



Britain's political parties and the constitution

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IfG–Bennett foreword

In February 2022, the Institute for Government and the Bennett Institute for Public Policy launched a Review of the UK Constitution, to offer an evidence-based and non-partisan analysis of the strengths and weaknesses of the constitution, and where necessary make recommendations for change.

To address the bold scope of this project, we have complemented our own in-depth research with a breadth of perspectives from some of the UK's foremost constitutional experts. In this series of expert guest papers, we publish the views and proposals of academics and practitioners, who take a range of stances from constitutional conservation through to major reform. While these papers respond to the pressing constitutional questions of the day, they all also look to construct long-term solutions that will inform political decision making as well as public debate.

Given the range of views expressed, we do not necessarily endorse all of the ideas found in these papers, but we can commend the rigour with which the arguments have been constructed and sincerely thank the authors for their thoughtful contributions.

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Summary

When it comes to what passes for the UK's constitution, our political parties – particularly those that routinely run the country – are the ghost in the machine: vital but barely acknowledged. The constitution looks and acts the way it does partly, perhaps even mainly, because of what they (or at least the politicians who operate within them) have said and done over getting on for two centuries. And yet the collection of various “institutions, statutes, judicial decisions, principles and practices” (to quote *The Cabinet Manual*) of which the UK's constitution is comprised rarely refers to them.¹ Rather, it is largely assumed that they should work within its constraints – on pain of legal sanctions, public criticism and possible electoral defeat.

This is not entirely surprising. Before the Second World War restored democracy to many (although by no means all) of those continental European polities that had seen it extinguished by fascism, their constitutions, even when codified, made little or no mention of parties – in marked contrast, it should be said, to today. And, notwithstanding the various waves of democratisation that have changed all that, many constitutional scholars, especially if they are lawyers, continue to do the same. As one of their number notes:

Political parties and party system dynamics are... critical to understanding how constitutions work, and why they may not, in spite of well-intentioned designs. Unfortunately, much of the recent literature in comparative constitutional law has paid little attention to the multiple ways our basic constitutional structures are conditioned by political parties and party system dynamics.²

In a system like the UK's, where the executive and legislature are essentially fused, the lack of attention paid to political parties (in the sense of their limitations and obligations being outlined and defined) leaves them as something of a black box – and, one might argue, with an awful lot of wiggle room if not outright power, not all of which is necessarily exercised in the public interest.

But if the UK constitution is not, at least on the face of it, particularly interested in parties, parties have long taken an interest in the UK constitution, even if the attention they pay it might best be described as fitful. It is also often instrumental, not to say self-interested.

Both the Conservative and Labour parties have attempted, sometimes very significantly and successfully, to change (or, as they are more likely to frame it, ‘update’) the constitution for what they, at least, regard as the better – all the way (to note only the most obvious examples) from franchise reform, through curbing the power of the House of Lords, reorganising local governance, legislating for human rights, creating a Supreme Court and introducing devolution, to joining and then turning the UK's back on (what eventually came to be called) the European Union.

So where, looking at their manifestos, announcements and internal debates, do those parties stand now on the constitution? Has the Conservatives' turn towards populism and descent into turmoil since 2016 resulted in largely empty threats or have they seriously eroded some of the checks and balances many of us had rather taken for granted. And what about Labour? Although it has suggested reforms to the constitution during its time in opposition, those suggestions have not, until very recently, been a prominent part of its offer to the electorate or, indeed, its attacks, as the official opposition, on the government. But as power for Labour now looks like a serious prospect for the first time in a decade, the constitution appears to be higher up in the mix than it has been for years. If Labour does make it into office, are any of the suggestions it looks likely to come up with likely to see the light of day in a few years' time?

Accepting a fairly wide definition of what is and isn't constitutional, this paper:

- contrasts how and why, unlike the situation that prevails in the UK, parties are now routinely and explicitly mentioned in the codified constitutions of other liberal democracies
- explores the suggestions for constitutional reform – enacted or otherwise – that the country's two main parties have outlined (not least in their election manifestos) in recent years – leaving to one side devolution for the constituent parts of the UK (covered in other contributions to this series), as well as its relationship with the EU
- discusses a couple of further reforms affecting political parties that others have put forward – one prompted by a number of MPs switching parties in the last parliament and another prompted by the Conservative Party making several changes of leader (and therefore prime minister) between elections.

Political parties *in* the constitution: the UK – an exception that proves the rule

What the Dutch political scientist Ingrid van Biezen has called the process of party constitutionalisation – the tendency of codified constitutions to address the role and organisation of political parties – “effectively began in the immediate post-war period, with Italy and the Federal Republic of Germany, in 1947 and 1949, respectively, the first countries to attribute a positive role to political parties in their constitutions adopted after the restoration of democracy”.³ A host of countries have followed their lead, in each of several waves of democratisation, especially (but not exclusively) in Europe where 28 out of 32 continental democracies now make references to parties in their constitution. The only codified constitutions *not* to make mention of them are those of Belgium, Denmark, Ireland and the Netherlands. Moreover, as van Biezen notes, “key democratic principles such as political participation, representation, pluralism and competition have come to be defined increasingly, if not almost exclusively, in terms of party”, with parties accorded “a pivotal role and given a privileged constitutional position”.⁴

The flip-side of this, however, at least for parties, is that while most constitutions (especially in countries that previously experienced one-party rule) at least imply that they are private associations, separate from the state, they have, to quote van Biezen again, “become increasingly subject to regulations and laws which govern their external and internal behaviour and activities”.⁵ As a result, along with constitutionalisation comes judicialisation. Justices of supreme/constitutional courts in getting on for half of European democracies have the power to rule on anything from matters of party organisation and financing to whether certain parties (those seen as threatening democracy or denying the existence of the state, for instance) should even be allowed legally to exist or at least to contest elections. In fact, according to van Biezen’s research,

nearly two-thirds of the democratic European constitutions contain provisions which regulate the structures and functioning of the extra-parliamentary organization. One common provision within this domain relates to the incompatibility of party membership with certain elected or public offices, such as the judiciary, the law enforcement and security services, or the presidency of the republic... Various constitutions demand, furthermore, that the internal structures and organization of political parties are democratic.⁶

This final requirement for democratic internal party structures, as we will go on to discuss, is arguably problematic: giving a say (especially the final say) to a party’s grassroots members, whether on its choice of policies or its selection of leaders and candidates, may seem only fair.* But those members are unrepresentative (arguably increasingly so, as their numbers decrease) of society as a whole.⁷ In any case, it is not immediately evident why any organisation that plays a crucial part in the viability and vitality of a liberal democracy needs itself to be democratic. Likewise, while a degree of state regulation of parties may be sensible, so too is their separation from the state even if, as van Biezen herself suggests, they might be better conceived of as public utilities than, strictly speaking, private (and therefore autonomous) associations.

Yet make no mistake, any disadvantages accruing to parties in this sense are compensated for (and perhaps more than compensated for) by the advantages conferred (especially on well-established parties) by constitutional regulation. Another political scientist, Gabriela Borz, neatly summarised those advantages and trade-offs:⁸

- Constitutional regulation legitimises and effectively entrenches parties’ role in the polity.
- It helps ensure parties are sufficiently resourced to perform that role.
- It differentiates parties from, but also privileges them relative to, other political actors such as pressure groups.

* What constitutes intra-party democracy (IPD in the jargon) is contested and its scope varies considerably. See Bolin N, Aylott N, von dem Berge B and Poguntke T, ‘Patterns of intra-party democracy across the world’, in Scarrow S, Webb P and Poguntke T eds, *Organizing Political Parties: Representation, participation, and power*, Open University Press, 2017.

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- It may make it easier to restrict the entry of parties that may pose a threat to democracy.
 - It allows for oversight of parties' activities, which should boost transparency and accountability – and minimise corruption.
 - It provides the basis for secondary legislation and court judgments concerning parties.

Whether or not these advantages are actually realised or not is a moot point. But it is worth reminding ourselves – particularly because the UK does not possess a codified constitution and because whatever passes for its uncoded constitution makes little, if any, explicit mention of parties – that this European-wide trend towards the constitutionalisation of political parties is of relatively recent vintage. As van Biezen observes, until the post-war period, both “the liberal tradition rooted in the philosophy of Locke, or the radical tradition inspired by Rousseau” tended to mean that partisan institutions were seen as inimical to the defence of individual interests and to the development of the “general will”.⁹

In the UK, all this, combined with a reluctance on the part of courts to involve themselves in the internal affairs of parties, meant that, for by far the greater part of the 20th century, they were, as Vernon Bogdanor puts it, “treated as if their constitutional significance was akin to that of golf or tennis clubs” – at best (and in the case of the Conservative Party for many years not even) being regarded, legally speaking, as “unincorporated associations” barely touched by statute.¹⁰

Barely, of course, did not mean completely. As Bogdanor notes, the 1937 Ministers of the Crown Act at last recognised that parliament was composed not just of individual MPs but also of parties, not least a government and an opposition (whose leader and chief whip were, for the first time, recognised and granted a salary). In 1969, he goes on to point out, the Representation of the People Act finally allowed candidates to put their party affiliation on ballot papers even though (thanks in part to the late David Butler, apparently) an attempt to ensure the accuracy of that description fell by the wayside. And in 1975 (having avoided putting them on a statutory basis by giving ‘Short money’ grants to opposition parties via a parliamentary resolution), the Sex Discrimination Act mentioned them – but only to exclude them from its provisions so as to allow Labour’s National Executive Committee to continue with its women’s section.

Only with the Registration of Political Parties Act 1998 (which, in addition to allowing logos on ballot papers, prohibited party names, like ‘Literal Democrat’, that were designed to cause confusion, as well as those containing more than six words or which are obscene or offensive) and the Political Parties, Elections and Referendums Act (PPERA) 2000 did the situation change. PPERA was particularly important.¹¹ Passed in the wake of work of the Committee on Standards in Public Life set up by the prime minister, John Major, it established an independent Electoral Commission charged with regulating political parties and, in particular, their funding arrangements. Although

neither the Act itself, nor its explanatory notes, said anything about the role of political parties, the secretary of state who introduced it to parliament, Jack Straw, did make mention of it, pointing out that

Parties are vital to the effective functioning of any representative democracy, but the political parties of today do not [as they did at the dawn of mass parties in the late 19th century] simply sustain a particular set of political leaders in office. In any mature democracy, political parties also provide both a crucial link between the citizen and the elected Government of the day and some of the key processes by which that elected Government are held to account.¹²

That, however, was it. Straw moved straight on to what the Act was primarily about by stressing: "Parties must be capable of discharging effectively those onerous responsibilities, and that necessarily requires money."¹³

A decade after PPERA, the UK government published *The Cabinet Manual*, which sets out the main laws, rules and conventions affecting the government's conduct and operation, and some experts quickly came to see it as a novel and important contribution to the country's constitution.¹⁴ It is also one of the few such documents that make multiple references to political parties. But even then, those references are largely confined to the mechanics of government formation (and dismissal) and to parliamentary practice, rather than discussing their wider role, rights and responsibilities.

It therefore seems reasonable to conclude that, inasmuch as the UK has a constitution, the role, rights and responsibilities of political parties remain at the level of an assumption and an implication. Even the Institute for Government/Bennett Institute's constitutional review paper on 'constitutional guardians', while naming political parties as one of several "auxiliary guardians" ("actors integrated within the core institutions who act as 'stewards' of the constitution, interpreting key texts and principles and advising core institutions and other key actors on the functioning of the UK constitution on a day-to-day basis"), goes on to say relatively little about them, other than to make the very important observation that

MPs hold multiple roles and overlapping responsibilities that can at times distort their willingness to perform this [guardianship] function. MPs are part of a sovereign parliament, but they are also representatives of their constituents, and often more importantly members of political parties. They are elected according to a manifesto from the party they represent and may feel a democratic responsibility to those commitments over the abstract constitutional role of parliament.¹⁵

Whether, in the end, it really matters that parties are ghosts in the machine is, of course, debatable. On the one hand, the UK's parties are denied some of the advantages and (indeed) protections that constitutionalisation gives their counterparts in continental Europe. On the other, they escape some of the associated constraints, leaving them with considerably more freedom to organise themselves as they, rather than the state and/or the courts, see fit. This trade-off would seem wholly practical and perfectly sensible

– unless, of course, one believes that the trend some experts have identified towards ‘democratic backsliding’ on the part of the UK government will lead ministers to one day go so far as to obtain permanent (as opposed to temporary) partisan advantage over their opponents (potential as well as actual), for instance by removing the enhanced status accorded to ‘Her Majesty’s Loyal Opposition’ or by proscribing parties for reasons other than their being perceived to encourage violence.¹⁶ But that seems unlikely, and could perhaps be made all but impossible (at the very least politically), even in the absence of a codified constitution, by introducing a statute that addressed such issues – especially if that statute were to be afforded the kind of ‘constitutional’ and therefore ‘protected’ status that, as we shall see, Labour is now discussing.

The Conservatives and the constitution since 2010

The UK’s adversarial, winner-takes-all political system affords whichever party is in office the opportunity, should it be so inclined, to make significant constitutional changes. Sadly, but inevitably, it is normally all but impossible to distinguish between the changes a governing party tries to make for what it (genuinely) sees as ‘the good of the country’ and the changes it knows full well will be in the interests of the party. More often than not, they are seen to be one and the same thing. The past decade or so in UK politics certainly offers plenty of examples.

Five years of the coalition government after 2010 saw a number of constitutional developments. Echoing New Labour’s use of referendums on Scottish, Welsh and English devolution (as well as on the Northern Ireland peace process), David Cameron conceded (and won) referendums on the voting system (2011) and Scottish independence (2014). He also promised a referendum on the UK’s membership of the EU in the next parliament, leading to charges that the country risked following other European democracies down the road of the opportunistic use of referendums for party management gains and (when eventually that referendum produced a result at odds with what was then the majority view at Westminster) contributing to a populist ‘people versus parliament’ narrative.

But at the time, perhaps, the most important constitutional change that the coalition government made was the removal, via the Fixed-term Parliaments Act 2011, of the prerogative power that allowed a prime minister to request a dissolution and call an election whenever they thought the time was right, albeit within the five years laid down by the Parliament Act of 1911. The legislation was lauded in the Conservatives’ 2015 general election manifesto as “an unprecedented transfer of Executive power”.¹⁷ But ministers’ motivation for that transfer (one wholly at odds, after all, with the party’s traditional desire to preserve the power of the executive vis-à-vis the legislature) was purely instrumental, accepted, on the one hand, in order to reassure the Liberal Democrats that the coalition would not be abandoned should the polls point to a Tory election win and, on the other, so as to prevent them cutting and running from the coalition should, instead, the government become deeply unpopular. Given this, although moves to repeal it only began in earnest once the constraints it imposed

on a government wanting to call an election (or simply wanting to strong-arm its MPs into supporting a piece of legislation by declaring any vote on it one of confidence) became apparent, it was always unlikely to become a permanent feature of the country's political life.

The Conservative Party's 2015 manifesto also boasted of a reform it had made to the House of Lords – namely that it had “allowed for expulsion of members for poor conduct”.¹⁸ But it stressed, too, that “[w]hile we still see a strong case for introducing an elected element into our second chamber, this is not a priority in the next Parliament”, although the party did promise to “ensure the House of Lords continues to work well by addressing issues such as the size of the chamber and the retirement of peers”.¹⁹ This was a slightly odd pledge in that, thanks partly to the efforts of the political scientist and Tory peer, Philip Norton, the House of Lords Reform Act 2014 had already made provision for the latter. The fact that it was achieved through a private member's bill, which was introduced by Dan Byles, Conservative MP for North Warwickshire, cannot have been the explanation since this was also the case for the House of Lords (Expulsion and Suspension) Act 2015, introduced by another Conservative MP, George Young – this time in collaboration with a Labour peer (and former House of Lords Speaker), Helene Hayman. Still, it did indicate that, even though, in the summer of 2012, backbench Tories had effectively scuppered the coalition government's Liberal Democrat-inspired House of Lords Reform Bill (whose plans for a partly elected second chamber had in any case attracted only lukewarm support from Cameron and his colleagues), the Conservative Party at least recognised that there were things about ‘the other place’ that needed fixing even if major reforms were deemed unnecessary.

But the party had much bigger plans for the House of Commons – and for elections to it. It promised in its 2015 manifesto to “reduce the number of MPs to 600 to cut the cost of politics and make votes of more equal value”²⁰ – a pledge that was subsequently legislated for but eventually abandoned, not least because of the party management problems that would have arisen had MPs been obliged to compete against each other for the same seat. And, while promising to “respect the will of the British people, as expressed in the 2011 referendum [when it opposed the introduction of the alternative vote, pressed on it by its Liberal Democrat coalition partners], and keep First Past the Post for elections to the House of Commons”, the party would “introduce votes for life, scrapping the rule that bars British citizens who have lived abroad for more than 15 years from voting”.²¹ This was a plan that, it was assumed (not necessarily correctly, as it happens²²), would harvest more Tory than Labour votes from the estimated five million Brits who lived abroad. Many suspected, too, given the incredibly low incidence of in-person voting fraud in the UK, that perceived party advantage also lay behind a promise to ensure that the Electoral Commission “considers insisting on proof of ID to vote”.²³ The same could be said of the final pledge in the manifesto that touched on the constitution, albeit inside rather than outside parliament, namely the promise to “introduce English votes for English laws, answering the longstanding West Lothian Question”²⁴ – a pledge that Cameron effectively (and controversially) made in the first flush of his victory in the 2014 Scottish independence referendum.

The 2017 Tory manifesto bore the imprint of Brexit but also contained a lot of unfinished business. As well as a promise to reform postal voting to minimise the potential for fraud, for instance, the party would now actually legislate “to ensure that a form of identification must be presented before voting” as well as for “votes for life for British overseas electors”.²⁵ It would apparently continue to address the issue of the size of the House of Lords, too, and – somewhat ironically, perhaps, in view of what was to come when Boris Johnson replaced Theresa May two years later – it would “review the honours system to make sure it commands public confidence, rewards genuine public service and that recipients uphold the integrity of the honours bestowed”.²⁶ But the main departure in terms of parliament was a pledge (with, note, absolutely no justification provided) to repeal the Fixed-term Parliaments Act.

Brexit, however, was the dominant theme in the section of the manifesto that touched on constitutional matters, which outlined an ambition that many critics of the government found particularly worrying, namely:

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.²⁷

Not surprisingly, Brexit loomed large in the 2019 manifesto, which argued that “the way so many MPs have devoted themselves to thwarting the democratic decision of the British people in the 2016 referendum... has opened up a destabilising and potentially extremely damaging rift between politicians and people” that only leaving the EU could begin to heal by allowing the Conservatives to check off their pre-existing to-do list – one that consisted of the following: getting rid of the Fixed-term Parliaments Act, which had apparently “led to paralysis at a time the country needed decisive action”; ensuring updated and equal parliamentary boundaries; introducing voter ID; and making it easier for “British expats to vote” and abolishing “the arbitrary 15-year limit on their voting rights”.²⁸

But this time there was more, including a promise “to look at the broader aspects of our constitution: the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people”.²⁹ There was a promise, too, to “update the Human Rights Act”, apparently “to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government”.³⁰ Meanwhile, it was important to ensure that judicial review should be there “to protect the rights of the individuals against an overbearing state” rather than “abused to conduct politics by another means or to create needless delays”. Accordingly, the party pledged: “In our first year we will set up a Constitution, Democracy & Rights Commission that will examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates.”³¹

The government's opponents and some in the legal community widely interpreted this as a plan to reduce whatever checks and balances the UK's constitution might offer, partly in revenge for the reverses that both the May and Johnson governments suffered – reverses that some Conservatives went so far as to label “a judicial coup” and which encouraged the right-wing think tank Policy Exchange to establish its “judicial power project”, designed to combat what it saw as judicial “overreach”.³² Suella Braverman, at the time a leading light in the backbench European Research Group but destined, of course, for higher things, was particularly forthright, her words a reminder that, as far as the party's Brexit hardliners were concerned, withdrawing from the EU and combating judicial overreach were part of the same project: apparently “repatriated powers from the EU will mean precious little if our courts continue to act as political decision-maker, pronouncing on what the law ought to be and supplanting Parliament”.³³ Naturally, since it flowed from another European (albeit non-EU) source, the Human Rights Act “and the prolific rights-industry which it spawned” also needed tackling, not least because “[s]trained interpretations of the Article 8 Right to Private and Family Life have meant that inherently political decisions to do with immigration and extradition have been overturned by the courts”. Moreover,

[I]f a small number of unelected, unaccountable judges continue to determine wider public policy, putting them at odds with elected decision-makers, our democracy cannot be said to be representative. Parliament's legitimacy is unrivalled and the reason why we must take back control, not just from the EU, but from the judiciary.³⁴

Whether the proposed commission was ever likely to fully fulfil that fantasy is debatable, but it at least looked like a fairly radical way forward, representing something of a departure (although not a completely unprecedented one) from the way the UK usually goes about constitutional reform, as academics Petra Schleiter and Thomas Fleming, note:

Most often, reforms have simply been developed by the government, rather than by a specifically constituted constitutional review body, commission, or convention. Only in a minority of cases – just under a third – has the process of drafting reform proposals been undertaken by commissions of expert and/or party-political elites expressly composed for the purpose.³⁵

In practice, however, the Johnson government shied away from an overarching, integrated commission, choosing instead to set up a number of discrete expert reviews, which it claimed (at least initially, although never very convincingly) should be seen as ‘workstreams’ rather than as having no relation to any kind of whole. But expert did not necessarily mean non-partisan. For example, the Independent Review of Administrative Law, which was established in July 2020 and which reported in March 2021, was chaired by the peer Edward Faulks, who had served as a minister of state at the Ministry of Justice between 2014 and 2016 and who had only recently described the Supreme Court's prorogation judgment as “a significant, unjustified constitutional shift”.³⁶ The

Independent Human Rights Act Review, which was set up in December 2020 and reported in October 2021, however, was chaired by a retired senior judge, Peter Gross, who had no prominent affiliation to any particular party.³⁷

Both reviews led to further consultations, with the first eventually contributing to the Judicial Review and Courts Act 2022. While, among other changes introduced, this offers the possibility of limiting the retrospective impact of court decisions, it could hardly be said, in all fairness, either to have confirmed the worst fears of the government's opponents or to have fulfilled the dreams of its most fervent advocates. As for the second review, it initially appeared that nothing much would come of it, not least because the then minister of justice, Robert Buckland QC, did not drive the review hard towards a particular, predetermined conclusion and so did not recommend far-reaching change. This naturally disappointed some Conservatives, who (not unpredictably) claimed that it had "excluded everyone with a track record on advocating a UK bill of rights" and "was captured by the human rights community – Europhiles to a man and woman – in the academic and charity sectors".³⁸

Fortunately for those critics (and as if to illustrate the fact that parties, should the supposedly arm's length commissions they set up fail to produce the recommendations they were supposed to, may well go ahead anyway), Dominic Raab, back for a second time at the Ministry of Justice, seemed keen to introduce the (inelegantly named) Bill of Rights Bill. This was to 'rebalance' the relationship between UK courts, the European Court of Human Rights (ECHR) and the UK parliament in favour of the last of these but without quitting the European Convention.

The bill, according to the (admittedly sceptical) Law Society, would see the government

- "introducing a new permission stage, requiring claimants to prove they have suffered (or would suffer) significant disadvantage as a result of a breach of their rights before they can take their claim to court
- setting a higher threshold for challenges to deportations for foreign national offenders based on the right to a private and family life
- removing the duty on courts to interpret legislation compatibly with convention rights
- removing the duty on courts to consider how the ECHR has interpreted a right
- limiting the interpretation of rights to a literal reading of the text of convention rights
- prohibiting courts from finding that a public body owes a positive obligation (which would require the public body to take certain steps to actively protect, fulfil or facilitate a right)
- requiring courts to give great weight to the views of Parliament when balancing rights issues
- preventing human rights claims that arise from overseas military operations."³⁹

All this was motivated, according to the government, by “rulings that many people in our country invariably would not recognise as part of human rights. This undermines public confidence in the system and tends to give human rights a bad name.” Free speech, too, apparently risked being “whittled away, little by little, for example by the development of a privacy law without legislative scrutiny – licensed by the Human Rights Act – ‘cancel culture’, and over-sensitivity”. The government was therefore “pressing the reset button and restoring a healthy dose of common sense”. It was also “prioritising our law-abiding public over dangerous foreign criminals” by creating “a framework to help prevent foreign offenders from exploiting certain ECHR rights to avoid being deported in the public interest”. And to ensure, for instance, that there would be no chance in future of a European court preventing asylum seekers being deported to Rwanda, the bill would “make it clear that the UK Supreme Court, not Strasbourg, has the ultimate authority to interpret the law in this country”. The bill was also about “reinforcing the separation of powers, to limit the expansion of human rights into areas which are clearly the job of Parliament”.⁴⁰

In the end, however, all this may prove, as they say, academic: it is now widely believed that Number 10 intends to ‘deprioritise’ Raab’s bill – much to the relief of the former justice secretary, Robert Buckland, although not necessarily to the relief of those worried about the government watering down human rights, many of whom believe that it has decided to pursue that course via individual pieces of legislation (for example, on immigration and asylum) rather than a big-bang bill. The latter, according to Buckland, risks getting an “absolute mauling” if it comes before parliament for a second reading.⁴¹

That did not happen, incidentally, when the government finally got round to repealing the Fixed-term Parliaments Act in the spring of 2022 via the Dissolution and Calling of Parliament Act. The means chosen involved not only a reassertion of the prerogative power but also ‘an ouster clause’ that meant it was non-justiciable, thereby striking a blow for executive power. But the House of Commons and House of Lords joint committee that considered the government’s plan, while not without its concerns, was broadly positive, while Labour could hardly complain since its 2019 manifesto had also promised repeal.⁴²

Ironically (although, some would say, not unpredictably), the passing back of power to the prime minister did cause concern (or at least a flurry of excitement) just as Boris Johnson was forced out of the Conservative leadership by his own MPs in the summer of 2022. Earlier on, when the Tories’ polling was poor but not necessarily terminal, he had been able, first, to ignore and then to rewrite (and arguably dilute) the ministerial code, as well as to shrug off the resignation of not one but two ethics advisers.⁴³ But as his ratings and those of the party headed further south, prompting predictions that his scandal-ridden premiership was about to collapse, some of his ‘friends’ and ‘allies’ suggested that his defenestration might result in a general election that none of their colleagues wanted. For a while, this was dismissed as an empty threat until, as the end drew nigh, it was suggested that Johnson might actually seek a dissolution.

Quite what seeking that dissolution would have achieved (if one believes it was anything more than an attempt by Johnson to persuade his party to stick with him) were he to have done so – and done so successfully – is not altogether clear: Tory MPs could presumably have voted no confidence in him and been led into any election by another leader, chosen in short order. But such a request by Johnson would have placed the monarch (the late Queen Elizabeth) in an invidious position, almost certainly leaving her no choice (under the so-called 'Lascelles principles') but to refuse his request and, in all likelihood, to have dismissed him on the grounds that the Conservative Party could, if it had to, find another MP from its ranks who could command a perfectly viable majority in the House of Commons. In the end, Johnson never made the request, although plans appear to have been afoot at the highest levels of the parliamentary party, the civil service and the palace, to ensure that, had he dared to do so, the monarch would have made herself 'unavailable' for as long as it took Tory MPs to ditch Johnson and appoint (a presumably interim) leader.⁴⁴ They did effectively force him out in the end but whether that means that, when it came to the crunch, the party performed a valuable constitutional function that the House of Commons as a whole could not perform is a moot point. After all, the only reason the House of Commons as a whole could not perform that function was because members on the Conservative benches had no intention of supporting a formal vote of no confidence.

Relief that the chaos that might have ensued had Johnson attempted to cling on was ultimately avoided should not, however, blind us to the fact that his government managed to push through a number of controversial measures likely to afford the Conservative Party partisan advantage in not only the short but also the long term – unless, of course, an incoming Labour government ends up reversing measures such as the introduction of voter ID and the placing of the Electoral Commission under ministerial direction.

Labour and the constitution since 2015

Parties in opposition, particularly in the UK, are always more done-to than doing. As a result, the constitutional proposals they come up with are often motivated by a desperate desire to limit the damage that, in their view anyway, the government – and, indeed, any future government – can do. In Labour's case, especially as the prospect of state socialism became less and less attractive both to voters and to many in the party itself, this has resulted in call after call for both weakening central government and loosening the grip that the executive has over the legislature. Whether, though, such ambitions (which in the end are just as much a combination of lofty idealism and self-interest as those that the Conservatives nurture) will survive intact should the party find itself in charge in Whitehall and Westminster after the next general election remains to be seen.

The Labour Party's 2015 manifesto was clear, even if it ignored the fact that, having governed the UK between 1997 and 2010, it bore some responsibility for the situation:

[T]oo much power is concentrated in too few hands. Those who make decisions on behalf of others, whether they are in Westminster, the European Union, in business, the media, or the public sector, are too often unaccountable. Our over-centralised system of government has prevented our nations, cities, county regions and towns from being able to take control and change things for themselves. We will end a century of centralisation. Labour believes meaningful and lasting change for the better is only possible when people are given the power to change things for themselves. Our governing mission is to break out of the traditional top-down, 'Westminster knows best approach', and devolve power and decision-making to people and their local communities.⁴⁵

Aside from more devolution to Scotland, Wales and Northern Ireland (an issue dealt with in more detail in other contributions to this series), this would also involve "the biggest devolution of power to our English city and county regions in a hundred years with an English Devolution Act",⁴⁶ although there was little detail in the manifesto about how it would work beyond switching control over billions of pounds currently spent centrally to "city and county regions". Nor (albeit not surprisingly in a Labour manifesto) was there any acknowledgement of the Conservatives' moves towards devolution, via combined authorities and elected mayors as per the Localism Act 2011 – more of which were to be established in 2017.

On more obviously constitutional territory, Labour promised to "set up a people-led Constitutional Convention" and declared it was "committed to replacing the House of Lords with an elected Senate of the Nations and Regions, to represent every part of the United Kingdom, and to improve the democratic legitimacy of the second chamber". The party also committed itself to giving the vote to 16- and 17-year-olds, to making it easier (and automatic) to register to vote and to reforming the party funding regime. With little evidence (at least at the time) to support its accusation, Labour also suggested that "[t]he Conservatives want to leave the European Convention of Human Rights, and abolish the Human Rights Act" whereas Labour, the manifesto claimed, was in the business of "protecting the Human Rights Act and reforming, rather than walking away from, the European Court of Human Rights".⁴⁷

In 2017, Labour's promises were fairly similar. Votes at age 16 were still there, although the party's ambitions for English devolution seemed to have been slimmed down somewhat. The promise to "establish a Constitutional Convention" (albeit without mention of it being 'people-led' this time) also stayed, but its remit to "look at extending democracy locally, regionally and nationally" was extended in the sense of it being asked to consider "the option of a more federalised country". The party reaffirmed that its "fundamental belief is that the Second Chamber should be democratically elected", as well as being made smaller, although there was no mention this time of geographically based representation.⁴⁸

In Labour's 2019 manifesto, however, there was a return to its "preferred option of an elected Senate of the Nations and Regions", as well as to an emphasis on English devolution (even if its proposals on that score continued to shy away from any elected element). Meanwhile, the Constitutional Convention would now be "led by a citizens' assembly". The party's plans for franchise reform had also developed markedly: it was committed not only to votes at 16 (as well as automatic voter registration) but also to "giving full voting rights to all UK residents", which would represent a truly historic extension of the franchise if it were ever implemented. As for the Conservatives' plan to introduce voter ID, this was rejected; but a Labour government would match the Conservatives' offer to "repeal the Fixed-term Parliaments Act 2011", which the party claimed had "stifled democracy and propped up weak governments". Party funding would also be subject to greater restrictions and more powers to levy higher fines would be given to the Electoral Commission.⁴⁹

Labour, of course, lost the 2019 election, just as it had lost the three elections that had preceded it. But its new leader, Keir Starmer, decided to go ahead and establish the long-promised UK-wide constitutional commission (the Commission on the UK's Future) anyway. This represented, according to a speech he made in Scotland right at the end of 2020, "the boldest project Labour has embarked on for a generation" – one that would "champion devolution, but beyond that [would] rule nothing out", while he would "look at the conclusions without preconceptions". The commission would not be "a project of Westminster, by Westminster and for Westminster" but would "hear direct from the British people".⁵⁰

Gordon Brown, said Starmer, would be "an adviser in the setting up of the commission". But as it turned out, the former prime minister was to be its driving force, although (somewhat ironically, perhaps, for a project that was supposedly all about pushing power out to the people) the names of his fellow commissioners were not made public until the publication of its report in December 2022, a year or so after it began its work – and, when they were, it was obvious that it was far from a cross-party effort, with the vast majority of commissioners and those acknowledged as helping them with advice and suggestions either being at least sympathetic to Labour or, more often than not, members and elected representatives (former and current) of the party.⁵¹

The commission's report overall pays a great deal of attention to the redistribution of economic powers, arguing that they cannot and should not be separated from constitutional and governance considerations. Aside from its recommendations on the preservation and functioning of the Union (an issue that other papers in this series deal with), there are two particularly eye-catching proposals in the report. The first relates to the House of Lords and its replacement with a democratically elected "Assembly of Nations and Regions". The second relates to the idea that acts of parliament deemed to be 'constitutional' (with a role there for the Supreme Court) be made harder to repeal or amend, which would be achieved by giving the assembly veto power over changes that, say, only a supermajority in the House of Commons could override.

Precisely which statutes will be so classified in the first place is not entirely clear. Nor is how, when and on what basis the assembly is to be elected, other than that it should be chosen (and here it is hard to escape the need to re-impose some sort of Fixed-term Parliaments Act) “on a different electoral cycle from the House of Commons”.⁵² This is presumably to avoid the distinct possibility that, were that not the case, the governing party or parties would likely command a majority in both chambers, which might effectively negate the assembly’s ability to provide a check on the executive.

The commission also proposes that the assembly has the power to prevent Westminster from legislating in devolved areas without the consent of the devolved legislatures. This inevitably raises the (West Lothian?) question as to whether assembly members from Scotland, Wales and Northern Ireland should vote on matters that, on the face of it, only relate to England. This is something their equivalents were (temporarily it turned out) prevented from doing under the ‘English votes for English laws’ (EVEL) mechanism that the Conservatives introduced after the Scottish independence referendum but then abolished (with cross-party support) in 2021.

This question is unlikely to disappear notwithstanding the fact that the commission (in keeping, as we have seen, with the trend of Labour thinking in this area) proposes more devolution to England, albeit pursued organically in the sense of ‘local partnerships’ being encouraged (rather than obliged) to band together and pool their powers in regional groupings.^{*} And then, of course, there is the wider question of whether it will even be possible to get an elected assembly – especially one capable of entrenching certain laws – up and running in the first place, given that it can only happen with the consent of MPs, many of whom worry that it might undermine the primacy, powers and privileges of the House of Commons. Many existing peers (among them many Labour peers) would also object, including perhaps the majority of those who do most of the valuable work of scrutiny that the House of Lords currently conducts and who argue, not unpersuasively, that reform from within (focusing on reducing its membership and bringing genuine rigour and independence to the appointments process) would be a better, far less time-consuming and more consensual way to go.⁵³ Indeed, one suspects that reform of the House of Lords, structured as it is around representation for the nations of the UK, has more to do with reducing the demand for Scottish independence on the part of a fervently unionist ex-prime minister than with anything else.

Perhaps the commission’s most radical proposal, however, has nothing to do with devolution, seeking as it does to “embed”, UK-wide, a number of Beveridge-style “social rights” in the constitution, each of which, it claims, “are already well established expectations with substantial social institutions behind them”,⁵⁴ namely:

- “Every person entitled to healthcare in the UK, will receive it free at the point of need, wherever they are in any part of the UK; no person shall be denied emergency treatment.”

^{*} According to the commission, a new statutory forum – a ‘Council of the Nation and Regions’ – would oversee relations and joint working between regions and Scotland, Wales and Northern Ireland.

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- “[E]very child shall be entitled to free primary and secondary education, wherever they are in any part of the UK.”
 - “So that no child, family or elderly citizen need live in poverty, every person legitimately present in the UK shall be entitled to social assistance in relation to periods of unemployment, disability or old age, in accordance with the relevant laws. No person shall be left destitute.”
 - “[E]very person shall be entitled to decent accommodation, in accordance with the relevant law relating to housing and homelessness.”⁵⁵

As the Institute for Government accurately points out, this would represent “a major constitutional development” and “would likely prove politically contentious, not least because they would open a great deal of government policy to judicial review” – something that would, incidentally, make them doubly unpalatable to the Conservatives, who not unfairly would see much of this as an attempt to give what are essentially political preferences constitutional status.⁵⁶

It is hardly surprising, then, that the commission addresses the issue of preparation and buy-in, recommending that “the necessary consultation and preparatory work should begin now, and this should include a ground-up conversation with the people of Britain” and that “the Labour Party should consult widely and take in the thoughts and feelings of people in all four nations”, with one “practical option” being “a series of Citizens’ Assemblies”.⁵⁷ This throwaway line surely underestimates just how complex and expensive that method of consultation (for all its proven advantages) would be for a party in opposition.⁵⁸ It is perfectly possible, of course, that the Labour leadership realises this and that, despite welcoming – indeed launching – the commission’s report, it was not (as some reports just before the launch suggested⁵⁹) quite wholly, or at least equally, enthusiastic about all of its recommendations.

All this takes us back to manifestos. If Starmer is truly serious about implementing the commission’s more far-reaching recommendations, and is to have any chance of doing so within his first term, then we should expect to see them spelled out (albeit in modified form) in black and white in the manifesto Labour produces for the next general election, not least because that will arguably make it easier to override opposition in both current chambers. The vaguer any such manifesto promises turn out to be, then the less likely we are to see them implemented. So expect a battle between those in the party who ‘really mean it’ and those prepared to pay lip-service but who, deep down, fear that trying to push through truly profound constitutional reform may simply bog down a Labour government that will have more than enough on its plate in other areas of policy. But even if the latter view wins out, Labour is likely to promise to implement some of the commission’s less onerous proposals, not least the suggestion that “the code of conduct for ministers should be separated out from the day today [sic] procedures for the operation of government, and set out in a code... approved by both Houses of Parliament”⁶⁰ and which would include *The Cabinet Manual*. It is also likely to support the formation of “an Independent Integrity and Ethics Commission

[which] should take on the role of investigating alleged breaches of the code... whether the Prime Minister of the day agrees or not”.⁶¹ But whether Labour will promise to implement the following (related) proposal is surely more of a moot point:

We propose therefore that these arrangements, and how they have operated in practice, should be regularly reviewed by a citizens’ jury of ordinary people, chosen at random and representative of the population. They should review the operation of the system and issue an annual report on the standards followed by ministers and MPs and the investigations, judgments and sanctions that have been made and applied, with an assessment of how these arrangements have worked and whether they have secured the public’s trust.⁶²

The same goes for the proposal that “the MPs’ Code of Conduct should be strengthened with a general prohibition on second jobs by members of Parliament, with few exceptions for employment required to maintain professional memberships, such as medicine”.⁶³ This would represent a fundamental change and an extension of less far-reaching reforms that the current government has already announced in the wake of the Owen Paterson affair. As such, it is likely to be difficult to implement. Even if the predictable opposition of Conservative Party MPs (who are far more likely to pursue income-generating ‘outside interests’ than MPs from other parties) can be overcome, there will be many Labour MPs (for example, those who earn money from writing books and articles) who would find such a prohibition unduly restrictive.

Two more possible reforms affecting parties

Another suggestion for a reform that would have a significant (and arguably more obviously ‘constitutional’) impact on MPs, albeit not one that the Commission on the UK’s Future has proposed, continues to do the rounds, prompted in part by the dramatic defection of Conservative MP Christian Wakeford, to Labour in January 2022. This is the idea that any member who crosses the floor should have to face a by-election – an idea embodied in a ten minute rule bill that another Conservative MP, Chris Skidmore, tabled back in 2011.

That bill, predictably enough, got nowhere but, notwithstanding the fact that none of the MPs who in 2019 defected to set up what became Change UK or to the Liberal Democrats chose to resign and re-fight their seats, there are precedents for this happening, albeit temporarily. For example, the Tory MPs Douglas Carswell and Mark Reckless resigned in 2014 after jumping ship to the UK Independence Party (UKIP) and triggered by-elections, which both of them won. And back in 1981, the Labour MP Bruce Douglas-Mann fought a by-election after defecting to the Social Democratic Party (SDP) – albeit in his case unsuccessfully. There is nonetheless an argument that post-defection by-elections should be the rule rather than the exception. After all, voters place far more weight on the party that a candidate represents than on the candidate themselves.

Moreover, it is not an idea that all parties (or, indeed, all MPs) would necessarily reject out of hand. Such a rule, after all, might well mean fewer MPs (and colleagues) would consider defecting. Indeed, the value that politicians place on party discipline, as opposed to their freedom as individual members, helps explain the recent failure of an attempt in New Zealand (another of those rare polities without a codified constitution) to repeal the country's controversial Electoral Integrity Act, by which the seat of any MP who switches party or is expelled by their party automatically becomes vacant.⁶⁴ On the other hand, it would arguably offend against the quasi-constitutional principle that MPs are trustees, not delegates. And – unless they follow the example of previous defectors who switch seats in order to maximise their chances of remaining in the House of Commons under their new colours – those MPs who defect can, with some justification, insist that their voters can hold them accountable for their actions (just as they do other MPs) at the next general election.

There is perhaps one more call for constitutional reform (again not one discussed in the report of the Commission on the UK's Future) that recent parliamentary events have prompted – namely the idea that we need to prevent (or at least discourage) parties changing their leader, if that leader is the prime minister, between elections. This is primarily on the basis that, should they do so, the choice of prime minister thus passes from voters to either a small and unrepresentative party membership numbering in the low hundreds of thousands or instead (if they can be by-passed, as they were when Rishi Sunak made it to Number 10) an equally (indeed, possibly even more) unrepresentative bunch of MPs numbering in the low hundreds.⁶⁵

One can, of course, argue that this is irrelevant since the UK government's mandate derives from it being able to command a majority in the House of Commons rather than from a 'personal mandate' that the electorate afforded a party leader at the previous general election. Yet calls to find some way of avoiding the first of these scenarios – a minuscule fraction of that electorate forcing on it a prime minister they never voted for – are completely understandable. After all, the ideological and demographic mismatch between the 'selectorate' and the wider electorate is undeniably huge. And should the grassroots choose (as they did when they elected Liz Truss) a leader who does not enjoy majority (or in Truss's case even plurality) support among parliamentary colleagues, then the country might be lumbered with a prime minister who fails to command the necessary confidence of the House of Commons as a whole.

But it is surely only at that point that one could even begin to argue that the situation shades into the 'unconstitutional'. Otherwise, given what we have already noted is the UK's traditional reluctance to (constitutionally or otherwise) regulate parties' internal affairs, it is hard to argue that allowing party members to choose the country's prime minister, while clearly more problematic than leaving the choice solely to MPs (who at least have a direct link to the electorate and must have confidence in whoever is chosen), is somehow illegitimate. Moreover, were the UK to follow some European polities down the road of insisting, in the course of 'constitutionalising' parties, that they be internally democratic, it might, ironically, make it more difficult than it already is to legislate away the right of their rank and file to choose a prime minister.

Conclusion

Political parties are rarely considered in discussions of the UK constitution even though they are a crucial actor in any democratic polity and even though it is they who are, in no small part, responsible for how it operates. As we have suggested, they are the ghost in the machine. And they deserve more attention than they have traditionally been paid whenever we come to discuss what we might term 'the rules of the game' – rules that they themselves help set, and a game in which they are some of the principal players.

But as we have seen, parties' unfolding contributions to the UK's continually developing constitution are rarely high-minded, disinterested attempts to protect and promote the collective interest. Rather, they are usually a series of highly partisan land-grabs that see parties trying to initiate and implement significant reforms designed either to stake out new territory or, just as often, to retake ground they regard as lost to previous administrations formed by their rivals (who, for their part, were trying to do exactly the same thing).

Some of those reforms (devolution being probably the best example) stick – mainly because they establish institutions (like devolved parliaments and, just possibly, a revised second chamber at Westminster) that cannot be as easily got rid of as more procedural changes. Indeed, some of the latter even end up being abolished (as in the case of the Fixed-term Parliaments Act and EVEL) by the very party that introduced them before deciding later on that they have outlived their usefulness. And there are reforms that are so nakedly partisan and so ideological that they stand little chance of surviving a change of government. Who, for example, would bet on the Conservatives' attempts to roll back the impact of the Human Rights Act or to introduce voter ID outliving even a one-term Labour government, always assuming, of course, that said government has the time, energy and the majority required to reverse such measures? And who, by the same token, would bet, were Labour to scrap those measures, against a future Conservative government taking up the cudgels for them once again?

Of course, when we talk about parties we perforce talk about them as unitary actors that exhibit consistency across time when, in reality, things are rather messier. Yes, they have traditions and records to defend, and they display a modicum of policy continuity, at least in the short term. But they are also, inevitably, the product of the individuals who populate them. True, the policy continuity evinced in the 2015, 2017 and 2019 Conservative manifestos does, to some extent, undermine the notion that it was only when Brexit and Johnson came along that some of what the party's opponents regard as some of its more egregious ideas began to get an airing. But, on the other hand, it is hard to believe that things would have been pushed quite so far or so fast were it not for Johnson – and, just as importantly, colleagues like Raab and Dominic Cummings.

Moreover, this points to an underlying constitutional tension – one that may be more acute in the era of the supposed presidentialisation of British politics but that long predates it. This is the tension between an electoral system that insists the electorate vote for individuals (and a media system that emphasises individual leaders) and a parliament and government that cannot function without the collectives called parties into which those individuals are effectively subsumed. Johnson, typically, tried to have his cake and eat it: on the one hand, he claimed that the “huge great stonking mandate” that the Conservatives won in 2019 gave them the right to override (and, in time perhaps, remove) the conventional checks and balances that were supposed to limit executive power;⁶⁶ on the other, when his party tired of him, he maintained that said mandate was somehow personal.⁶⁷ Neither claim was (or at least should be) convincing; but that did not stop him trying and probably will not stop another equally populist politician making such claims in the future. Some would say this is why we need to take action to entrench those limits and (although this may, in fact, prove even more difficult) to return to the idea that the prime minister is merely first among equals rather than the be-all and end-all.

There is a sense in which political parties are mutable, ideological and the creatures of those who temporarily control them. And perhaps it is this that accounts for the fact that they are rarely accorded a role in discussions of the constitution compared with other institutions that are more readily conceived of as abstractions, parliament and the judiciary being only the most obvious examples. But given their constitutional importance – their role in implementing constitutional reforms and in helping to ensure (even if only reluctantly) that our political leaders stick to the rules – this needs to change. Quite how that change could be achieved without codification or, at the very least, a further ‘official’ and therefore authoritative contribution to the sources of the UK’s uncodified constitution, we leave up to readers (and, of course, the parties themselves) to suggest.

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