

The Constitutional Reform Process: Evidence submission to the House of Lords Constitution Committee from Democratic Audit

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.
- 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 appear 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'.¹ 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.

¹ Flinders, Matthew (2010) *Democratic Drift: Majoritarian Modification and Democratic Anomie in the United Kingdom*, Oxford: Oxford University Press, p.219.

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 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

<p>Conservative government (1990-1997) Publication of Ministerial Code (1992); Intelligence Services Act 1994; promulgation of Civil Service Code (1997)</p>
<p>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</p>
<p>Coalition government (2010 -) Parliamentary Voting System and Constituencies Act 2011; Fixed-term Parliaments Bill; European Union Bill; production of Cabinet Manual.</p>

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.² 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.

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 *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

² See eg: Goldsworthy, Jeffrey (2010) *Parliamentary Sovereignty: Contemporary Debates*, Cambridge: Cambridge University Press, pp.174-201.

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

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