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# The Future of UK Constitutional Law

ROBERT BLACKBURN

The UK is facing unprecedented challenges to its constitutional law and practices, arising from the effects of radical social and technological changes impacting on its traditional forms and processes of government. Many of the constitutional problems and reform proposals arising relate to questions of democratic accountability, political representation, and national identity. This article identifies and discusses those elements of UK constitutional law that will need assessment and reform over the course of the next two decades. Substantial research and planning will be needed for tailoring the legal options for future reform of the UK constitution in order to modernise its ancient institutions and structure while retaining the positive elements in its working and culture. The resolution of these matters will be tantamount to a new constitutional settlement for the UK.

**Keywords:** constitution; royal prerogative; house of commons; house of lords; Europe; human rights; legislation; referendums

Over the past quarter century UK governance and its constitutional law has undergone a transformation, with a host of modernising reforms taking place affecting almost all parts of its institutional structure and working.<sup>1</sup> 1997 was a particular watershed in government policy and public attitudes towards reform of the constitution, with the Labour Party elected to office that year with a manifesto promising a radical and wide-ranging programme of constitutional change, and a large overall majority in the House of Commons with which to carry it out.<sup>2</sup> However despite the major changes that were made, many essential aspects of what was heralded in Labour's programme were left unfinished by the time the party was voted out of government in 2010. Subsequently the Conservative-Liberal Democrat coalition down to 2015 and the Conservative governments since then have had markedly different preoccupations for shaping Britain's constitutional future, most importantly in the country's relationship with Europe.<sup>3</sup>

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<sup>1</sup> See Vernon Bogdanor, *The New British Constitution* (Oxford: Hart, 2009); Jeffrey Jowell, Dawn Oliver & Colm O'Cinneide (eds.), *The Changing Constitution* (Oxford University Press, 8th ed. 2015).

<sup>2</sup> These reforms included devolution to Scotland (Scotland Act 1998), Wales (Government of Wales Act 1998), Northern Ireland (Northern Ireland Act 1998), Greater London (Greater London Act 1999), incorporation of the European Convention on Human Rights into UK law (Human Rights Act 1998), access to official information (Freedom of Information Act 2000), creation of a Supreme Court (Constitutional Reform Act 2005), and statutory recognition and regulation of political parties and campaigning (Political Parties, Elections and Referendums Act 2000). For the policy background see Robert Blackburn and Raymond Plant (eds), *Constitutional Reform: The Labour Government Constitutional Reform Agenda* (Harlow: Longman, 1999). The Labour Party's policy objectives on constitutional reform in their 1997 manifesto were renewed when Gordon Brown succeeded Tony Blair as Prime Minister in 2007: see *The Governance of Britain* (CM 7170, 2007).

Significantly, constitutional reform under both Labour and Conservative governments has been, and continues to be, conducted in an ad hoc rather than coherent or joined-up manner. This is consistent with one of the most striking features of UK politics and government, which is the paucity of modern theoretical underpinning for the constitution and its component parts, save for the fundamental if rather nebulous concepts of the rule of law and democracy.<sup>4</sup> Not only has the incomplete nature of the parties' earlier modernisation initiatives left the UK constitution in a very unsettled state, but UK governance generally has come under increasing pressures from public discontent with the establishment<sup>5</sup>, especially its handling of the economy, amplified through the new technologies enabling mass communication in mobilising popular opinion.

In addressing the future of UK constitutional law, it is essential to understand the processes and special characteristics of the current arrangements within which it operates. The existing structure of UK government and its constitution is best described as traditional and historical in nature. It is a relic of the 1688-89 settlement, following the Glorious Revolution and forced abdication of King James II.<sup>6</sup> The legal supremacy of Parliament over the Crown was accepted by the new monarchs William and Mary and guaranteed in the Bill of Rights 1689. Shortly afterwards the Act of Settlement 1701 guaranteed the independence of the judiciary, although one in which the courts and the common law performed a subordinate role to Acts of Parliament.<sup>7</sup> Over the subsequent three centuries no further revolutionary moment arose that demanded that the structure and working of government and rights of citizens be set down in documentary form as the fundamental law of state, a written constitution.<sup>8</sup>

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<sup>3</sup> The reforms since 2010 have included fixed five-year intervals between elections (Fixed-term Parliaments Act 2011) and in terms of constitutional practice the strategic decision to hold three referendums on matters of fundamental political importance, the voting system (Parliamentary Voting System and Constituencies Act 2011, leading to the 2011 poll endorsing the status quo), Scottish independence (Scottish Independence Referendum Act 2013, leading to the 2014 poll endorsing the status quo), and membership of the EU (European Union Referendum Act 2015, leading to the 2016 poll to withdraw from the EU). References in this chapter to the UK's departure from the EU states the position as at 31st January 2019.

<sup>4</sup> The doctrine of separation of powers has never in its strict form corresponded with the facts of UK government, principally because, although the functions and powers of state are largely separated, the personnel of the political executive and parliamentary legislature overlap: see M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967). On a classic exposition of the Rule of Law from a UK perspective see Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010).

<sup>5</sup> The term "establishment" is commonly used in the UK to signify the matrix of official and social relations within which power is exercised: see Peter Hennessy, *The Great and the Good: An Inquiry into the British Establishment* (London: Policy Studies Institute, 1986).

<sup>6</sup> See Ann Lyon, *Constitutional History of the United Kingdom* (London: Cavendish, 2003).

<sup>7</sup> In UK law parliamentary statutes may be interpreted by the courts as to their meaning and application, but may not be reviewed as to their constitutional legitimacy: generally see Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013).

<sup>8</sup> On the proposal for a written UK constitution see below.

The essential elements of the UK constitution therefore have been - and remain - the supremacy of an Act of Parliament as a source of law, and absence of any fundamental law by reference to which the courts can control and declare Acts of Parliament to be unconstitutional;<sup>9</sup> there is extensive reliance upon conventions and political understandings to informally adapt its ancient laws and institutions to modern conditions;<sup>10</sup> and there is no special amendment process by which legislative reforms of the unwritten constitution are conducted.<sup>11</sup>

## **The Executive and Royal Prerogative**

There is now a strong movement across the political spectrum to establish greater controls and mechanisms of accountability over executive power. Most of this attention has been focussed on the ancient common law prerogative powers of the Crown and how to render their exercise subject to parliamentary scrutiny and consent. The scope of the "royal prerogative", as these powers are collectively known, goes much further than simply those powers that are vested in the person of the Monarch him or herself, and by far the greater part of the prerogative powers that continue in existence today is exercised by ministers and officials acting as Her Majesty's government. The scope of executive action authorised by the prerogative is very wide indeed and embraces some of the most basic and important tasks of government, extending across the terrain of foreign and international affairs, matters of national security, and into numerous matters at home such as the grant of royal charters, a multitude of public and political appointments, the honours system, and the nature and extent of our defence capability. The controversial element of the royal prerogative is that all the powers, privileges and immunities it comprises are in origin common law and extra-parliamentary: in other words, major policies and decisions may be adopted by the government under the authority of the royal prerogative without the need for any formal approval by Parliament. Indeed some such powers may be exercised without any form of parliamentary scrutiny or discussion at all, and in some cases even without Parliament's knowledge.<sup>12</sup>

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<sup>9</sup> This is known as the doctrine of parliamentary sovereignty, on which see A. V. Dicey, *The Law of the Constitution* (London: Macmillan, 1885; 10th ed. 1985); and Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010). The doctrine also involves the principle that an Act of Parliament may not bind future legislative enactments: *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1KB 733, *Ellen Street Estates v Minister of Health* [1934] KB 590. A recent qualification to this rule is that where an Act is constitutional in nature its provisions may only be repealed or amended by a later Act containing express words to that effect: *Thoburn v Sunderland City Council* (2003) QB 151; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3).

<sup>10</sup> See Geoffrey Marshall, *Constitutional Conventions* (Oxford University Press, 1984).

<sup>11</sup> See Robert Blackburn, "Constitutional Amendment in the United Kingdom", Ch. 18 in Xenophon Contiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (London: Routledge, 2013).

<sup>12</sup> For example there was no parliamentary debate in 1958 on the agreement reached with the United States for their nuclear weapons to be based on UK territory, a decision taken under the royal prerogatives of defence and treaty making; and no parliamentary debate in 1950 on the UK becoming a contracting party to the European Convention on Human Rights, decided under the royal prerogative of treaty making: historically it seemed the greater the importance of a public policy issue, the less likely Parliament has a say in the matter.

The case for codifying the royal prerogatives and making their exercise subject to parliamentary scrutiny and/or formal approval has continued to gather support in recent decades since Tony Benn's early advocacy on the matter in the 1980s.<sup>13</sup> Whole-scale codification was advocated in the Labour Party's 1993 policy programme, *New Agenda for Democracy: Labour's Proposals for Constitutional Reform*. This objective was subsequently dropped under Tony Blair's leadership of the Labour Party and period in office as Prime Minister, but taken up by the House of Commons Public Administration Committee in the 2001-05 Parliament. The Committee's report, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*,<sup>14</sup> firmly placed the subject back on the political agenda, and was carried forward by Gordon Brown in his own constitutional policy document, *The Governance of Britain*,<sup>15</sup> published only a few days after he succeeded Tony Blair as Prime Minister in 2007.

At that time the case for statutory codification of the prerogative had been strongest in the field of treaty making, the UK being the only country in the EU with no formal procedures to guarantee parliamentary scrutiny for major foreign policy decisions.<sup>16</sup> As one UK parliamentarian had earlier remarked, "We are talking about a remnant of the medieval or at least very early modern British monarchical constitution. It makes nonsense of the principle of the doctrine of parliamentary sovereignty that the Crown retains the right to sign and ratify treaties without having submitted them to Parliament".<sup>17</sup> Gordon Brown's Constitutional Reform and Governance Act 2010 proceeded to place into statutory form the pre-existing convention known as the Ponsonby rule that a treaty signed by the relevant minister must be laid before Parliament for 21 days, and it conferred on the House of Commons a limited form of veto.<sup>18</sup> Otherwise however, apart from placing the civil service on a statutory basis, the 2010 Act failed to address parliamentary control of the royal prerogative more widely, leaving this area of constitutional law ripe for further research and development.

Alongside these parliamentary developments the courts have shaped a judicial role in controlling the arbitrary nature of prerogative decision-making in recent times, departing from their earlier common law position that an exercise of a Crown prerogative power was immune from judicial review.<sup>19</sup> In the landmark case of *Council of Civil Service Unions v Minister*

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<sup>13</sup> See for example his Crown Prerogatives (House of Commons Control) Bill (1987-88) HC 117; and for commentary Robert Blackburn, "The Dissolution of Parliament: the Crown Prerogatives (House of Commons Control) Bill 1988", *Modern Law Review* (London: Stevens, 1989), pp.837-840

<sup>14</sup> (2003-04) HC 422.

<sup>15</sup> Cabinet Office, CM 7170 (2007).

<sup>16</sup> See Lucius Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* (Basel: Helbing & Lichtenhahn, 1971). In stark contrast to the UK position the US Constitution requires a treaty to be ratified by two-thirds of the Senate.

<sup>17</sup> *Lords Hansard*, 28 February 1966, col. 1542.

<sup>18</sup> See Part 2: Ratification of Treaties.

<sup>19</sup> [1985] AC 374; subsequent case law on the exercise of prerogative powers includes *R v Foreign Secretary, ex p Everett* [1989] QB 811; *R v Bentley* [1994] QB 349; *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513; see also *R (Bancoult) v Foreign Secretary (No. 2)* [2008] 1 AC 453.

for the Civil Service in 1985, in which a government decision to exclude trade unions from the Government Communications' Headquarters was challenged in the courts, the House of Lords (then the final court of appeal<sup>20</sup>) held that some prerogative powers were now to be justiciable as to the manner of their exercise.<sup>21</sup> More dramatically in 2017, the Supreme Court in the case of *R (Miller) v Secretary of State for Exiting the European Union*<sup>22</sup> held that the government could not initiate a UK withdrawal from the European Union by notification under article 50 of the Treaty on European Union simply relying on the royal prerogative of treaty making and unmaking, but this action would require the consent and authority of an Act of Parliament.<sup>23</sup>

The prerogative power that has been most extensively debated since the Iraq invasion in 2003 has been that of authorising armed conflict abroad. A number of proposals, including ones embodied in private members' bills presented for debate in Parliament, have argued for legislation to require parliamentary approval to military interventions.<sup>24</sup> Gordon Brown's 2007 policy document hesitantly suggested that a resolution of the House of Commons should be required prior to "significant non-routine" deployment of the armed forces "without prejudicing the Government's ability to act to protect national security, or undermining operational security of effectiveness",<sup>25</sup> but this proposal was taken no further. In 2013 considerable excitement was aroused in academe after the Conservative Prime Minister David Cameron sought the approval of the House of Commons for air strikes in Syria, and in response to the parliamentary vote opposing such action the air strikes were called off. This led many academic commentators to argue that a new constitutional convention had entered into force, one that now required parliamentary approval before armed conflict.<sup>26</sup> Indeed the Cabinet Office's manual prepared in 2011 supported this view, stating that "the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except where there was an emergency and such action would not be appropriate".<sup>27</sup> Debates and votes were taken twice shortly afterwards, supporting the government's proposed military action against ISIS in Iraq in September 2014, then for its extension into Syria in December 2015. Earlier in 2011 the then Foreign Secretary William Hague had gone so far as to give a commitment to the House of Commons that the government would legislate for such a rule.<sup>28</sup> However the present government's

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<sup>20</sup> The Judicial Committee of the House of Lords as final court of appeal was replaced by the Supreme Court by the Constitutional Reform Act 2005, part 3.

<sup>21</sup> Generally see Paul Craig, *Administrative Law* (London: Sweet & Maxwell, 8th ed., 2016), Part 2.

<sup>22</sup> [2017] UKSC 5

<sup>23</sup> European Union (Notification of Withdrawal) Act 2017.

<sup>24</sup> For example Waging War (Parliament's Role and Responsibility) Bill (2005-06) HC 34.

<sup>25</sup> Cabinet Office, *The Governance of Britain* (CM 7170, 2007), para. 29.

<sup>26</sup> Cabinet Office, *The Cabinet Manual* (2011), para. 5.38; and see a similar interpretation of the constitutional position given to Parliament by the Leader of the House of Commons, Sir George Young, on 10 March 2011: *Commons Hansard*, col. 1066.

<sup>27</sup> Para. 5.38.

<sup>28</sup> "We will ... enshrine in law for the future the necessity of consulting Parliament on military action": *Commons Hansard*, 21 March 2011, col. 799.

attitude has now gone into reversal. In April 2016 the then Defence Secretary Michael Fallon issued a statement that the government had changed its mind and would not be legislating or putting forward a Commons resolution, and the Prime Minister Theresa May has been even more emphatic: "Put simply, making it unlawful for Her Majesty's Government to undertake any such military intervention without a vote would seriously compromise our national security, our national interests and the lives of British citizens at home and abroad - and for as long as I am Prime Minister, that will never be allowed to happen."<sup>29</sup>

This state of affairs serves to illustrate that the principal beneficiary and custodian of the royal prerogative power is not the Monarch but the Prime Minister. In addition to the executive powers in the field of foreign affairs already mentioned, it is under the authority of the Crown that Prime Ministers make Cabinet, ministerial and senior civil service appointments, and that peers as members of the House of Lords are selected and appointed, together with numerous other public appointments. Until Gordon Brown took office in 2007, even the appointment of archbishops and the most senior bishops of the Church of England were in the hands of the Prime Minister, a power that both Margaret Thatcher and Tony Blair on occasion made use of.<sup>30</sup> Political and academic debates on the future of the royal prerogative are bound up with questions of reform to the office of Prime Minister itself, and the widely acknowledged presidentialisation of that office. Since the office of Prime Minister is a pure creature of tradition and convention, and its tenure and powers not provided for in any Act of Parliament, its role and relationship to Cabinet and collective ministerial decision-making is whatever the holder of that office chooses to decide.<sup>31</sup> Conversely, others will argue that a Prime Minister is only as powerful as his or her ministerial colleagues allow him or her to be,<sup>32</sup> though a myriad of factors are in play in determining this, particularly the force of the personalities involved and the size of the government majority in the House of Commons.

Of far less political importance, but with the potential for considerable disruption in UK constitutional affairs, is some lingering uncertainty surrounding the rules governing the prerogative powers and public conduct of the royal Head of State. The special importance of constitutional conventions,<sup>33</sup> operating as a form of obligatory political morality rather than

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<sup>29</sup> *Commons Hansard*, 17 April 2018, c208-209. For parliamentary select committee inquiries into this subject, see House of Lords Constitution Committee, *Waging War: Parliament's Role and Responsibility* (2005-06) HL 236 (supporting a convention regulating war powers) and *Constitutional Arrangements for the Use of Armed Force* (2013-14) HL 46 (opposing legislation or a parliamentary resolution on the matter); and House of Commons Political and Constitutional Reform Committee, *Parliament's Role in Conflict Decisions* (2010-12) HC 923 (recommending clarity on the arrangements and welcoming the ministerial promise of legislation at that time).

<sup>30</sup> See generally Dominic Grant, "By Law Established: The Church of England and its Place in the Constitution", in Robert Blackburn (ed.), *Constitutional Studies* (London: Mansell, 1992), Ch. 11; R. M. Morris (ed.), *Church and State in 21st Century Britain* (Basingstoke: Palgrave Macmillan, 2009).

<sup>31</sup> Andrew Blick and George Jones, *Premiership: The Development, Nature and Power of the British Prime Minister* (Exeter: Imprint Academic, 2010); J. P. Mackintosh, *The British Cabinet* (London: Stevens & Sons, 3rd ed. 1977).

<sup>32</sup> For discussion see Anthony King (ed.), *The British Prime Minister* (London: Macmillan, 2nd ed. 1985); Peter Hennessy, *The Prime Minister: The Office and its Holders since 1945* (London: Penguin, 2000); and for a prime ministerial perspective, Harold Wilson, *The Governance of Britain* (London: Weidenfeld & Nicolson, 1976), Foreword pp. 1-11.

<sup>33</sup> Geoffrey Marshall, *Constitutional Conventions* (Oxford University Press, 1984).

law, is nowhere more important than in regulating the public role and conduct of the royal Head of State. This is because the occupant of the throne possesses a number of vital legal powers in the royal prerogative that only they can directly exercise, among them prime ministerial (and other ministerial) appointment, the summoning and prorogation of Parliament, and the Royal Assent to Acts of Parliament and Orders in Council. Yet there remain doubts and misunderstandings in public and academic life on whether the Monarchy is entitled or expected to be personally involved in the exercise of the powers today.

The better view is that these royal powers are purely ceremonial and automatic leaving no scope or need for personal involvement.<sup>34</sup> On all matters of public conduct the convention is that the Monarchy is to follow the advice (in other words, direction) of the Prime Minister, and any difficulties relating to the appointment or dismissal of a Prime Minister are to be resolved by majority voting in the House of Commons (expressed in no-confidence or confidence motions). The separate issue of the scope for a future Monarch to express their personal views in public speeches or advocacy in private to ministers has aroused substantial media speculation in relation to the heir to the throne, Prince Charles, who is well known for strong opinions on a range of public issues ranging across the environment, farming, human rights, and occupation of Tibet.<sup>35</sup> However conduct of this nature operates within the convention of ministerial responsibility, meaning that it is for the Prime Minister to advise and guide the royal Head of State on the scope of such activities.

Misleading courtesies to the Crown, in the flummery of royal etiquette and use of ancient terminologies about the Sovereign, have helped perpetuate the myth of personal and reserve powers of the contemporary Monarchy. There is a good case now for codifying the powers, duties and conventions of the royal Head of State, which might be conducted as a separate exercise through an official review and agreed written statement from Buckingham Palace or a Conference on Royal Affairs. Far better however, given the central place in which the Crown fits into the legal structure of the UK's political and constitutional affairs, would be for its rationalisation to form part of a new constitution for the UK, embodied in a written, codified form.<sup>36</sup>

## **Theory and Practice of Parliament**

Ever since 1688 the axis of the UK constitution has remained the relationship between the Crown and Parliament. The supremacy of an Act of Parliament over the common law and royal prerogative, security for the meeting of Parliament, and the accountability of ministers to Parliament, together formed the bedrock of the 17th century constitutional settlement,

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<sup>34</sup> See Robert Blackburn, "Monarchy and the Personal Prerogatives", *Public Law* (London: Sweet & Maxwell, 2004), pp.546-563; also Robert Blackburn, "Queen Elizabeth II and the Evolution of the Monarchy", Ch. 10 in *The British Constitution: Continuity and Change*, ed. M. Qvortrup (Oxford: Hart Publishing, 2013).

<sup>35</sup> Robert Blackburn, *King and Country: Monarchy and the Future King Charles III* (London: Politico, 2006).

<sup>36</sup> See further below.



extended into the Union with Scotland after 1707.<sup>37</sup> Parliament is the heart and soul of the constitution, afforded primacy in the law and politics of the country, and is still shaped by its ancient history and evolution.

It is to the institutions and procedures of the House of Commons therefore that one looks for the fundamentals and guarantee of constitutionalism in the UK. As I have written elsewhere on the nature and importance of parliamentary procedure,

"Of all legal subjects parliamentary procedure is the one most often overlooked for its level of importance to the working of politics and the constitution. This is especially the case in respect of the United Kingdom Parliament, since the unwritten nature of the country's constitution means there is no body of entrenched basic law governing and controlling the affairs of the executive and government. Instead the common law doctrine of parliamentary sovereignty provides that Parliament is the supreme and dominant legal and political authority in the state. The consequence of this is that it is within Parliament itself that the primary constitutional architecture exists for controlling and limiting the power and activities of central government and the political executive."<sup>38</sup>

Though the UK's system of parliamentary government, with its executive drawn from the dominant party (or coalition parties) in the House of Commons, is shared with many other countries in Europe and across the world, its special characteristics derived from the unwritten nature of the constitution have led some commentators to describe the UK political system as being one of "elective dictatorship".<sup>39</sup> It is true that in the UK the language of checks and balances is misleading because ultimately governments can almost always get their way on its legislative and other policy proposals in the House of Commons, or at least until the next General Election day. A better and more realistic terminology for understanding the parliamentary process is to say that its role and function is not to exercise direct power, command or obstruct government policy and action, but to influence it by generating advice, criticism and scrutiny.<sup>40</sup> Parliament is principally a reactive body, responding to whatever ministers propose or have done, whether in legislative form or as executive action.<sup>41</sup> The

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<sup>37</sup> The classic works of UK constitutional history including on the 1688 settlement are F. W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908), and Sir William Anson, *The Law and Custom of the Constitution*, Vol. I: Parliament (Oxford: Clarendon Press, 5th ed. 1922); Vol. II: The Crown (Oxford: Clarendon Press, 3rd ed. 1907).

<sup>38</sup> Robert Blackburn, "The Nature and Importance of Parliamentary Procedure", Ch. 4 in Blackburn, Arianna Carminati & Lorenzo Spadacini (eds.), *Parliament as the Cornerstone of Democracy: Studies on the UK and Italian Parliaments in commemoration of Magna Carta's 800th Anniversary* (London: King's College London & Brescia University, 2018) at p.45. Under article 9 of the Bill of Rights 1689 the judiciary may not adjudicate on or inquire into the internal proceedings of Parliament ("The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament").

<sup>39</sup> Lord Hailsham, *Elective Dictatorship* (London: BBC, Richard Dumbleby Lecture, 1976).

<sup>40</sup> Robert Blackburn, "The Nature and Importance of Parliamentary Procedure", p.47; and Bernard Crick, *The Reform of Parliament* (London: Weidenfeld and Nicolson, 1964), especially p.77.

<sup>41</sup> Some limited powers of initiation exist in law-making by way of Private Members' Bills and policy reform proposals from Select Committees, both considered below.

parliamentary process, and the procedures that facilitate its workings, is all about pressures, the release and resolution of tensions, and the uninhibited exchange of views.

To facilitate this process, through the ventilation of opinion and holding of government to account for its actions, there have been a succession of major procedural changes in the House of Commons in recent times. Combined together, these have greatly strengthened the role of the Commons collectively, as well as Members individually. Better resources have been granted to Members in their office and working facilities, invigorating their use of the traditional procedures of the House, such as putting Questions to ministers. In 2015-16 for example there were 4,742 oral Questions tabled for ministers, alongside 35,956 written Questions, a huge increase from earlier times. A significant innovation since 2007 has been that of Topical Questions, allowing fifteen minutes in each one hour of Questions to be allocated to matters arising that day or very recently, increasing the relevance of parliamentary business to news and discussions in the media. Two other related innovations have been additional time being created for parliamentary debate through the use of Westminster Hall for parallel sittings of the Commons, and the creation of a Backbench Business Committee on 15 June 2010 for the orderly selection of backbench requests for debates.

Most significant of all has been the success of the government department related Select Committee system, gradually developed and strengthened since being established in 1979, whose formal role under Standing Orders is "to examine the expenditure, administration and policy of the principal government departments".<sup>42</sup> Whereas debate in the chamber does not lend itself to scrutiny beyond discussion of general principles of policy, and Questions to ministers do not allow for prolonged interrogation, Select Committees do require ministers, as well as experts or any persons from public life they request to appear before them, to respond to up to two hours of sustained and detailed scrutiny and questioning to assist in the inquiries they decide to pursue. Until recently the composition of a Select Committee, consisting of usually 12 members, was selected and determined by the respective party managers, but pressure developed for greater independence in the appointments, culminating in a major report on the subject by a special Commons committee.<sup>43</sup> The new arrangements since 2010 are for chairpersons to be elected by a cross-party ballot of all Members of the Commons, and other Committee members chosen by ballot from their party membership in the House. This has substantially enhanced their independence of action and the robustness with which they pursue their inquiries.

A future focus for academic study and research on the House of Commons can be expected to be assessment of the practical impact of these recent procedural changes in terms of influencing government policy and decision-making,<sup>44</sup> and how the role of Members is evolving in terms of the relative time they spend on the different categories of political work

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<sup>42</sup> HC SO 152.

<sup>43</sup> House of Commons Reform of the House of Commons Committee, *Rebuilding the House* (2008-09) HC 748.

<sup>44</sup> An early example of this is Meg Russell and Meghan Benton, *Selective Influence: The Policy Impact of Commons Select Committees* (London: Constitution Unit, 2011).

they perform both at Westminster and in their constituencies. Attention to certain to be focused also on the attempts being made to involve and engage the public more directly in the working of Parliament. Greater use of the ancient procedure for public petitions is being made,<sup>45</sup> and a new "collaborative" e-petition procedure was started in 2015 that allows the public to petition the House of Commons to raise an issue with ministers, and if there are over 100,000 supporters a debate can be held in Westminster Hall.<sup>46</sup> Since 2010 a new "public reading stage" for government Bills has been trialled on a small number of occasions, inserting an on-line public consultation into the legislative process. These and other attempts at direct popular involvement in parliamentary affairs will continue to be the subject of discussion, proposals and experimentation.

Fresh momentum behind a new voting reform that incorporates a measure of proportional representation (PR) in elections to the House of Commons can be expected to re-emerge in the near future. There has been a cyclical nature to the debate on PR in the UK going back as far as the mid-19th century, with periodic outbreaks of demands for greater proportionality between votes cast and seats won, especially in 1917-18 and 1929-31 and more recently in the periods 1983-87 and 1992-97.<sup>47</sup> The UK First-Past-the-Post (simple plurality) system produces a wide deviation from proportionality in terms of votes cast and seats won for political parties.<sup>48</sup> This was more tolerable in democratic terms under a predominantly two party system (in the post-1945 era the Conservative and Labour parties). However in more recent times significant other parties have had substantial electoral support (highest among them being the Scottish National Party and Liberal Democrats) and voting behaviour is now far less tribal, reflecting the changing class structure of UK society and state collectivism no longer being a core ideology dividing the parties. The ill-timed referendum in 2011 offering the Alternative Vote (not a proportional system) may have killed off any prospect of electoral reform for a decade,<sup>49</sup> but the topic can with some certainty be expected to return again before long in forthcoming debates on constitutional reform designed to achieve greater popular representation.

One intractable problem in UK constitutional law has been a democratic settlement for the composition of the House of Lords.<sup>50</sup> UK bicameralism is the product of history rather than contemporary logic, and the existence of the Second Chamber is founded on ancient

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<sup>45</sup> See Erskine May, *Parliamentary Practice* (London: Butterworths, 24th ed., 2011), p.484.

<sup>46</sup> See HC SO 145A. A recent case was a petition from 1.8 million people demanding that President Trump did not make a state visit to the UK, subsequently debated on 18 January 2016.

<sup>47</sup> See Robert Blackburn, *The Electoral System in Britain* (London: Macmillan, 1995), Ch. 8.

<sup>48</sup> Ibid; also Ron Johnson and Charles Pattie, *From Votes to Seats: The Operation of the UK Electoral System since 1945* (Manchester University Press, 2012).

<sup>49</sup> At the poll the Alternative Vote was rejected 68:32. The referendum was held as part of a deal struck within the Conservative-Liberal Democrat coalition under which no proportional system was placed on the ballot paper and the Conservative leadership campaigned for keeping First-Past-the-Post. Earlier an Independent Commission on the Voting System (Cm 4090, 1998) had been established to recommend a proportional alternative to First-Past-the-Post but the Labour government then defaulted on its promise to put this to the electorate in a referendum.

<sup>50</sup> See Chris Ballinger, *The House of Lords 1911-2011: A Century of Non-Reform* (Oxford: Hart Publishing, 2014).

class representation (the Lords Temporal and Spiritual sitting in the upper chamber of Parliament, with the gentry sitting separately in a House of Commons). In other countries emulating the Westminster system of parliamentary government, their Second Chamber has usually been afforded one or more special roles in the country's constitutional law, which is commonly to represent the interests of the component states within a federal structure and to approve amendments to a country's written constitution. The House of Lords has no special place or powers in constitutional law in respect of these two vital parliamentary functions at present.<sup>51</sup>

In contrast a UK government white paper preceding one of the many failed attempts at reform over the course of the past 100 years described the functions of the House of Lords as being the provision of a forum for full and free debate on matters of public interest; the revision of public Bills brought from the House of Commons; the initiation of public legislation, including in particular those government Bills which are less controversial in party political terms and Private Members' Bills; the consideration of subordinate legislation; the scrutiny of the activities of the executive; and the scrutiny of private legislation.<sup>52</sup> These categories of business are precisely what the House of Commons already perform, and there is nothing unique or special stated about the parliamentary role of the Second Chamber. In practice therefore the House of Lords performs what is essentially a duplicating function, but without being the chamber on which the life or financial accountability of the government rests. It has minimal power with which to contradict the House of Commons, with its original power of legislative veto being removed in 1911, replaced with a power of one-year delay circumscribed by conventions and rarely exercised in practice.<sup>53</sup> In defence of its position, a theory of it being "a revising chamber" emerged in the late nineteenth century, supplementary and useful for second thoughts, but not actually necessary.<sup>54</sup> The weakness of the legislative powers and democratic authority of the Second Chamber has led some to describe the UK parliamentary process as one of "disguised unicameralism".<sup>55</sup>

Popular pressure for further reform now largely focuses on a perceived oddity and anachronism in its membership and current arrangements, aggravated by periodic bouts of ridicule in the mass media of misbehaving lordships.<sup>56</sup> The current size of the House has reached 793, the largest Second Chamber in the world, which includes twenty-two bishops or

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<sup>51</sup> For the author's view on the proper role for the Second Chamber see Robert Blackburn, "The House of Lords", in Robert Blackburn and Raymond Plant (eds), *Constitutional Reform: The Labour Government Constitutional Reform Agenda* (Harlow: Longman, 1999), Ch. 1.

<sup>52</sup> House of Lords Reform (Cmnd 3799, 1968), para. 8. Later government accounts of the Lords functions have been expressed in broadly similar terms.

<sup>53</sup> For the history, law and conventions on the legislative powers of the Lords, see Robert Blackburn and Andrew Kennon, *Parliament: Functions, Practice and Procedures* (London: Sweet & Maxwell, 2nd ed. 2003), Part Four: The Lords.

<sup>54</sup> See Walter Bagehot, *The English Constitution* (1867; London: Fontana ed. 1963), Ch. III.

<sup>55</sup> For example Lord Desai and Lord Kilmarnock, *Destiny Not Defeat: Reforming the House of Lords* (London: Fabian Society discussion document 29, 1997).

<sup>56</sup> Oonagh Gay and Patricia Leopold (eds.), *Conduct Unbecoming: The Regulation of Parliamentary Behaviour* (London: Methuen, 2004); and for cases Reports of the House of Lords Privileges and Conduct Committee.

archbishops and nine-two hereditary dukes, earls, viscounts and barons.<sup>57</sup> All these legislators are unpaid, suggesting it is a voluntary activity, which in many respects it is. The frequency and selection of new appointments are matters entirely controlled by the patronage of the Prime Minister acting under the royal prerogative.<sup>58</sup> Meanwhile in the public eye there is deep confusion as to whether appointments to the House of Lords are made either as an honour or as part of the political process; and if the latter, whether this is to be regarded as a promotion or form of retirement.

In the coming years the future of the Second Chamber will continue to be much debated in academic and political circles, adding to the widespread conviction that something must be done. However the practical politics of this matter do not bode well for an agreed final settlement reform in the near future. The 2017 manifesto of the Conservative Party referred to Lords reform as "not a priority"<sup>59</sup>. Nor was there any sense of urgency in the Labour manifesto, which read, "Our fundamental belief is that the Second Chamber should be democratically elected. In the interim period, we will seek to end the hereditary principle and reduce the size of the current House of Lords as part of a wider package of constitutional reform to address the growing democratic deficit across Britain".<sup>60</sup>

The impetus behind any government initiative suffers from the political reality that any modernising measure is almost certain to confer upon the Second Chamber greater power and authority than it possesses at present, because it will assume greater democratic authority that it may choose to employ to contradict and interfere with government policy and legislation. This is an unattractive proposition to an incumbent Prime Minister, unless they are strongly ideologically committed. Meanwhile within the House of Lords itself a large majority of peers continues to protect its existing position from any reform involving popular elections,<sup>61</sup> though there is an emerging body of support behind a recent proposal, from a Lords Speaker's Committee on the subject, to change lifetime appointments to non-renewable terms of fifteen years.<sup>62</sup>

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<sup>57</sup> The number of hereditary peers allowed as members of the House of Lords was reduced to 92 under the terms of the House of Lords Act 1999. For recent debates on the size of the chamber, see *Lords Hansard*, 5 December 2016, cols.526f; and 19 December 2017, cols. 1965f, 2011f, 2071f.

<sup>58</sup> If and when a Prime Minister decides that some new peers are to be appointed, by convention he or she offers the leaders of the opposition parties a smaller number of nominations at his or her discretion, usually in proportion to their representation in the Commons.

<sup>59</sup> Conservative Party Manifesto, *Forward Together* (2017) at p.41.

<sup>60</sup> Labour Party Manifesto, *For the Many Not the Few* (2017) at p.102.

<sup>61</sup> During Labour's failed attempt at reform in 2002-03 the Lords voted in support of retaining a wholly appointed House by 335 to 110: *Lords Hansard*, 4 February 2003, cols. 116-117. See also the debates on the same day in the House of Commons which while voting in favour of an elected Second Chamber failed to approve any particular proportion of elected element from fully elected to 20 per cent: *Commons Hansard*, 4 February 2003, cols. 211-243.

<sup>62</sup> A Lord Speaker's Committee report on 31 October 2017 recommended (a) the capping of the size of the House of Lords at 600 (and until this is reached only one new peer should be appointed for every two dying or leaving); (b) members of the Lords should serve a 15-year non-renewable term; and (c) a proportion of seats should continue to be held by crossbenchers (approximately 22 per cent of all seats) with the number allocated to

A pre-requisite for a final democratic settlement for the House of Lords will be for a reforming government to manage dissent and disagreement within the governing party to ensure it can command a majority in the Commons. All the serious attempts at reform in modern times were undermined by conflicts of opinion within the governing party leading government proposals to be withdrawn altogether: these included Labour's Parliament Bill 1968-69,<sup>63</sup> Labour's policy proposals in 2001<sup>64</sup> (after a Royal Commission<sup>65</sup>) and in 2003<sup>66</sup> (after a Commons Select Committee inquiry<sup>67</sup>), and the Conservative-Liberal Democrat's Draft House of Lords Reform Bill in 2011.<sup>68</sup> The initiatives in 2001 and 2003 were weakened further by the then Prime Minister Tony Blair's personal opposition to an elected or partially elected Second Chamber,<sup>69</sup> and in 2011 by the proposals coming from the minority Liberal Democrat component in the coalition government. The successful completion of the reforms necessary will require strong leadership from 10 Downing Street and much greater efforts at cross-party co-operation conducted through informal negotiations by the respective parliamentary party managers.

### **The Guarantee of Fundamental Rights**

There has been a long debate in government, parliamentary, policy institute and University circles on the desirability or otherwise of a UK Bill of Rights.<sup>70</sup> For a period after the Human Rights Act 1998 was passed, this debate fell quiet, in large part because although this major piece of legislation was intended to give effect to an international treaty, the European Convention on Human Rights (ECHR), yet it was widely perceived as being a Bill of Rights in all but name, particularly as for the first time it provided for actionable human and civil rights in the courts. However in 2006 the Bill of Rights debate was reignited by David Cameron, then Opposition leader, in setting out the Conservative case for repeal of the Human Rights Act, which was widely opposed across the Conservative Party for its association with Europe. Mr Cameron proposed a "modern British Bill of Rights and Responsibilities", arguing that the Human Rights Act undermined national security and the fight against crime and terrorism, and had encouraged a culture of rights without responsibilities.<sup>71</sup>

The long-term objective of the Labour Party in its pre-1997 constitutional reform programme had in fact been for a British Bill of Rights, to be worked towards after the first

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parties determined by the seats and votes won at the preceding general election; and see *Lords Hansard*, 19 December 2017, cols. 1965-2106, on motion to take note of the report, not leading to a vote.

<sup>63</sup> See Janet Morgan, *The House of Lords and the Labour Government 1964-70* (Oxford: OUP, 1975).

<sup>64</sup> *The House of Lords - Completing the Reform* (Cm 5291, 2001).

<sup>65</sup> *A House for the Future* (Cm 4534, 2000).

<sup>66</sup> *Constitutional Reform: Next Steps for the House of Lords* (Department for Constitutional Affairs, 2003).

<sup>67</sup> Public Administration Committee, *Second Chamber: Continuing the Reform* (2001-02) HC 494.

<sup>68</sup> Cm 8077.

<sup>69</sup> See for example *Commons Hansard*, 29 January 2003, cols. 877-78.

<sup>70</sup> See Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (London: Pinter, 1999).

<sup>71</sup> David Cameron, *Balancing Freedom and Security: A Modern British Bill of Rights* (London: Centre for Policy Studies, 2006).

step of incorporating the ECHR into domestic law.<sup>72</sup> However until Mr Cameron's intervention in 2006 this had been forgotten, certainly by Prime Minister Tony Blair, and the civil liberties movement in the country was largely content with the working of the Human Rights Act. When Gordon Brown took office in 2007, his reform document *The Governance of Britain* returned to the subject, setting out proposals for a British Bill of Rights and Duties that emphasised its role in shaping notions of citizenship and identity. His green paper *The Governance of Britain* said,

"It is important to be clearer about what it means to be British, what it means to be part of British society and, crucially, to be resolute in making the point that what comes with that is a set of values which have not just got to be shared but also accepted. There is room to celebrate multiple and different identities, but none of these should take precedence over the core democratic values that define what it means to be British. A British citizen, playing a part in British society, must act in accordance with these values."<sup>73</sup>

As part of this fresh initiative, a Citizenship Review was conducted on ways to promote civic rights and responsibilities,<sup>74</sup> and the Ministry of Justice produced a further discussion paper, *Rights and Responsibilities: Developing our Constitutional Framework*.<sup>75</sup> By the time of the 2010 general election no Cabinet agreement had been reached on a Bill of Rights, the major stumbling block being traditional socialist antipathy towards any suggestion that the measure might strengthen the judiciary, still widely thought of as class-ridden and biased against Labour interests.<sup>76</sup>

During the same period the Joint Committee on Human Rights in Parliament took the opportunity of the revived debate in political affairs to conduct its own inquiry, and proposed a Bill of Rights and Freedoms.<sup>77</sup> This would contain a number of rights beyond those in the ECHR including jury trial and children's rights and reject the idea of including duties and responsibilities in the document. On the legal status and priority of the Bill, it recommended requiring common law and statute to be interpreted in a way that is compatible with the Bill of Rights so far as it is possible to do so (similar to the Human Rights Act) and make explicit (in a way that the Human Rights Act does not) that Parliament continues to have the power of legislative override by expressly declaring in an Act of Parliament that the Act or any

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<sup>72</sup> "The incorporation of the European Convention on Human Rights is a necessary first step ... [but] it is not a substitute for our own written Bill of Rights ... There is a good case for drafting our own Bill of Rights" (Labour Party, *A New Agenda for Democracy: Labour's Proposals for Constitutional Reform* (1993); and see Robert Blackburn, "The Idea of a British Bill of Rights", *Human Rights Law Journal* (Strasbourg: N.P.Engel, 2016) pp.311-323.

<sup>73</sup> Ministry of Justice, *The Governance of Britain*, Cm. 7170 (2007), paras. 195-196.

<sup>74</sup> Published as *Citizenship: Our Commons Bond* (2008).

<sup>75</sup> Cm. 7577 (2009). On the academic debate, see Stephan Parmentier, Hans Werdmolder and Michael Merrigan (eds), *Between Rights and Responsibilities: A Fundamental Debate* (2016).

<sup>76</sup> The classic academic exposition of this view is set out in J. A. G. Griffith, *The Politics of the Judiciary* (London: Fontana, 5th ed. 1997).

<sup>77</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2007-08) HL 165; and for debate see *Commons Hansard*, 25 June 2009, col 307WH.

provision in it shall operate notwithstanding anything contained in the Bill of Rights and Freedoms.<sup>78</sup> An independent Commission on a Bill of Rights was set up shortly after the new Conservative-Liberal Democrat government took office, which in its majority report also supported a Bill of Rights unconditional on the exercise of responsibilities, with additional rights beyond those in the ECHR.<sup>79</sup> Like the Joint Committee it rejected a judicial power to strike down legislation on grounds of violation of the Bill of Rights, but preferred adopting the declaration of incompatibility procedure in the Human Rights Act.<sup>80</sup>

Current Conservative government proposals on human rights law are in a state of suspension, with its efforts on negotiating and implementing withdrawal from membership of the European Union taking primacy over all other constitutional matters. There is a serious possibility that, once the UK has left the EU, the UK might also withdraw from the European Convention and Court on Human Rights, since it will no longer be bound to be a signatory of the ECHR which is a pre-condition of EU membership.<sup>81</sup> An indication of the present Prime Minister Theresa May's antipathy towards the ECHR and European Court of Human Rights was reflected in a speech she made as Home Secretary in early 2016 before the EU referendum had taken place. She expressed her view that,

“The ECHR can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia’s when it comes to human rights... So regardless of the EU referendum, my view is this: if we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its court.”<sup>82</sup>

Subsequently the Conservative election manifesto prepared under her premiership in spring 2017 went on to say,

"We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next Parliament".<sup>83</sup>

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<sup>78</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2007-08) HL 165, p.114. The Canadian Charter of Rights and Freedoms has an equivalent provision.

<sup>79</sup> Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us* (December 2012).

<sup>80</sup> Human Rights Act 1998, section 4: a declaration under this section does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and is not binding on the parties to the proceedings. Its effect is therefore advisory, putting the Ministry of Justice and Parliament on notice of judicial opinion, causing ministers and parliamentarians to review the legislative provision for its amendment or repeal.

<sup>81</sup> See Robert Blackburn and Jörg Polakiewicz (eds.), *Fundamental Rights in Europe: The ECHR and its Member States* (Oxford University Press, 2001), pp.89-100.

<sup>82</sup> Reported in the *Guardian* newspaper, 25 April 2016.

<sup>83</sup> Conservative and Unionist Party Manifesto, *Forward Together: Our Plan for a Stronger Britain and a Prosperous Future* (Conservative Party, 2017), p.37.



Therefore, if the Conservative Party is re-elected to office at the next general election currently scheduled for 5th May 2022, it is foreseeable that it will return to and reassert its policy programme for repeal of the Human Rights Act, coupled with plans to withdraw from the European Convention on Human Rights.

## **Democratising the Constitution**

There has been growing pressure from public opinion, and a high degree of agreement across the political spectrum, that government should be brought closer to the people, and new methods found to make the UK system of government at all levels more representative, accountable and inclusive. In this regard, historically it was an accountability failure of European Union governance, leaving a sense of disconnection from EU decision-making and the benefits of EU membership, which fed directly into the 2016 referendum decision to leave the EU. By contrast internally within the UK there has been a deepening of national identities, especially in Scotland and Wales brought about by the Scotland Act 1998 and Government of Wales Act 1998 creating a new tier of governance in each of those two areas.<sup>84</sup>

There are now serious dangers that devolution, unless it is embedded in an overarching Act of Union or a newly created federal structure for the UK that settles a form of regional government also in England, may become the first stage of a process that leads to national disintegration and the separation of Scotland and Wales.<sup>85</sup> The UK government's decision to withdraw from the EU has significantly aggravated separatist pressures especially in Scotland which strongly voted in favour of remaining in the EU at the 2016 referendum.<sup>86</sup> In order to find a new, permanent settlement for the four nations of the UK and halt the ambitions of the nationalist parties, a debate in political circles and academe is now underway on how best to frame a final settlement that binds the United Kingdom together in a stronger unit than the complex and asymmetrical series of devolution statutes.<sup>87</sup>

Within the process of national decision-making, various attempts have been made to provide greater consultation or involvement of the public. Use of the referendum has now

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<sup>84</sup> Those two Acts have been subsequently amended conferring extended powers to the devolved bodies; and for other elements of UK devolution see Northern Ireland Act 1998 (as amended) and Greater London Authority Act 1999. In 2002-04 an attempt was made by the then Labour government to introduce a scheme of regional government in eight areas of England, see Cabinet Office, *Your Region, Your Choice: Revitalising the English Regions* (Cm 5511, 2002): however this was withdrawn after a failed referendum on 4 November 2004 (78:21 on a 48% turnout) to endorse setting up the first assembly in the North East of England.

<sup>85</sup> For a proposed legislative blueprint see Act of Union Bill, HL (2017-19) Bill 132. See also Bingham Centre, *A Constitutional Crossroads: Ways Forward for the United Kingdom* (BIICL, 2015).

<sup>86</sup> For parliamentary discussion see Lords Hansard, *Brexit: Stability of the Union*, 17 January 2019, cols.331-389.

<sup>87</sup> See Andrew Blick and George Jones, *A Federal Future for the UK: The Options* (London: The Federal Trust, 2010); Andrew Blick, *Devolution in England: A New Approach* (London: The Federal Trust, 2014); Independent Commission of the Bingham Centre, *A Constitutional Crossroads: Ways Forward for the United Kingdom* (London: British Institute of International and Comparative Law, 2015); Daniel Greenberg, *Discussion documents: Act of Union and Explanatory Memorandum* (2016).

entered UK political life, though still on a relatively few occasions and only twice on a state-wide basis.<sup>88</sup> Most referendums in the UK have been held within its four nation component parts: in Northern Ireland on staying part of the UK or becoming part of the Irish Republic in 1973 and on the Northern Ireland (Good Friday) Agreement in 1998, in Scotland and Wales on devolution proposals in 1979 and 1998 (and again in Wales in 2011), in London on the Greater London Authority proposals in 1998, and in North East England on a regional assembly proposal in 2004. More controversially, referendums were held in 1975 on continuing membership of the (then) EEC, and since the Conservatives took office in 2010 on the voting system in 2011, Scottish independence in 2014 and membership of the EU in 2016. Popular expectations for referendums on major public policy decisions in the future have therefore been fuelled. Conversely, Prime Ministers may in the future find it less easy to hold a referendum simply because it suits their internal party differences and political convenience.<sup>89</sup>

There has been widespread criticism of the manner in which some of these referendums have been called and conducted, generating a number of academic studies and parliamentary inquiries and suggested updating revisions to the Political Parties, Elections and Referendums Act 2000. The most important elements to be addressed in any future amendments to the Act are a) how to ensure a level playing field between the two (or more) options being placed before the electorate in terms of resources and access to the media, and b) particularly where the policy question raises a complex number of considerations (as in the 2016 referendum on EU membership) whether the Electoral Commission has the resources to provide independent statistical and other factual information on matters in issue during the heat of the campaign. Meanwhile, as the Constitution Committee in the House of Lords concluded in its inquiry into referendums in 2010, while the initiative for calling a referendum remains with the government, the final judgement on whether one should be held or not should be a decision made by Parliament.<sup>90</sup> There is a good case for referendums, but care must be taken to ensure they support and do not undermine the UK's institutions of representative democracy.

An important debate is now emerging on the theory and practice of deliberative democracy; in other words, establishing a process for learning and discussion among assemblies representative of the public, at national, regional or local level as the matter or

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<sup>88</sup> A selective comparison in the period since 1990 of the number of state-wide referendums is: Italy 56, Ireland 27, New Zealand 14, Poland 10, Iceland 8, Denmark 7, France 3, Australia 3, Spain 1, Greece 1: see Independent Commission on Referendums (London: UCL Constitution Unit, 2018), chapter 1.

<sup>89</sup> It is widely believed that the decision to hold the 2016 referendum on continuing EU membership, which was government policy, was a tactical device of David Cameron the serving Prime Minister to silence dissent within the governing Conservative Party, rather than a genuine desire or need to consult the electorate, wrongly calculating that the government would win the referendum (which was lost by the government 48:52): some have described his decision as "Cameron's catastrophe", especially as it led directly to his resignation from office: see Robert Worcester, Roger Mortimore, Paul Baines and Mark Gill, *Explaining Cameron's Catastrophe* (London: Indie Books, 2017)).

<sup>90</sup> House of Lords Constitution Committee, *Referendums in the United Kingdom* (2009-10) HL 99, para. 226.

question in issue may involve.<sup>91</sup> In the case of questions of political and constitutional reform, this debate has taken the form of proposals for a Constitutional Convention, alternatively known as a citizens' assembly.

An influential precedent with lessons for the UK has been the Convention conducted in the Republic of Ireland in 2012-14, set up by resolution of both Houses of the Oireachtas and paid for out of public funds. A list of issues were referred to the Convention for deliberation and recommendation, and these included (among others) reducing the Presidential term of office to five years and aligning it with the local and European elections; reducing the voting age to 17; review of the Dáil electoral system; provision for same-sex marriage; increasing the participation of women in politics; and such other relevant constitutional amendments that may be recommended by it. The 100 members of the Convention included a chairperson, 66 citizens and 33 elected politicians. The 66 citizen members were randomly selected from the electoral register so as to be broadly representative of Irish society by an independent polling company. The way in which the Convention proceeded was to hold at least one weekend-long plenary meeting for each of its inquiries into the issues referred to it. The first day of each meeting featured roundtable discussions supported by facilitators and note-takers, followed by a plenary session during which any emerging themes would be reported. The second day usually began with a roundtable session to reflect on the previous day's discussions and/or a question and answer session with experts. The Convention then voted on the matters under discussion, with the results of the vote announced by press release on the same day, and a report subsequently drafted and published. Some recommendations were adopted by government action such as creating an Electoral Commission and extending polling hours; and others were put to a referendum including on reducing the minimum age for the presidency (rejected 73:27) and same-sex marriages (supported 62:38).<sup>92</sup>

On the centre-left of politics there is already firm support for a UK Constitutional Convention. The Labour Party's most recent election manifesto pledged it would set one up,<sup>93</sup> and substantial groundwork for how a UK Convention might be organised and operate has been conducted by a parliamentary inquiry into the subject.<sup>94</sup> In addition substantial academic research and writing now exists on the options for the UK, drawing on worldwide precedents of deliberative democracy techniques and practice.<sup>95</sup>

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<sup>91</sup> See David van Reybrouck, *Against Elections: The Case for Democracy* (London: Bodley Head, 2016) and James Fishkin, *Democracy When the People Are Thinking: Revitalising Our Politics Through Public Deliberation* (Oxford: OUP, 2018).

<sup>92</sup> For the proceedings of the Convention see [www.constitution.ie](http://www.constitution.ie).

<sup>93</sup> Labour Party Manifesto, *For the Many Not the Few* (2017): "A Labour government will establish a Constitutional Convention to examine and advise on reforming the way Britain works at a fundamental level. We will consult on its form and terms of reference and invite recommendations on extending democracy. This is about where power and sovereignty lies..." (at p.102).

<sup>94</sup> House of Commons Political and Constitutional Reform Committee, *Do We Need a Constitutional Convention for the UK?* (2012-13) HC 371

<sup>95</sup> See Alan Renwick, *After the Referendum: Options for a Constitutional Convention* (Constitution Society, 2014), and on the political science of popular deliberation more widely Ron Levy, "The Law of Deliberative Democracy:

The case for a Constitutional Convention has been linked to the desirability of moving towards the adoption of a written, codified constitution for the UK, since it is no easy task for the ordinary citizen to understand UK constitutional law as it stands which is a prerequisite to any public debate on how its individual elements and institutions should be modernised and reformed. There is now a growing body of opinion among parliamentarians and University professors, with a converging range of reasons, behind a comprehensive, joined-up documentary constitution of this nature. Some saw the civil service's recent initiative in preparing the Cabinet Manual as the start of such a process, and during Gordon Brown's tenure as Prime Minister 2007-10 he stated in the House of Commons his personal support for the preparation of a written constitution.<sup>96</sup> Significant progress on this reform proposal was made with the first ever official inquiry into the subject conducted by the House of Commons Political and Constitutional Reform Committee during the 2010-15 Parliament, with its final report containing three illustrative blueprints on how a codified written constitution for the UK could work.<sup>97</sup> Support for a written constitution comes from parliamentarians on all sides of the political spectrum, Conservatives,<sup>98</sup> Liberal Democrats,<sup>99</sup> and Labour.<sup>100</sup>

There would be many advantages of writing down UK constitutional law into one documentary constitution. Above all, in support of the UK's political democracy, it would enable people to see and be clear about what the institutions, functions and powers of the political system are together with the constitutional rules that govern them. Professor Vernon Bogdanor in arguing for a written constitution compares the current system to a person belonging to a club but not being told what the rules of membership are.<sup>101</sup> This argument

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Seeding the Field", *Election Law Journal* (2013) 355 and "Deliberative Voting: Realising Constitutional Referendum Democracy", *Public Law* (2013) 555;

<sup>96</sup> Gordon Brown stated, "I personally favour a written constitution. I recognise that this change would represent a historic shift in our constitutional arrangements, so any such proposals will be subject to wide public debate and the drafting of such a constitution should ultimately be a matter for the widest possible consultation with the British people themselves." *Commons Hansard*, 10 June 2009, col 798

<sup>97</sup> House of Commons Political and Constitutional Reform Committee, *A New Magna Carta?* (2014-15) HC 463. The author served as Special Counsel to this inquiry: see Robert Blackburn, "Enacting a Written Constitution for the United Kingdom", *Statute Law Review* (2015, Vol. 35, No. 1), pp.1-27.

<sup>98</sup> Lord Hailsham (Conservative Party Chairman 1959-60; Lord Chancellor 1970-74 and 1979-83), *Elective Dictatorship* (BBC, Richard Dimpleby Lecture 1976) and *The Dilemma of Democracy* (London: Collins, 1978).

<sup>99</sup> The 2010 Liberal Democrat election manifesto under Nick Clegg's leadership proposed to "address the status of England within a federal Britain, through the Constitutional Convention to set up to draft a written constitution for the UK as a whole", p.92.

<sup>100</sup> The 2010 Labour election manifesto under Gordon Brown's leadership proposed to set up "an All Party Commission to chart a course towards a Written Constitution", para. 9:3.

<sup>101</sup> "If one joined a tennis club, paid one's subscription, and asked to be shown the rules, one would not be pleased to be told that the rules had never been gathered together in one place, that they were to be found in past decisions of the club's committee over many generations, and that they lay scattered among many different documents; nor would we be pleased to be told that some of the rules - so-called conventions - had not been written down at all, but that we would pick them up as we went along, with the implication that if we had to ask we did not really belong:" Vernon Bogdanor, *The Crisis of the Constitution* (London: Constitution Society, 2nd ed.

for inclusiveness is a powerful one, and there is no doubt that a constitution (especially if it contains a Bills of Rights, the US being a classic example) does perform a powerful educative role in society generally. The report of the House of Commons committee on the subject set out twenty-one arguments for a written UK constitution, and among these were the desirability of settling in law those constitutional conventions that appear uncertain; distinguishing constitutional law from ordinary law and providing a special legislative process for amendment of the former; using the opportunity to strengthen the checks and balances in the constitution such as settling the position of the House of Lords and including a British Bill of Rights; and enabling the document to serve as an expression of the UK's democracy, identity, future and purpose.<sup>102</sup>

A catalyst will be required that prompts a future Prime Minister who is already well disposed to the case for a written constitution to set up a commission to prepare a draft document to lay before Parliament. A constitutional moment, as this is usually described, is difficult to predict, but a dramatic worsening of the UK's national finances,<sup>103</sup> the impact of the UK's departure from the EU,<sup>104</sup> and demands for Scottish independence, or a combination of such factors, could all stimulate demands for a written constitutional settlement.<sup>105</sup> If a Constitutional Convention as mentioned above is established, especially if set up in the context of a widespread sense of political and economic crisis in the country, as was the situation driving the reform agenda in Ireland<sup>106</sup>, a recommendation from the Convention for a written constitution would carry considerable weight and certainly fix this proposal on the UK's agenda for reform. A sense of urgency would be needed to drive the measure onto the statute book, especially if it contains a series of reforms to the substance of the law and working of government, Parliament or the judiciary, rather than a simple consolidation of existing law and practice.

The pace of social change in the UK at present, driven by new technologies, chronic economic problems and political instabilities, and its impact on public attitudes on political affairs is now so great that the direction of constitutional reform in the foreseeable future

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2015) at p.46; see also *The New British Constitution* (Oxford: Hart, 2009), chapter 9 ("Towards a Written Constitution?").

<sup>102</sup> The report, which was neutral in considering the case for a written constitution, also set out 21 reasons against a written constitution (at pp.24-28), chief among them that it would further politicise the judiciary: Nick Barber, "Against a Written Constitution", *Public Law* (2008) 11; and Sir John Baker, *Our Unwritten Constitution* (British Academy lecture, 2009).

<sup>103</sup> The financial crisis in Iceland in 2008 led directly to a major review of the constitution; see also Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis* (London: Routledge, 2013).

<sup>104</sup> See Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (London: Bloomsbury, 2019).

<sup>105</sup> If the Monarchy collapsed for want of a suitable personality on the throne, the legal theory of the Crown as the residual basis of authority in the state would need to be replaced by a written UK constitution serving as the country's fundamental law.

<sup>106</sup> Tánaiste Eamon Gilmore in his speech at the launch of the Convention on 1 December 2012 said, "The idea for a citizen's convention to examine our Constitution came against the backdrop of the most profound crisis our country had ever faced. Caught in a perfect storm, where a world crisis, a European crisis and a domestic crisis met, the very viability of our independent state was in question. Confidence in our institutions – in Government, in the banking system, and, in recent years, the Church – had been shaken to its core."

cannot be predicted with absolute certainty. Few down to 2016 predicted UK withdrawal from the EU, even during the referendum campaign; still fewer in 2015 envisaged a radical left-wing outsider being selected as Labour Party leader and the UK's current Prime Minister-in-waiting<sup>107</sup>; and the dramatic collapse of traditional party politics and political ascendancy of the Scottish National Party in Scotland since 2010, agitating for independence from the UK, was never envisaged by the architects of the 1998 devolution arrangements.<sup>108</sup> The politics of the UK, as across many of the western democracies, has been full of surprises in recent years.

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<sup>107</sup> Jeremy Corbyn, Leader of the Opposition since 2015.

<sup>108</sup> However some maintained at the time of the reforms that without devolution being delivered within a federal UK structure, it would serve as the thin end of the wedge towards Scottish independence: see Tam Dalyell, *The Question of Scotland: Devolution and After* (Edinburgh: Birlinn, 2016).