

# Towards a codified constitution

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*This paper has been produced by a group of lawyers and other constitutional experts led by Stephen Hockman QC and Professor Vernon Bogdanor. Known to its members as the 'constitution working group', we held a series of meetings to discuss the questions which would need to be addressed if the United Kingdom decided to draft a written constitution. We hope that this working document is a valuable, if modest, contribution to the debate which is taking place about the process of constitutional reform.*

## Introduction

Britain has always been anomalous amongst democracies in lacking a written or codified constitution. Indeed, she shares this anomalous situation with just two other democracies – Israel and New Zealand. We do not always appreciate how anomalous our situation actually is. Suppose one joined a tennis club and, having paid one's subscription, asked to see the rules of the club. How would we feel if we were told, 'Actually, the rules have not been collected and brought together all in one place. They are scattered around amongst the decisions of past presidents of the club, and decisions made by the various committees of the club. You can search through the minutes to try to find them, but it will be a long job. In addition, there are some rules which are not written down at all – unspoken conventions. These you will pick up as you go along. But, please do remember that, if you have to ask what the rules are, you do not belong'. We would hardly be mollified. Indeed, we might ask for our subscription back. But that is the position in which the citizen finds herself in relation to the British constitution.

This anomaly has become even more striking in recent years. For, since 1997, this country has been going through a period of profound constitutional change. These changes have included such wide-ranging measures as the Human Rights Act 1998, the devolution legislation, reform of the House of Lords and the Freedom of Information Act 2000. Further constitutional change is very likely. Indeed, all three of the main political parties seem to favour it. In its green paper, *The Governance of Britain*, the government hinted that the various constitutional reforms that it was proposing 'might in time lead to a concordat between the executive and Parliament or a written constitution'.<sup>1</sup> In a written statement to the House of Commons on 3 July 2008, the Lord Chancellor and Minister for Justice, Jack Straw MP, said that the government sought to secure 'a new constitutional settlement'. On 10 June 2009, the Prime Minister went further, saying that:<sup>2</sup>

*It is to some people extraordinary that in Britain we still have a largely unwritten constitution. I personally favour a written constitution but I recognise that changing this would represent an historic shift in our constitutional arrangements so such proposals will be subject to wide public debate and ultimately the drafting of such a constitution would be a matter for the widest possible consultation with the British people themselves.*

More recently, on 2 February 2010, the Prime Minister announced the establishment of a cross-party group to identify the principles which should be included in any written constitution. He suggested that 'if we are to decide to have a written constitution the time for its completion should be the 800th anniversary of the signing of the Magna Carta in Runnymede in 1215'.<sup>3</sup> The Conservatives are also proposing a number of constitutional reforms, amongst them: reducing the number of MPs; 'English votes for English laws' to combat what they regard as the inequalities in the devolution settlement; and a 'British Bill of Rights' to replace the Human Rights Act. Finally, the Liberal Democrats have long argued for a written constitution and an entrenched bill of rights.

It has become increasingly apparent that we have, in a piecemeal and unplanned way, been codifying our constitution. Much that was previously accepted in the form of convention or tacit understanding has now become statutory. The expenses crisis has perhaps strengthened the feeling that unwritten conventions are no longer sufficient and that clear rules are needed.

It is, moreover, a paradox, that we have, since 1997, been through a period of such profound constitutional change without being wholly clear what our constitution actually is. How can we attempt to reform our constitution successfully if we do not really know what it is that we are reforming? If the parties are asking the people to endorse constitutional changes or proposed constitutional changes, surely the people are entitled to know and understand what our pre-existing constitutional arrangements actually are. Indeed, one important aim of producing a constitution must be that of public education.

Our purpose in what follows, however, is not to make the case for a codified or entrenched constitution. That is for the politicians and the people to decide. Our purpose is the more limited one of analysing the main problems which need to be resolved and the key questions which need to be answered if, in the future, it is decided to enact a constitution. We present this report, therefore, as an aid to public debate. We recognise that we will not have identified all of the problems and questions that might arise, but hope that the report will provide a useful foundation for further work and discussion.

It is assumed for the purposes of this document that a constitution would codify rather than reform our political arrangements. For this reason, many questions which might otherwise be analysed, eg the form and functions of a second

chamber, will not be discussed in this report. Our aim is to analyse what is the case, not what perhaps ought to be the case. We have taken this approach in part because it is a necessary first step to be clear about the current constitutional arrangements before serious consideration is given to what should be changed.

The report therefore lists what we believe to be the most important questions which will have to be considered when drafting a written constitution for the United Kingdom. It does not propose answers to those questions, but does flag (mainly in footnotes) some of the issues that would be raised.

## Preparation

A constitution, to be effective, needs legitimacy. In the modern world, this can only come about if it has public support. The draft of a constitution would obviously have to be produced by a small body of people – a mixture of experts (for example lawyers and academics) and members of the public perhaps. The following issues will need to be addressed:

- Should a constitutional commission be established, on the model of past Royal Commissions?
- If so, how should it be composed?<sup>4</sup>
- How should the work of a commission be supported, in terms of a secretariat and legislative drafters?
- To what extent should the membership include politicians?
- How should places for politicians be allotted? Should it be on a proportionate basis, based on seats in the House of Commons? Or, should it be based on a proportion of the popular vote? Should these be calculated on the basis of a single, most recent, election, or averaged over a certain number of previous elections (say, post-war years)? The results of a single election may be contingent on issues that do not reflect broader political consensus over time. What provision should be made for minor parties?
- Is there a role for other key figures in public life, such as media representatives, business and trade union leaders or the leaders of the various religious faiths?
- Should there be representation of the nations and regions of the United Kingdom? If so, on what basis?
- How, if at all, should the Crown dependencies of the bailiwicks of Jersey and Guernsey and the Isle of Man be involved? How, if at all, should the British overseas territories be involved?
- Should the general public be represented on the commission? If so, how should members of the public be chosen? In the Canadian provinces of British Columbia and Ontario, Citizens' Assemblies on Electoral Reform were established to consider the right electoral system for the province, with

the members chosen by lot. Would such an arrangement be appropriate in the United Kingdom?

## Principles

A written constitution is an embodiment of the principles its drafters consider to be fundamental and 'constitutional' in nature, in that they say something relevant about the structure and role of the State. What those principles should be, and in particular how a constitution should deal with rights, must be the subject of specific consideration. For example:

- What should the constitution do? Should its aims be set out in the form of a preamble? What force would a preamble have?
- What should the constitution say about sovereignty? Where does sovereignty now lie?
- To what extent should principles such as the separation of powers, independence of the judiciary, accountability, and the rule of law, be explicitly stated in the constitution, rather than merely reflected in its various provisions?<sup>5</sup>
- Should there be a reference, perhaps in the preamble, to 'the people'?<sup>6</sup> How should a constitution reflect the interaction between 'the people' and the various institutions of government?
- How, if at all, should the United Kingdom of Great Britain and Northern Ireland be described? As a 'union' state? As a 'unitary' state?
- Is the constitution to be for the whole of the United Kingdom? Should there be separate documents for its component parts – England, Scotland, Wales and Northern Ireland?<sup>7</sup>

## Rights

The following are some of the issues which will arise under this heading:

### *Should there be a bill of rights?*

- What would be the purpose of a bill of rights?
- What would be the relationship between a bill of rights, the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA)?
- What are the drawbacks and advantages of a constitution which does *not* contain or refer to a bill of rights?

### *The content of a bill of rights*

- What rights should be included? What political rights should be put in the constitution, eg the right to vote, to stand for election, freedom of information, etc. Should economic and social rights be included?
- Should the right to equality and non-discrimination be made a free-standing right?<sup>8</sup>

- Which rights, if any, would be qualified, and how (by general or specific limitation clauses, bearing in mind the absolute nature of some rights, such as the right not to be subject to torture)?
- Should the bill of rights apply horizontally between private citizens, as well as vertically between citizen and state?
- Should a bill of rights contain a section on responsibilities? Should it be a 'Bill of Rights and Responsibilities'? If so, what responsibilities and to whom? Should any of the [non-fundamental] rights in a bill of rights and responsibilities be made contingent upon responsibilities? Can judges take note of responsibilities in any manner (including as interpretive principles)?

***'New' rights – socio-economic rights, right to a clean environment, cultural rights etc.***

- What are 'social rights', 'economic rights' or 'cultural rights'? What issues would arise if the bill of rights were to contain 'social' or 'economic rights' (or other types of rights not contained in the ECHR)?
- If the bill of rights should include economic and social rights, should it make them justiciable, or should the non-justiciable but 'aspirational' approach be taken?
- If such rights are included and are justiciable, should they be qualified? Should they in particular be qualified to take into account 'reasonableness' or pressure of resources, as in the South African constitution?
- Should a bill of rights contain new rights going beyond those provided for in the HRA, such as a right to equality; to good administration; social and economic rights in the spheres of healthcare, housing and education; 'cultural rights', for example in relation to minority languages such as Welsh, Gaelic etc; children's rights; or rights in relation to the environment? Should any such rights be able to be invoked by groups, or by individuals, or both?

***Should the bill of rights be part of the constitution, or a separate document?***

There are advantages and drawbacks to each option, particularly bearing in mind that a 'rights and responsibilities' section may attract more interest and therefore be more conducive to meaningful public engagement and consultation than would other potential sections of a written constitution. The US Bill of Rights is part of the Constitution but an amendment to it and therefore, to that extent, a separate document; the French equivalent is a totally separate document; the EU Charter of Rights was intended to be an integral part of the 'Constitution' but is now self-standing and given legal status in the Lisbon Treaty; while rights are an integral part of the German Basic Law.

## Institutions

- Which institutions and public offices should be recognised as having constitutional status in a codified constitution? How should each institution be defined?
- To what extent should the powers and duties of each institution be set out in the constitution (as opposed to ordinary legislation or left to convention)? Candidates would include:
  - The Monarch<sup>10</sup>
  - The United Kingdom Parliament (including separate reference to the powers of the House of Commons and the House of Lords)
  - The government of the United Kingdom as a collective entity (including reference to the cabinet)
  - The office of Prime Minister
  - The office of Secretary of State
  - The office of Lord Chancellor
  - The Privy Council
  - The United Kingdom Supreme Court (including the President, Deputy President and Justices)
  - The Lord Chief Justice of England and Wales (and which other judicial officer holders in England and Wales?).
  - The Lord Chief Justice of Northern Ireland (and which other judicial office-holders in Northern Ireland?)
  - The Lord President (and which other judicial office-holders in Scotland?)
  - The Law Officers of the Crown
  - The Comptroller and Auditor General (National Audit Office)
  - The civil service
  - The Parliamentary Commissioner for Administration
  - The Commission for Local Administration
  - The Commissioner for Public Appointments
  - Her Majesty's Chief Inspectors
  - The Scottish Parliament and the Scottish government
  - The National Assembly for Wales and the Welsh Assembly government
  - The Northern Ireland Assembly and the Northern Ireland Executive
- What is meant by the executive? Should there be a reference to the cabinet, the government as a whole, the position of the Prime Minister, the role of the opposition etc, given that these are as much a product of convention as of law? (We consider conventions in more detail below.)
- What, for the purposes of the constitution, is the Crown, and what role does it play?
- How should the relationship between the two houses of the legislature be defined? This relationship is regulated as much by convention as by

law. To what extent should the various conventions<sup>11</sup> be included in the constitution?

- Should the constitution include recognition of the status and role of local authorities throughout the United Kingdom?
- How is the judiciary to be defined? To what extent do courts and tribunals which are not courts of inherent jurisdiction fall within such a definition?
- Is a definition using the terms of 'exercising the judicial power of the State' (see s19 Contempt of Court Act 1981) an appropriate starting point?
- How is the role and function of the judiciary to be defined?<sup>12</sup>
- In connection with all of the above it is to be borne in mind that the UK has three separate legal systems. See s41 Constitutional Reform Act 2005.

### **The electoral process and referendums**

- Should a constitution state the electoral system used to choose Members of United Kingdom Parliament? Should it state the electoral systems used for the devolved bodies and local authorities?
- To what extent should a constitution include reference to political parties? It would perhaps be unrealistic not to mention them at all. Should the constitution contain the kinds of provisions in the Political Parties, Elections and Referendums Act 2000, regulating the internal procedures, candidate selection mechanisms and funding of the political parties?
- Should political parties be bound by 'basic constitutional values'? Should the constitution embody a 'strong democracy', for example should it cover the circumstances in which referendums are held, their status, and the extent to which they bind Parliament and government?<sup>13</sup>

### **Devolution**

- Does the legislation providing for devolution to the non-English parts of the United Kingdom provide the basis for constitutions for these areas?
- Should the constitution require a referendum to be held before significant changes to the scope of powers of the devolved institutions are made?
- To what extent should the constitution set out in detail the legislative competence of the Scottish Parliament, the National Assembly for Wales, and the Northern Ireland Assembly?
- Should the Sewel Convention be stated in the constitution? Should there be reference to other conventions affecting relations between the United Kingdom government, the United Kingdom Parliament and the devolved bodies?
- Should the constitution expressly make Northern Ireland being part of the United Kingdom dependent on the consent of the people and include provision for a referendum? (see s1 Northern Ireland Act 1998). Should

similar provision be made in relation to any other part of the United Kingdom?

- Which inter-governmental organisations should be recognised by the constitution? For example the Committee of Ministers and the British-Irish Council.
- What would be the role of the UK Supreme Court in resolving disputes?
- What, if any, reference should the constitution make to the Crown dependencies of the bailiwicks of Jersey and Guernsey and the Isle of Man?
- What, if anything, should the constitution say about the common travel area between Crown dependencies of the bailiwicks of Jersey and Guernsey and the Isle of Man and the United Kingdom?
- What, if any, reference should the constitution make to the British overseas territories?

## International Relations

### *Background questions*

- How should the constitution deal with international law?
- How should membership of the European Union be characterised in a constitution for the United Kingdom given the tension between the sovereignty of Parliament and the superior legal order of the European Union?

### *Specific provisions*

- Should the constitution state that the United Kingdom is a member of any international organisations? If so, which ones? Consider the following possibilities:
  - European Union
  - Council of Europe
  - Commonwealth of Nations
  - United Nations
- How, if at all, should the constitution state the relationship between national and international law? In particular, to what extent should international treaty obligations be referred to in the constitution, particularly in respect of international bodies whose actions affect the United Kingdom such as the WTO and the UN? Should there be express reference to customary international law and its relationship to domestic law?
- Should there be different or separate treatment as between (i) *jus cogens*, ie peremptory norms of international law which permit no derogation, and (ii) international law more generally? Should international human rights law be treated in a different or separate way from international law more generally?

- Should power of ratification of treaties lie with Parliament?
- What role should be given to incorporated treaties in the resolution of domestic disputes?

## Conventions

Conventions are customs or rules that are respected as a fundamental part of a constitution even though they are not enforceable as rules of law. They are of very different types, and distinctions will need to be made between these different types, since they are of very varying strengths and importance. It will be necessary when drafting to evaluate the role of specific conventions, perhaps on an ad hoc basis. It will be appropriate to codify some but not others. What follows are background questions that will generally apply to all conventions.

- How are conventions to be identified and distinguished from mere practices?
- Can conventions be stated in sufficiently precise terms? If not, is that a weakness or a strength?
- Can a convention's content be accurately discovered merely by stating it?
- How can the status of a convention be determined? What tests should be used?
- How can we decide whether a convention has fallen into desuetude? A convention which has seemingly faded from view may be rapidly resurrected.
- Could a codified convention be altered by a change in practice? Is there an appropriate constitutional mechanism for altering it?
- Would the violation of a codified convention mean that the action concerned was unconstitutional, illegal or both?<sup>14</sup>
- With regard to conventions which are not suitable for inclusion in a constitution, eg parliamentary control of the war power, might there be some other form of codification such as a joint parliamentary resolution?<sup>15</sup>
- Should conventions perhaps be included in a document separate from the constitution? An authoritative but non-binding document may be useful for clarificatory and educative purposes. Might such a document have a status in-between that of a written constitution and ordinary legislation, as in France or Spain with their organic laws?
- What role should be given to 'concordats' and 'memoranda of understanding'?<sup>16</sup> How should the constitution deal with sub-conventions and implementing concordats?<sup>17</sup>

## Adoption

How to adopt a constitution will be an important decision. Any constitutional document will be quite unlike anything else in British law. There are four main options:

- Ratification by the Crown-in-Parliament. There could conceivably be a requirement of a qualified majority. The House of Lords could be given a veto, as with any bill seeking to extend the life of Parliament.
- Ratification by Crown-in-Parliament *and* regional elected bodies and assemblies. Separate consideration by regional bodies may be appropriate if significant changes are to be made to existing devolution legislation.
- Ratification by the people in a referendum. A qualified majority or minimum turnout requirement may be included in this.
- Ratification by the people by referendum in each region. Again, this may be thought appropriate for those parts of the country which adopted devolution legislation by referendum, which is being substantially altered by the new document.

## Amendment

How one can amend the constitutional document is arguably the most important question of all. The approach to amendment may well dictate the type of document to be produced, and so may answer some of the questions raised in other areas.

Different provisions of the constitution may be made subject to different amendment rules. For example, the sections on rights or devolution may be made subject to a more stringent amendment process than other sections. The options are as follows:

- A simple parliamentary majority and royal assent, ie the traditional Crown-in-Parliament formula of Dicey.<sup>18</sup>
- A simple parliamentary majority and royal assent, but with a requirement of express repeal along the lines established in the European Community Act 1972 and the HRA (and possibly more widely in *Thoburn v Sunderland CC* [2002] EWHC 195 (Admin)).
- A constitutional long-stop along the lines of the House of Lords being able to block legislation which extends the life of Parliament (the Parliament Acts 1911-49, especially section 2 of the 1911 Act).
- A qualified majority in the House of Commons, eg two-thirds. This tends to be the approach adopted in the majority of constitutions.
- An additional requirement of prior consent of/consultation with devolved bodies,<sup>19</sup> as is generally the case in federal states.

- Referendums (in the entire country or only in a part of the country, depending on the subject matter).<sup>20</sup> If the referendum is adopted for constitutional amendment, some thought needs to be given to its constitutional status – is it to be mandatory or merely advisory?
- Should some provisions be unamendable as in the Indian and German constitutions, eg certain basic rights?

## Status

This section considers the status of the constitution, as distinct from the amendment process. In particular, what powers to strike down legislation should the courts have if they hold that a measure is unconstitutional?

### *Remedies*

There are five broad possibilities:

- Power to declare an unconstitutional measure invalid. Unconstitutional means illegal.<sup>21</sup>
- Power to disapply an unconstitutional measure without strictly pronouncing upon its validity.<sup>22</sup>
- Power to declare a measure incompatible but leaving it legally valid.<sup>23</sup>
- Power to declare a measure incompatible with the constitution, but with Parliament having the ability to override the declaration only for a period limited to the length of one Parliament, ie a sunset clause which forces the government to face re-election on the measure.<sup>24</sup>
- Duty to interpret a measure, as far as possible, without pronouncing on its validity.<sup>25</sup>

These options are not necessarily mutually exclusive (particularly the latter three points).

### *Other judicial powers*

- Should the courts have the ability to pronounce upon the constitutional validity of a proposed bill, before it becomes law?<sup>26</sup> If so should this be available generally or only on a reference by the executive and/or Parliament.
- How should the constitution affect the judicial review of measures other than primary legislation?

### *Constitutional severability*

- Can different parts of the constitutional document be treated differently?
- Can certain parts be made non-justiciable?
- Could the breach of particular provisions be remedied by a body other than a court (such as a parliamentary committee/Ombudsman)?<sup>27</sup>

## Miscellaneous

### *Citizenship*

- What should the constitution say about British nationality?

### *Symbols of national identity*

- What should the constitution say about national flag(s), anthem(s) and motto?
- Should the constitution state that English is the official language of the United Kingdom? What provision should be included on the status of the Welsh language? What provision should be included on the status of other minority languages (Gaelic, Ulster-Scots)?
- Should the constitution state that London is the capital city of the United Kingdom? What, if any, provision should be made for the status of Cardiff, Edinburgh and Belfast?

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### Notes

- 1 Ministry of Justice, *The Governance of Britain*, CM 7170, 3 July 2007, para 212.
- 2 In a statement delivered to the House of Commons on the topic of constitutional renewal, 10 June 2009.
- 3 'Transforming politics', speech to the RSA, 2 February 2010.
- 4 The Scottish Constitutional Convention, which sat from 1989 to 1995 and was composed of representatives of the Scottish political parties sympathetic to devolution and representatives of Scottish civil society, played an important part in laying down the principles of what became the Scotland Act 1998.
- 5 The Constitution Reform Act 2005 is novel not least for its use of the concept of 'the rule of law', albeit without any definition. A definition would undoubtedly prove challenging given the lack of agreement as to the precise meaning of the term. See, however, Lord Bingham's suggested definition in his 2006 Sir David Williams lecture, 'The rule of law', CLJ [2007] 67-85 at p69: 'The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or

- private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts'.*
- 6 A concept very rarely seen in British constitutional thought but more common in the French and American constitutional traditions.
- 7 In a federal state, there is usually a constitution for the federation and also constitutions for the various component parts - the sub-national units.
- 8 Article 14 ECHR only guarantees non-discrimination in access to other convention rights. The UK has not signed Protocol 12, which makes it a free-standing right available against all state action. Existing statutory instruments, as well as the draft Equality Bill which seeks to codify them, put far-reaching obligations on the state, but through a statute.
- 9 In its report, *A Bill of Rights for the United Kingdom?* HL 165-1, HC 150-1, 2007-8, the Joint Committee on Human Rights proposed that economic and social rights, including the right to a healthy and sustainable environment, instead of being made justiciable, should impose a duty on the part of government and other public bodies, of 'progressive realisation', the principle adopted in the South African constitution. This principle would require the government to take reasonable measures within available resources to achieve realisation of these rights.
- 10 No doubt reformers would wish to ask how the powers of the monarch and principles of succession should be defined. And further, what should be done about the rule of primogeniture and the specific ban on the Monarch being a Roman Catholic or any member of the royal family marrying a Roman Catholic?
- 11 For example the Salisbury Convention, an understanding that a 'manifesto' bill, foreshadowed in the governing party's most recent election manifesto and passed by the House of Commons, should not be opposed by the second chamber on second or third reading.
- 12 Reformers may wish to ask whether there should be a constitutional court, and, if so, how should it be composed. Or, alternatively, should one follow the Irish practice and make use of the senior judges of the Supreme Court to deal with constitutional questions?
- 13 Should there be reference to the right to recall MPs, and the ability of the public, or a section thereof, to demand a parliamentary debate on any issue through signature ballots?
- 14 It does not follow that the inclusion of a convention in a constitution need necessarily make it justiciable. Some conventions seem more justiciable than others. The Sewel Convention, for example, regulating relations between Westminster and the devolved bodies, perhaps borders on being judicially enforceable, but to try to make the convention of individual ministerial responsibility justiciable would be to enter a political minefield. Can one then accurately or adequately distinguish between different types of conventions within a constitution so that some are justiciable while others are not?
- 15 This question has arisen over Parliamentary control of war powers of the executive.
- 16 These are documents of potentially immense importance and often of a highly constitutional nature (eg the concordat between the Lord Chancellor and the Lord Chief Justice on the separation of their roles and the functioning of the judiciary) but without apparent legal force. Memoranda of understanding regulate the relationships between Westminster and the devolved bodies.
- 17 This is a problem particularly with respect to the devolution settlements where inter-governmental relations are subject to a raft of different measures of different status.
- 18 The Diceyan formula is obviously familiar, but leaves the document with the same status as any other piece of primary legislation. A constitution, however, may be thought to be more important than, for example, the Dangerous Dogs Act.
- 19 This may be especially important to consider if, for example, the adoption process recognises separate voices from the nations of the United Kingdom such as a referendum in Scotland and Wales as well as England.
- 20 The Irish approach.
- 21 The USA approach.
- 22 The EU law formula.

- 23 The s4 HRA approach.
- 24 The Canadian approach under the Charter of Fundamental Rights.
- 25 The s3 HRA approach.
- 26 This power is given to the Irish Supreme Court and the French Conseil Constitutionnel.
- 27 An example might be a breach of a constitutional convention such as that of individual ministerial responsibility, which could be assessed by the legislature rather than the judiciary.