactive in respect of constitutional reform proposals - at present it merely reacts to proposals drafted and placed before it by the Executive. In any event, more provision should be made for constitutional reform measures to be initiated by outside bodies and individuals. In short, constitutional reform should be less Westminster-centric (and in reality, less Executive-centric) than at present.

8. Question 7: Major constitutional reforms should, at the very least, be encapsulated within a White Paper so that these proposals can be influenced (and hopefully improved) by the widest possible audience.

9. Question 8: It was Professor Bogdanor who has commented that the British Constitution knows nothing of the British people. This is an unfortunate truism and constitutional reform proposals should be subject to public consultation and one way of achieving this is via Citizens' Assemblies. If Citizens' Assemblies are to be convened, to be meaningful, they must involve a significant number of members of the public. In any case, they should certainly be much more expansive than the *Governance of Britain* town hall events which took place in 2008 (Hansard, HC Vol 487, 3 Feb WA col 1170W). Other ways to engage the public would be through comprehensive opinion polls which cover the entire United Kingdom (it is, after all, technically the constitution of *the United Kingdom*). In fact such polls are surprisingly inexpensive to conduct given the data that they can supply. A more radical suggestion is for periodic referendums to be held on major constitutional issues (a mechanism used in a number of other countries for approving and legitimising constitutional reforms). Indeed, a precedent (albeit political) has now been set for itself by Parliament - for good or ill - by virtue of section 1 of the Parliamentary Voting System and Constituencies Act 2011. Once the principle of such referendums is conceded, it may be difficult to resist calls for future ones on other more significant constitutional matters (e.g. completing the reform of the House of Lords).

10. Question 9: Although it is unrealistic to expect complete unity on matters of constitutional reform, because of their fundamental nature, ideally there should be as much agreement and consensus (both inside and outside Parliament) on a cross-party basis as possible. Moreover, this cross-party support should also embrace the independent cross-bench element extant in the House of Lords.

11. Question 10: Parliament should play a much more dominant role *vis- a- vis* the Government in respect of constitutional reform legislation. Unfortunately, Parliament's scrutinising function is somewhat diluted by the Executive's dominance of the House of Commons.

12. Question 11: Other countries which have codified constitutions have successfully managed the art of delineating constitutional laws from non-constitutional laws. Although in the United Kingdom - in the absence of such a codified document - it is admittedly more difficult to make this distinction, in broad terms, parliamentarians and commentators are adept and sophisticated enough to recognise a Bill with constitutional significance. After all, the terms of reference of the House of Lords Select Committee on the Constitution require it to make an assessment of the 'constitutional implications' of all Public Bills. Constitutional Bills should continue to be considered on the Floor of the House of Commons in order to maximise the widest possible input. The House of Lords should also be given a more formal role and responsibility in relation to scrutinising constitutional measures and this function should continue to form part of the constitutional remit of any fully reformed second chamber.

13. Question 12: Constitutional reforms should be subject to parliamentary pre-legislative scrutiny and the timetable for undertaking pre–legislative scrutiny should not be unduly restricted, unlike for example, in relation to the compressed timetable imposed on the 2008 Joint Committee on the Draft Constitutional Renewal Bill. In addition, ideally all elements of a Bill should be subject to pre-legislative scrutiny. For example, although the Constitutional Reform and Governance Bill was heralded as a Bill which had undergone pre-legislative scrutiny, elements of the Bill at its First Reading (such as the House of Lords provisions) had *not* formed part of the original draft measure (i.e. the Draft Constitutional Renewal Bill).

29th March 2011

Memorandum by Unlock Democracy (CRP 13)

Executive Summary

1. Unlock Democracy (incorporating Charter 88) is the UK's leading campaign for democracy, rights and freedoms. A grassroots movement, we are owned and run by our members. We campaign on democracy, rights and freedoms, and specifically for a written constitution and bill of rights for the United Kingdom.

2. Unlock Democracy has always argued that the process of constitutional change is as important as the outcome and that citizens need to own their constitution. We believe that for the citizens to possess a constitution they need to have built it themselves. When the new South Africa wanted to write a constitution following the end of apartheid it embarked on a wide-scale process of public discussion, debate and participation. We would very much welcome a similar process for the UK. However citizen involvement in constitutional reform is not dependent on, or limited to, writing a constitution from scratch. We therefore welcome the Committee's inquiry into the constitutional reform process.

3. However we are concerned about starting to codify a process of constitutional change at a time when there is little in the way of consensus on what makes up our constitution. The risk in creating additional protections for our constitutional laws before we have a written constitution is that we codify an unreformed and arguably unfair constitutional settlement.

4. Unlock Democracy believes that there should be different processes for the varying levels of constitutional change. While we advocate public involvement in drawing up new constitutional measures or proposals to fundamentally alter our rights and freedoms, this would not be appropriate for some of the more technical changes that may be necessary from time to time.

5. This evidence consists of written answers to some of the questions posed by the Committee and a briefing on how the public can be involved in deliberative decision making.

Should constitutional laws be considered to have a special character such that constitutional law-making is given special treatment?

6. Unlock Democracy believes that constitutional laws should be subject to special procedures both at the time when they are passed and if they are changed. However before these proposals are discussed in detail it is important to acknowledge that this is the wrong question to be asking at this point. The United Kingdom is unusual not just in that it doesn't have a written constitution but also because there is no agreement on what makes up our constitution. For example was the recent

Parliamentary Voting Systems and Constituencies Act an example of constitutional law? Some would say yes, indeed it was subject to additional parliamentary scrutiny on this basis. However in New Zealand they take the view that while the need to have elections is constitutional the exact details of how those elections are conducted, including voter registration and constituency size, are essentially technical, rather than constitutional, issues. Consequently they are not subject to additional protections. This is a debate that we need to have in the UK.

7. Unlock Democracy believes that constitutional issues are those that change the contract between the government and the governed. These include, but are not limited to:

   - transfers of power from the UK Government to other units of government within the UK or to supra-national bodies such as the European Union;
   - Acts of Parliament to do with when elections should be held and entitlements to vote; and
   - Acts of Parliament that define the rights of residents of the UK such as the Human Rights Act or any future Bill of Rights.

8. There is danger in establishing special procedures for constitutional reform before it is defined and reformed. Constitutional reform procedures usually make it deliberately difficult to reform the constitution. Different mechanisms such as super majorities and referendums can be used but the reason for having these processes is that it should be difficult but possible to change the constitution. This is because there has already been some form of constitutional convention or national debate that has come to a consensus about which principles should be entrenched and changing them should require a similar level of consensus. If these procedures were to be introduced at the moment, before we have had any national debate or convention process to collectively agree on what should be in our constitution, it would entrench an unreformed and arguably unfair settlement.

How would you characterise the constitutional reform process in the UK? What are its strengths and weaknesses? Has the process changed in recent years?

9. Unlock Democracy does not believe that the UK has a consistent constitutional reform process. Rather we have ad hoc procedures which are used as and when political will dictates, some of which then become conventions and continue to be used. The use of referendums to endorse constitutional change is a good example of this. While it is not formally stated that a referendum is necessary to devolve power from Westminster to a lower tier of government, the fact that there have been referendums in Scotland, Wales, London and the North East means that it is highly improbable that any similar change could be implemented without a referendum.

10. Unlock Democracy supports the increased scrutiny of constitutional reform proposals which has been introduced in recent years, however we believe they should be applied consistently. Currently, some changes receive pre-legislative scrutiny while others don't, some are considered by a Joint Committee of both houses while others are not. This means that too often the reform process is

controlled by the Executive who can either ensure that proposals never go any further than scrutiny or rush proposals through.

Should the Government apply particular procedures to constitutional policy-making? If so, what should these be?

11. Ideally constitutional change should require a level of consensus and that as far as possible the changes should be seen to be benefiting the country as a whole rather than simply partisan interest. This is not always possible and inevitably constitutional issues become entangled in the cut and thrust of political debate, not least as some parties are philosophically more open to reform than others.

12. The first thing to recognise about any constitutional change process is that there are varying levels of change which should be treated differently. Thus while Unlock Democracy is an advocate of deliberative decision making processes involving members of the public, this is not appropriate for all forms of constitutional change and would also make reform prohibitively expensive. In the same way that there are different procedures (negative, affirmative and super-affirmative) for the ratification of statutory instruments depending on the significance of the individual measure, Unlock Democracy believes that there should be a number of constitutional reform processes that could be applied depending on the significance of the proposed reform. While it is crucial that constitutional reforms are scrutinised and any long term implications explored it is also important that scrutiny is not used as a means of preventing reform from taking place.

13. One of the disadvantages of our current ad hoc process is that constitutional change is all too often perceived as something that is being pursued by the government of the day for narrow partisan advantage. While it is not possible, or arguably even desirable, to entirely remove politics from constitutional change we believe that the fact that the process itself, including the level of scrutiny the proposals receive, is controlled by the Executive is not helpful. Therefore we propose that a select committee should determine which process any constitutional reform proposal should go through. Rather than creating a new committee we suggest that members of the existing House of Commons Political and Constitutional Reform Committee could sit jointly with members of your Lordships committee. Certainly we believe that the committee should have members of both Houses of Parliament and it may be desirable that the committee have a majority of opposition members. While we hope that these procedures will help to build consensus for reform we don't believe that consensus should be required as part of the process. All too often consensus is taken to mean universal agreement and used as a block to reform.

Processes for creating new constitutional laws

<u>Process 1</u>

14. This would apply to a reform proposal that the committee determined was essentially technical in nature. It would still require detailed scrutiny as something

that impacts upon our constitutional settlement but would not require public involvement. This would involve pre-legislative scrutiny and parliamentary scrutiny through the Committee of the Whole House procedure in both Houses.

Process 2

15. This would apply to proposals that the committee deemed to be significant changes but not ones that involve fundamental changes to the nature of our constitutional settlement. This would involve pre-legislative scrutiny with an additional element of pro-active public involvement in the scrutiny process. This would not necessarily involve deliberative processes, although it could, but it would involve more extensive engagement than the standard government consultation process for example by working with civic society organisations.

Process 3

16. This would apply to fundamental changes to our constitutional settlement such as significant changes to our rights and freedoms, reforms that should be endorsed by the country as whole. This is where we believe it is essential that deliberative processes are used and that there is wide scale national debate about the reform process. The outcomes of the deliberative process would then be subject to parliamentary scrutiny. If Parliament chooses not to take any action on the outcomes of the deliberative process it should be possible for a referendum to be triggered. This is the process that was outlined in the Citizens Convention Bill and a briefing on how deliberative processes can be used to engage the public in constitutional change is enclosed with this submission.

Process for amending existing constitutional laws

17. The processes set out above describe how new constitutional laws should be created. Unlock Democracy believes that once proposals have been passed and become part of the constitutional settlement they should be subject to additional protections. We do not believe it is right that our fundamental rights, such as those set out in the Human Rights Act or the Parliament Acts, should be able to be repealed with a majority of one. It should certainly be possible to change a constitution but it should be difficult. Therefore we would support the use of super-majorities to amend the constitution. If a government wishes to amend the constitution but cannot command the votes in Parliament, the proposal could be put to a referendum. While the UK does not have a culture of using referendums, indeed we are only just holding our second national referendum, we believe it is important that the constitution is seen to be something that belongs to the people, not just Parliament.

31 March 2011