INSTITUTE FOR GOVERNMENT

Bennett Institute for Public Policy Cambridge

Not by design

The erratic evolution of the British constitution since 1997

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IfG–Bennett Institute 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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Introduction

The British constitution has never stood still. Famously evolutionary, the pace of change has not relented over the past 25 years. Governance in the UK now looks very different from what New Labour inherited in 1997. But the course of change has not been smooth. Despite periodic bursts of reform, much of the constitutional architecture remains deeply contested and lacks a basic coherence. More erratic than systematic, evolution has not delivered fitness for purpose.

Some change has taken the UK into unprecedented territory. Devolution to Scotland, Wales and Northern Ireland has transformed the political geography of the UK. With three Scotland Acts, four Wales Acts and numerous fresh starts in Northern Ireland, the process of devolution has been dynamic, yet the centre of government – the ways of working of Whitehall and Westminster – has barely shifted at all.

Some change has stalled. Appointment to the House of Lords is markedly less by accident of birth but otherwise remains largely untroubled by democratic process. Some things have changed, then changed back again. One prime minister briefly lost the prerogative power to dissolve parliament but then wrested it back. One Conservative government answered the West Lothian question with a form of English votes for English laws, another undid it.

Some things endure. The first-past-the-post system survived a referendum in 2011 and continues to populate the House of Commons in a largely disproportionate way. And England remains a highly centralised polity despite continued and inchoate attempts to pursue some form of devolution.

Two seismic questions have been asked through referendums. One kept Scotland in the UK, the other took the UK out of the EU, but neither commanded losers' consent.

One of the advantages of the British constitution, it has long been claimed, is its ability to evolve pragmatically in response to changing circumstances. Unlike many other democratic countries, there has been no founding moment or emergence from crisis in modern times to force the codification of constitutional norms. The tradition of practical adaptation endures.

But at what cost? The ramshackle nature of the British constitution may not be a direct driver of popular discontent, but there is evidence that the democratic fabric is wearing thin. Trust in politics and politicians is plumbing new depths.[1] Polls suggest that around half the population of Scotland want to leave the Union.[2] While there is not majority support for unification with the Republic of Ireland in Northern Ireland, polls suggest that post-Brexit opinion is more finely balanced,[3] and in Wales more people than ever before say that they would support independence.[4] Analysis of the EU referendum shows the fracturing of old party-political certainties around a politics driven more by identity.[5] Whatever the merits of specific constitutional reforms, the net result has not left the British constitution in a state of robust health, capable of commanding assent and respect across the country.

What does this say about the nature of constitutional reform in the UK? As the history of the past 25 years illustrates, there has been no want of proposals for reform and much reform has been enacted. Each of the three main UK political parties – the Conservative Party, the Labour Party and the Liberal Democrats – has, at one time or another, espoused reform programmes; there has been no sustained ideological opposition to change per se.

In spite of this, there has been a marked failure to deliver a coherent and enduring outcome. Why is this so? With no written constitution, there are no set guiderails to marshal constitutional change, either in terms of the process to follow or to force systemic coherence. But the lack of a written constitution is more a symptom than a cause. The way in which constitutional change is managed is ultimately a consequence of political culture. That is the core issue this paper seeks to address – the relationship between the political process and constitutional change – to seek an explanation as to why constitutional change in the UK has been so inchoate, inconsistent and contingent.

Two main factors, the paper argues, entwine to deliver this result. The first is a perhaps surprising lack of system capacity, within government institutions and wider civic society, to see the constitution in a long-term timeframe and as a whole system. The second is the way in which constitutional change is driven through the political process. With no wider checks or balances, there are only weak incentives on political actors to subordinate short-term political calculation for long-term constitutional coherence. As a consequence, even major constitutional decisions can be motivated by narrow party advantage and can be taken by very small cliques of politicians who hold the keys to power. These two factors have set a political culture that is resistant to a consensual, enduring approach to constitutional reform.

Moreover, a system becomes vulnerable when those in power no longer respect the conventions or assumptions on which it depends. With no special status for constitutional law, there is no additional hurdle that offers extra protection to constitutional norms. Reliance on the innate self-restraint of political leaders on its own is not enough; there is no overriding injunction that compels office-bearers to behave like 'good chaps'.[6]

The signs of erosion are clear. The Boris Johnson government, with a majority exaggerated by the first-past-the-post system, on a mission to deliver a hard Brexit outcome in the teeth of opposition from nearly half the population and explicit rejection from two parts of the UK, did not show itself sensitive to the niceties of constitutional convention. Attempting to prorogue parliament in defiance of accepted norms, threatening to break international law, having a cavalier attitude to the enforcement of parliamentary standards, undermining the devolution settlements through the United Kingdom Internal Market Act 2020 and introducing laws such as the requirement to show ID in polling stations, all chipped away at confidence in the constitutional framework.

Parliament itself has not asserted its prerogatives against a drift towards greater executive supremacy, a trend given further impetus by the Johnson government's sustained criticisms of the extra-parliamentary institutions that walk the boundaries of executive power – the judiciary, the civil service and the media, not least the BBC. Some may argue that the ejection from office of Johnson as prime minister, who was widely seen, including in his own party, as unfit for this role, shows, contrary to the concerns of the pessimists, that the British constitution is working robustly. But it was Johnson's manifest failure to respect the ethical norms of high office that primarily drove his fall from grace. There has been no groundswell of opinion within the governing party to reverse the constitutional distortions that were the hallmark of his time in office. For example, the Northern Ireland Protocol Bill, a piece of legislation that would explicitly lead to the UK reneging on its international commitments, passed its House of Commons stages despite Johnson's resignation.

The Johnson-led government most evidently exploited the vulnerabilities of the British constitution. But no government in recent years has taken a consistent, long-term approach to constitutional reform. The upshot is a system that now teeters on the edge of legitimacy. That has revived the argument about whether the UK requires a full-blown written constitution. While that would bring the UK closer to the norms of most other democratic countries and, in an ideal world, might be an enticing prospect, it would be a complex and contested political process. It is unlikely that any government in the foreseeable future will have the political courage or bandwidth to commit to such a project. This paper asks instead whether there are other, still meaningful, steps that could be taken to change the way in which constitutional change is handled in this country.

This paper:

- gives an overview of the mechanism of constitutional change and the system that enables it
- exemplifies the history of constitutional change by examining particular episodes of reform over the past 25 years
- concludes by exploring ways of enhancing the management of constitutional change in the UK.

The argument set out in this paper draws on my personal experience. As a civil servant for 30 years, I worked at the centre of the Scottish Office at the time of devolution and then in various roles in the new Scottish executive (and in due course the Scottish government). The latter part of my career was spent in Whitehall. From mid-2012 to early 2019, as civil service lead in the Deputy Prime Minister's Office and then head of the UK Governance Group in the Cabinet Office, I was responsible for constitutional and devolution policy. Towards the end of my career, I also worked in the Department for Exiting the European Union, first as second permanent secretary and then as permanent secretary. I have thus had the privilege of at least a walk-on part in some of the great

constitutional dramas of our time, not least devolution, House of Lords reform, the Scottish independence referendum and Brexit. Those roles make me to some degree complicit in the way in which the British constitution has evolved in recent years but, by the same token, have perhaps given me an unusually close insight into the functioning of our political system; I hope to relay some of that through this paper.

Overview: the constitutional mechanism

In the theory of the British constitution, constitutional legislation has no special character. Dicey bracketed the Act of Union with the Dentists Act to make the point;[7] no parliament can bind its successors, so no statute is immune from repeal. The Johnson-led government barely had to break stride to undo the Fixed-term Parliaments Act 2011, despite its evident constitutional importance and recent provenance.

In practice, there are constraints on parliamentary sovereignty but these are more of a political nature. Parliament itself recognised in the Scotland Act 2016 and the Wales Act 2017 the 'permanence' of the Scottish parliament and the Welsh Senedd, accepting that neither could be abolished unless the people of Scotland or Wales agreed to it through a referendum. While these clauses could be amended or removed, any UK government that attempted to abolish the Scottish parliament or Senedd in the teeth of opposition from popular opinion in Scotland or Wales would generate a destructive constitutional crisis.

Such political constraints notwithstanding, constitutional legislation does not differ in its essential character from any other legislation. While the impetus for constitutional legislation varies, and hence the timing of its introduction in the parliamentary cycle, the extent of consultation and the ease of passage through parliament, there is no requirement for super-majorities in either the House of Commons or the House of Lords, no binding obligation to secure the assent of the devolved legislatures, no particular need for additional consultation or extra-parliamentary deliberation, nor any means of referral to an external authority such as a constitutional court.

In essence, a government that can command a majority in the House of Commons is free to introduce whatever legislation it sees fit and believes to be politically advantageous. Opposition from the House of Lords can, if required, be overcome through the Parliament Acts of 1911 and 1949, which limit the delay the Lords can impose to one parliamentary session. The constraints on ministers in constitutional or quasi-constitutional space are non-statutory and largely self-imposed.

The *Cabinet Manual*, explicitly not a codification of the constitution, was first published as recently as 2011.[8] It is a source of constitutional precedent, of immense value to civil servants and politicians as they navigate critical events such as government formation, but it has no special status. The *Ministerial Code* is formally an emanation of the prime minister of the day and cannot bind him or her.[9] The 'Nolan principles of public life',[10] critically important to moderate the exercise of government patronage in the filling

of influential public positions, cannot be enforced against a government intent on ignoring them. The independence of bodies or individuals put in place to guard the conscience of government can be circumscribed by subsequent statute, as shown by the requirement the Elections Act 2022 imposes on the Electoral Commission to have regard to a strategy and policy statement that ministers have written.

Of course, the law constrains ministers. Constitutional decisions that the government takes are challengeable in the courts. So, subsequent to the Miller case in 2017, ministers were obliged to seek an Act of Parliament to trigger the Article 50 process for the UK to leave the EU. Similarly, the Supreme Court ruled that the prorogation of parliament that Johnson sought in September 2019 when he was prime minister was unlawful. In neither case did the government seek to overcome the ruling of the court by changing the law, although that option was available. Judges can and do interpret the meaning of the law as it stands but they cannot extend the import of constitutional law beyond its statutory basis. Indeed, the Supreme Court has shied away from constitutional ambiguity; in the Miller case, the court fell back on the doctrine of unalloyed parliamentary sovereignty in ruling that the Sewel Convention,* although now enshrined in statute, had no binding effect on ministers.

In effect, the UK possesses no single institutional mechanism to act as the guardian of the constitution. Different institutions have a role to play but, in the face of a determined executive, there is no collective means through institutional interaction to stay the hand of the government of the day. The courts can only intervene when ministers are deemed to be acting beyond their legal power or authority. The House of Lords has no special status in respect of constitutional legislation, other than the power reserved under the Parliament Act 1911 to veto a bill to extend the life of a parliament. Under the Salisbury Convention, the House of Lords does not vote down bills that are manifesto commitments. It does not oppose money bills. As a chamber largely dominated by the political parties, its moral authority to seek to set the norms of constitutional convention is weak.

The civil service likewise has no special constitutional locus. It is there to do the bidding of the government of the day. The cabinet secretary is expected to advise ministers on their constitutional responsibilities. Working closely with the Palace, they have an important role in managing the transition between governments in a way that protects the monarch from being drawn into political decisions or political controversy. At those moments in particular, the cabinet secretary has considerable moral authority but that does not translate into a formal power to prevent a government from straying beyond constitutional norms.

It was the courts, not the cabinet secretary, that required the government to submit the Article 50 process to parliament and which prevented an illegal prorogation. Nor was the cabinet secretary able to prevent the government from threatening to act in a way that was plainly in breach of its international legal commitments in the initial drafting

* This convention requires the UK parliament to seek the consent of the Scottish parliament and the Welsh Senedd when enacting legislation within their devolved competences.

of what is now the United Kingdom Internal Market Act 2020 and in the Northern Ireland Protocol Bill currently before parliament, in spite of the 'overarching duty' in the *Ministerial Code* that ministers will comply with the law.

More generally, the civil service does not have a view of the constitution that is independent of the position of the government of the day. It holds no idealised model of the functioning of the constitution against which to judge ministerial proposals; advice on each proposition for constitutional change tends to be offered on its own individual merits, rather than in the context of the constitutional whole. It is rare for the collective of permanent secretaries to ponder the constitutional state of the country in the round.* The implications of reforms for the governance of the country, for example devolution, are weakly understood. The political and constitutional outlook of the civil service leadership normally only extends to the next electoral horizon.

All told, the handling of constitutional issues is surprisingly low down the list of civil service priorities. Before the formation of the Department for Constitutional Affairs in 2003, the broad assumption was that the Lord Chancellor's Department held the lead on constitutional matters, although through the process of devolution in the early years of the Labour government that appeared to be as much *ad hominem* in the person of Lord Irvine as institutional.[11] The centre of gravity of the Department for Constitutional Affairs was mainly on its English and Welsh judicial and court functions rather than the constitution and in any event the department only lasted until 2007 when the Ministry of Justice was created.

At that point, responsibility for the constitution moved to where arguably it should always have been – the Cabinet Office and hence the centre of government. But this has proved to be a barely more settled home. With the coming of the coalition government, the Constitution Group in the Cabinet Office reported to the director general who ran the Deputy Prime Minister's office, in line with Nick Clegg's ministerial responsibilities for the constitution. Given the other functions of that office, the constitution was never more than a part-time preoccupation for that director general.

From 2010 to 2015, there was no one in the permanent secretary collective with day-to-day responsibility for the constitution. That changed in 2015 with the creation of the UK Governance Group in the Cabinet Office, under the leadership of a second permanent secretary with a brief to advise the prime minister on all matters relating to the constitution and devolution. Part of the rationale for the new group was a recognition of the need to build up a cadre of civil servants who had deep exposure to constitutional issues and devolution; the group encompassed the Scotland and Wales Offices and the Office of the Advocate General for Scotland as well as the Constitution Group (but not, for partly personnel and partly policy reasons, the Northern Ireland Office).

* In my seven years as the lead civil servant on constitutional policy, this never happened.

That arrangement in turn foundered. When Michael Gove took responsibility for the UK Union to the new Department for Levelling Up, Housing and Communities, the team responsible for devolution issues went with him, so splintering the attempt to develop a coherent centre of constitutional and devolution expertise in the Cabinet Office. Those functions have since returned to the Cabinet Office.

The peregrinations of the constitutional function are symptomatic of its status in the Whitehall pecking order; important, but not – other than at times of constitutional stress – central. This is mirrored in the training required of civil servants; it is possible to go a long way up the hierarchy without much need to show a functioning knowledge of how UK governance operates, not least in respect of the devolution settlements.

If the formal institutional constraints on the executive are weak, there is little by way of extra-parliamentary pressure to compensate. Despite the best efforts of groups such as Charter 88, the Electoral Reform Society and the Hansard Society, interest in constitutional issues is very much a minority preoccupation. With the important exception of questions that touch on the core question of national identity, winning support for constitutional change is an uphill battle, as the framers of the respective referendums on a regional assembly for north-east England in 2004 and on the change of the electoral system from a first-past-the-post to an alternative voting system in 2012 discovered.

Although the propositions put forward in both cases were far from robust, neither campaign caught the public's imagination; the accusation that a positive vote would lead to an increase in the cost of the democratic process became a potent rallying point for those opposed to change. Lack of trust in politicians and the political process has not translated into popular agitation; the country has witnessed nothing on the scale of the extra-parliamentary campaigns that animated the reform process in the early 1830s, the Chartist movement or the suffragettes.

The exceptions are of course hugely significant. The pressure for devolution in Scotland was a genuinely popular concern, as confirmed in the 1997 referendum outcome. The debate preceding the independence referendum in 2014 was immensely vigorous and all-consuming, and the subsequent turnout the highest of any democratic event since universal suffrage. This was a question, not so much of constitutional reform, as of the future of the UK itself. A similarly existential question continues to motivate political engagement in Northern Ireland. The campaign to leave the EU has also been cast as a quasi-independence quest from the supremacy of EU law. That trope certainly overwhelmed more nuanced arguments about the pros and cons of EU membership; 'take back control' as a slogan carried more than a tinge of British nationalism.

Whether or not a sense of disenfranchisement from the democratic process in part generated the upsurge in nationalist sentiment, the key point is that it has not translated into popular pressure on parliament to reform the constitution. Extra-parliamentary agitation has been no substitute for the lack of institutional constraints; a government that can command a majority in the House of Commons can broadly get its way on the

constitution. The main motivation to use this power wisely has been a self-imposed one, a respect for democratic norms, buttressed by convention. With only weak institutional checks to prompt deeper public debate, the constitution is vulnerable to the erosion of its democratic underpinnings.

The much-touted advantage of the British system is its adaptability. Unlike countries with more stringent constitutional conditions, for example the United States, the constitution can 'evolve' in respond to changing requirements and expectations. The disadvantage is that the constitution is exposed to the vagaries of the political cycle. There are few incentives to take a long-term and whole-system approach. The greater risk is that constitutional change collapses into the short term; what should be consensual becomes partisan, what should be consistent becomes incoherent. How have things worked out in practice?

The constitution in practice: how has it been managed?

Chronology

Many reform proposals have been debated in parliament over the past 25 years and a good number have reached the statute book. Much of the change came in three waves: at the beginning of the Labour era in power from 1997; with the Conservative–Liberal Democrat coalition government of 2010; and with the Cameron government of 2015. A brief analysis of each wave shows the contingent nature of constitutional reform in the UK, ultimately subordinated to other political pressures and rarely pursued consistently.

The incoming Labour government in 1997 had what was the most comprehensive plan for constitutional reform of any government since the 1950s. Promising to 'clean up politics', the ambitions of the new government were far reaching, from devolution for Scotland and Wales, a mayor for London, a new settlement for Northern Ireland, House of Lords reform, the creation of a Supreme Court, a Human Rights Act and a new scheme of regional governance in England, to greater transparency for government through freedom of information.

The early momentum to deliver these promises was impressive. Devolution referendums were held in Scotland and Wales in 1997, the devolution Acts being passed in 1998. The Human Rights Act was also passed in 1998, the House of Lords Act in 1999 and the Freedom of Information Act in 2000. A weakened Conservative Party was more or less a bystander as the New Labour government swept all before it. But, despite an impressive majority and two subsequent electoral triumphs, the heat dissipated from the reforming zeal.

The programme was never completed. Despite early sidling up to Paddy Ashdown's Liberal Democrats, the commitment to a referendum on electoral reform was never delivered. Regional devolution in England foundered on the lacklustre referendum in the north-east in 2004. House of Lords reform was never completed. There was little change to arrangements at the centre of government as a consequence of devolution.

There were also other distractions, notably the Iraq war and later the financial crash. The programme of reform had never been cohesive; the whole did not add up to more than the sum of its parts. The political cost of allowing promises of reform to founder was low.

The UK party most committed to constitutional change, the Liberal Democrats, got their chance when they negotiated the coalition deal with the Conservatives in 2010. Here came another impressive array of reform propositions, agreed between the two parties: a referendum on electoral reform, reform of the House of Lords (again), fixed terms for parliaments, party funding reform, an answer to the West Lothian question (discussed later in this paper), further devolution for Scotland and Wales and a 'referendum lock' on any future transfer of powers to the EU.

This programme of reform stalled too. The two parties campaigned on different sides of the referendum on electoral reform and the proposal for a system of alternative votes to replace first-past-the-post was decisively defeated. Devolution Acts for Scotland and Wales were overshadowed by the Scottish independence referendum. Cross-party talks on reform of party funding got nowhere, never gathering enough momentum to overcome the vested interests of Labour and the Conservatives. House of Lords reform fell victim to opposition from the Conservative backbenches. And the Johnson-led government overturned the one apparently lasting success, the Fixed-term Parliaments Act 2011, in 2022.

The shock of the Scottish referendum prompted another bout of reform from the Cameron government in 2015. Promising to sustain the Union and 'finish the job' of devolution, the government committed to pass further powers to Scotland and Wales, to complete the devolution of corporation tax to Northern Ireland and to introduce English votes for English laws (EVEL). The Scotland Act 2016 and the Wales Act 2017 delivered on these commitments, and the procedures of the House of Commons were changed to accommodate EVEL. But the vote to leave the EU and all the implications that had for the integrity of the UK swept away whatever coherence this plan might have had.

This chronology is illustrative of the stop–start nature of constitutional reform in the UK. Each of the parties at various moments has been worried enough about the state of politics or the future of the Union to embark on substantial reforms. But those concerns have never been pressing enough to sustain an overall coherent programme of reform. Labour gave up on House of Lords reform and never really attempted to overcome the inertia of centralisation in England. The Liberal Democrats were not powerful enough in coalition to hold the government even to the reforms it was committed to in its programme for government. For the Conservatives, the European question came to overshadow all other constitutional issues despite the evident risks to the Union.

This sporadic attention can be seen not just in the lack of coherence of the overall approach to constitutional reform but also in the handling of individual elements of constitutional change. Short-term tactical thinking and expediency, marbled through at times with partisan politics, have marked the product of reform over the past 25 years.

The handling of four major elements of the constitution – territorial governance, the Scottish independence and EU referendums, the reform of parliament and the electoral system – is examined below.

Territorial governance: making it up along the way

Nowhere is the lack of overall coherence seen more clearly than in the story of devolution to Scotland, Wales and Northern Ireland. In many ways, this is the most profound change the UK has seen to its internal governance since the creation of the Irish Free State in 1922. It has substantially rebalanced the holding of power in the three devolved parts of the UK in a way that is in practical political, if not sovereigntist theoretical, terms irreversible. Yet the story of devolution charts a process in which the shifting parts never joined to make a coherent whole.

The drivers of devolution in the three devolved parts of the UK were different. The claim of Labour leader John Smith that devolution was the 'settled will' of the people of Scotland was hard to dispute. The Constitutional Convention had done its work well, turning grievance at the perceived assault of the Thatcher government on Scotland's sense of self into demand for constitutional change. Despite the long history of doubt among many in the Labour Party about the wisdom of devolution, Scottish secretary Donald Dewar could not be denied his referendum and Scotland Bill.

But the form of devolution could be circumscribed. The model chosen followed the logic of the long history of administrative devolution. The powers devolved were those that a territorial department, the Scottish Office, already ran; it was legislative and political oversight that transferred from Westminster to the new Scottish parliament. But Treasury resistance meant that the fiscal powers of the new institution were nugatory, limited to increasing income tax by no more than 3 pence in the pound, which would barely have covered the cost of making the change. As significantly, the apparatus put in place to manage the interface between the Scottish executive and reserved policy matters was weak. The new Joint Ministerial Committee was hardly used in the early years, bypassed in favour of bilateral contacts. The influence of Scottish interests on reserved policy was at best opaque.

The route to devolution in Northern Ireland was completely different. A signature success of the early Blair administration, the Belfast/Good Friday Agreement signalled an end to the Troubles and created the structures for power-sharing and a devolved assembly. Northern Ireland had a long history of devolution, and the assembly inherited the suite of powers that Stormont previously held together with a devolved civil service. The structure of devolution and the extent of the powers held were different from what was being introduced to Scotland at the same time as the Belfast/Good Friday Agreement was signed.

Wales was different again. The scheme of devolution offered was much weaker than the Scottish variant – basically an assembly without primary legislative powers. Although the policy areas devolved to the assembly matched those that the Wales Office previously ran, one major difference from the Scottish settlement was the exclusion

of justice and policing, which remains a bone of contention to this day. This lacklustre model just scraped over the referendum line in 1997, with only 50.3% of those who voted in favour.

Perhaps the most striking feature of the approach to devolution was not what was done, but what was not done. The centre of government barely changed at all. Used to administrative devolution of much domestic policy to the territorial offices, Whitehall departments barely broke stride in their approach to policy engagement with the UK's periphery. As it had always been, it remained low down on departmental priorities. 'Devolve and forget' was a rational policy response. In the early days of devolution, the coincidence of a Labour government in London and Labour-led governments in Wales and Scotland engrained a habit of looking to bilateral links to resolve policy issues rather than using the embryonic structure of intergovernmental relations set up under the auspices of the Joint Ministerial Committee. There were few incentives for Whitehall to make the effort to engage with the newly emerging politics of the devolved parts of the UK, even less when different parties were in power. With few areas of shared policy and a weak system of intergovernmental relations, the centre of government could largely act as if there had been no major change to the governance of the UK.

There is no evidence that the government in 1997 ever stood back from its suite of devolution proposals to ask whether it had created a coherent scheme of devolution. Nor did any subsequent government attempt to construct a consistent blueprint. As each settlement came under stress, so the response from the UK government was unique to each. It took two more Scotland Acts to give Scotland a suite of fiscal and welfare powers and three more Wales Acts to create the Senedd as a functioning parliament with full primary legislative powers, but still no control of justice or policing and fewer responsibilities than Scotland over tax and welfare. The Northern Ireland settlement lurched from crisis to crisis, through various reinterpretations such as the St Andrew's Day agreement of 2006 and the Fresh Start Agreement of 2015.

Meanwhile England remained the only polity in the UK with no unique representation of its own and one of the most centralised in the democratic world. While each incoming government promises a new approach to devolution in England, the practice has been haphazard. Labour never recovered its devolutionary zeal after the defeat of the proposal for an assembly in the north-east in 2004, and the regional development agencies as administrative entities with weak local roots were ripe for culling by the incoming coalition government. That was an act more of partisan ideology than a rational approach to regional and local decision making in England. Policy for the replacements for the regional development agencies – local enterprise partnerships – evolved on the hoof and they in turn have faded from view. The policy of creating metro-mayors and city deals was ad hoc in its origins in the coalition time and remains so, with the 'devolution' element still constrained mainly to the local administration of centrally driven decisions. England is left with a confusing mix of city regions with mayors and combined authorities, counties and districts, and unitary authorities.

Judged on their own terms, the various schemes of devolution over the past 25 years can be seen as a success. The Scottish parliament and Welsh Senedd are under no serious threat as institutions and the Northern Ireland assembly retains majority support in Northern Ireland. It would be a brave government that followed in Margaret Thatcher's footsteps and abolished the London mayoralty and assembly, as she did the Greater London Council in 1984. Although some places such as Bristol have turned their backs on their city mayors, the metro-mayors in Manchester, the West Midlands, Teesside and elsewhere look set to stay.

By other criteria, devolution has failed to achieve one of its ostensible objectives: to rekindle enthusiasm for the UK as a political entity. Indeed, opinion in Scotland and Wales has drifted in the opposite direction and opinion in Northern Ireland remains volatile. This may in part be a direct consequence of devolution, which has had the effect of consolidating the sense of political community in Scotland and Wales. What is unknowable is whether the UK would be in any better shape had devolution been denied. In Scotland, at least, there was substance in the claim that the demand for devolution was the 'settled will' of the Scottish people; *not* proceeding with devolution would have been unlikely to have answered the challenges around Scotland's place in the Union. Brexit too has undoubtedly shaken allegiances further; no surprise, when two out of the four parts of the UK voted to remain in the EU. So, while the individual devolution projects are now well established and command assent, confidence in the Union as a whole continues to falter.

Moreover, in the post-Brexit world, the devolution 'settlements' have appeared to be more unsettled than at any time since their inception. In addition to the challenge of allocating the powers returning from Brussels, Brexit has introduced a newly partisan approach to handling devolution by the UK government. Once the Conservative Party had got over its antipathy to devolution in the early part of this century, a broad consensus emerged across the three main UK political parties around active support for devolution, as exemplified by the 'vow' that all three signed up to in the last days of the Scottish referendum campaign in 2014 – to offer further devolution to Scotland as a counterpoint to the promises of independence. The Johnson-led Conservative government took a far less sympathetic line. It overturned the practice of previous administrations of seeking the agreement of the Scottish parliament and Welsh Senedd for legislation that had an impact on their responsibilities by repeatedly ignoring the refusal of legislative consent motions by the devolved legislatures. It imposed an Internal Market Act across the UK that the devolved governments fear will undermine their powers, taking powers to spend money directly in devolved areas of policy.

Devolution in the UK remains an unsatisfactory halfway house, a tale of missed opportunities to remake the constitution of the UK in order to distribute power equitably across the nations and regions while retaining the coherence of the whole. For those living in the periphery and for many in the regions of England, the way in which their interests are reflected in key decisions taken at the centre of government remains

opaque. The centre of government, for its part, has largely absolved itself of the need to reform its own practices and has shown neither the capacity to see governance across the UK as a coherent whole nor the discipline to refrain from sudden lurches of partisan intervention.

Despite further revisions of the Scotland and Wales Acts in 2016 and 2017 respectively and renewed commitments to devolution in England under the Johnson government's levelling-up agenda, the territorial constitution of the UK remains unsettled. This could be seen as a consequence of the inherent asymmetry of the UK as a territorial entity and the absence of popular support for devolved regional governance in England. But that becomes an argument for no change at all. It offers no answer to the need to reimagine the shape of the Union in response to popular unease with the status quo. Nor does it deal with failings of a polity that has led to one of the most marked disparities in regional prosperity of any country in Europe.

Confronting the existential

There is no constitutional lore in the UK that offers guidance on when it might be appropriate to ask the public rather than their elected representatives to take a decision through a referendum. Yet two existential referendums were held in quick succession, on Scottish independence in 2014 and on the UK's membership of the EU in 2016, both of which have shaken the UK polity to its core. David Cameron as prime minister was the key mover in both. His decisions were intensely political, and he has argued subsequently that both were necessary, if not inevitable.[12] But the decisions he took were made in response to short-term political exigencies, one driven by an unexpected electoral outcome, the other by problems within one political party, and in a constitutional vacuum. That meant that the process for each was uncertain and disputed and, arguably, militated against losers' consent in either case, thereby exacerbating the destabilising effects of both.

The prospect of a Scottish independence referendum was barely on the radar screen in the early days of the coalition government. It was the surprise winning of a majority by the Scottish National Party (SNP) in the Scottish parliamentary elections of 2011 that turned a remote possibility into a live question. The sovereignty of the Scottish people had long been recognised, at least in theory, by British prime ministers, including Margaret Thatcher. But the Scottish devolution settlement contained no clause akin to the Border Poll clause in the Northern Ireland Act 1998 that determined when that sovereignty might be exercised.

With that SNP majority, based on an explicit referendum commitment, Cameron, with the support of his Liberal Democrat coalition partners, felt he had no choice but to concede the holding of a referendum. A handful of actors at the centre of government made this decision with astonishing speed and in the absence of any broad public or parliamentary debate about its implications. Already on the morning after the 2011 Scottish parliamentary election, Cameron was talking about winning a referendum and his intention to allow one to be held was confirmed within days in parliament.

This allowed for no debate beyond the senior echelons of the coalition government and no extended consideration of the implications of a referendum, in both the short and long term.

The process to allow the holding of a legal referendum was retrofitted once the main decision had been taken. Cameron's determination, informed by his confidence that the Union side of the argument would prevail, was to ensure that the referendum would be seen to be 'fair, legal and decisive'. To that end, he insisted on one question only, with no 'devo-max' option on the ballot paper, but handed control to the Scottish government over the form of question, franchise and timing. Neither government was required to submit the claims they made about what would happen if their side of the argument prevailed in the referendum to any sort of independent analysis. The Scottish public, assailed on all fronts by contradictory claims, were left to make up their own minds without recourse to impartial parsing of the arguments that the two sides put forward. Moreover, in an attempt to buttress confidence in the outcome, Cameron allowed no contingency planning to take place within the UK government in the event of a 'yes' vote.

Cameron's confidence was shaken as the polls tightened in the run-up to referendum day. In the last chaotic days before the vote, the three main UK political parties signed up to the last-minute vow, mentioned earlier. The final result, at 55% for the Union and 45% for independence, was closer than most had predicted at the start of the campaign. Cameron had conceded a lot in order to ensure that the referendum was seen to be 'fair, legal and decisive'. While the first two goals were broadly achieved, the third was not; as the surge in support for the SNP after the referendum and the party's astounding victory in the 2015 Westminster elections evidenced, there was no losers' consent for the outcome.

In the event, the risk that Cameron took in the Scottish context paid off. The story was a less happy one for the EU referendum. Political exigency also drove the holding of this referendum but over a more extended timescale and in response mainly to political pressure on and within the Conservative Party. Cameron's Bloomberg speech in January 2013[13] set the path to the referendum. A handful of actors at the centre of government again determined this course of action, with no attempt to open a public debate on the pros and cons of a referendum or to seek cross-party agreement on whether or how to hold one. It remains unclear whether Cameron hoped that his commitment would be voided by the need to form a coalition government with the Liberal Democrats after the 2015 general election. His winning of a majority meant he had no choice.

As with the Scottish referendum, the Political Parties, Elections and Referendums Act 2000 shaped the conduct of the campaign. But the framing of the referendum, in particular the timing and the franchise, rested with the prime minister. In the event, Cameron doubled down on the risks he had taken in the Scottish referendum. Seared by his Scottish experience, he went for a short campaign, failing to recognise that his was

the side that needed time to overcome the innate Euro-scepticism of the British public. He went for a negative campaign but one that avoided blue-on-blue conflict. Once again, he allowed no contingency planning for a 'leave' outcome. Nor did he require either side to subject their campaign claims to independent and authoritative scrutiny. When Brexit came, it arrived with few clues as to what it would actually entail other than leaving the EU.

A referendum is a blunt instrument to settle a complex question. Cameron may have been right that it was democratically necessary to hold both the Scottish and the EU referendums. But the manner in which he did so muddied the outcomes of both. For Scotland, the question remains open as to when the conditions will be met for the people of Scotland to exercise their sovereignty again. In the view of the Conservative government elected in 2019, a pro-independence majority in the Scottish parliament was not enough. But what is? The passage of time since 2014? A sustained lead for independence in the opinion polls? The constitutional void leaves Scotland stuck, with no certainty as to when or if another turn of the political wheel will make the prospect of another referendum real.

As for the EU referendum campaign, the incoming government of Theresa May, faced with the enormity of the challenge before it, was reduced to mouthing 'Brexit means Brexit' as its best stab at outlining to the British public the course the country was now on. With no clarity on the 'leave' vision, May had no guide to her negotiating mandate. Those who had advocated Brexit were free to shift their interpretation of the outcome as their political needs shifted.

It suited Cameron to seek to get the referendum out of the way as quickly as possible, as soon as he had the outcome of his deal with the EU. And there was no sustained pressure on the 'leave' side of the argument to set out a coherent proposition for a post-Brexit Britain. The government gave no consideration to a pre-referendum process, for example engaging a citizens' assembly as in Ireland before the referendum on abortion and in Ontario and British Columbia before the referendum on constitutional reform. With no time for deliberation on possible post-referendum futures, there was no clarity on what those futures might hold. By prioritising the needs of his own party, Cameron ensured that the country would embark on its Brexit future in a state of maximum uncertainty. Given the closeness of the outcome, that turned out to be a bitter legacy to leave behind him.

Reforming parliament... or not

There is a ready metaphor for the state of the constitution in the actual UK parliament building. Seen from a distance, it is a grand, historical and imposing construct. Parts have been refurbished, but closer inspection reveals that the whole thing is in danger of becoming uninhabitable. Poisoned by asbestos, with a vast tangle of electrical, gas and water cabling and piping that no one understands, masonry crashing to the ground on a regular basis and a Victorian sewage system that threatens to explode over the lower

reaches of the building, the whole thing is sliding slowly into the River Thames. The risk to its inhabitants increases by the month and yet the parliamentary body is paralysed with indecision on the work necessary to make it fit for purpose again.

As with the building itself, there have been running repairs to the functioning of parliament. Labour introduced changes in the 1997 parliament to modernise sitting hours and other procedures and the committee system was overhauled after the recommendations of the Wright Committee in 2009.[14] But the functioning of parliament remains arcane and disputatious, and much would be recognisable to its 19th-century inhabitants. There has been no consistent effort to build a cross-party consensus on the overhaul of parliament, just piecemeal attempts at reform, which have failed to make much impression on the basic character of the place.

The most illustrative example of parliamentary reform is House of Lords reform. There are cogent arguments about the role of a second chamber and the extent of the powers it should hold over the legislative process and hence the programme of an elected government. Most modern democracies manage with second chambers that have some combination of democratic election and regional representation. Only the UK hangs on to a vast chamber of mostly political appointees where the only hint of democratic process occurs when the remaining hereditary peers elect a replacement for one of their departed.

All three of the main UK political parties have at one time or another committed to reform of the House of Lords. Labour made a brave start with the House of Lords Act 1999, which removed most of the hereditary peers but, despite the Royal Commission led by Lord Wakeham and a number of public consultations, white papers and votes in both Houses, Labour governments under both Blair and Brown never mustered the political will to push through further reform in the teeth of resistance from the Lords themselves. With no settled view in the parliamentary party on what shape a reformed chamber should take, House of Lords reform was simply not a high-enough political priority.

The coalition government fared no better. A commitment in the programme of government, a reform bill that would have created a largely elected second chamber, passed its second reading stage but was withdrawn when Conservative backbench rebels combined with the Labour opposition to stymie the programme motion for the bill and hence the possibility of its passage through the House of Commons. Both the Conservative rebels and the Labour opposition cited concerns about the relationship between the House of Commons and a reformed House of Lords as the reason for opposing the bill. In practice this masked political opportunism to undermine the coalition government's reform programme, even though both parties were in theory committed to reform of the second chamber.

Minor Acts in 2014 and 2015 provided for the resignation and expulsion of peers. Otherwise, even attempts to control the size of the second chamber have failed. The number of Lords has crept up to more than 770 and the House of Lords retains its place as the second largest legislative chamber in the world after the National People's Congress of China. There is no better symbol of the inertia of British constitutional reform.

In another overhang from the Middle Ages, ministers exercise considerable prerogative powers, either directly or through advice to the monarch. There have long been doubts about the extent of the powers the prerogative lends to the executive, but reform has proved problematic. One of the most important powers, to advise the monarch to dissolve parliament, was effectively handed to parliament through the Fixed-term Parliaments Act 2011, a measure that was partly an insurance policy for the junior partner in the coalition government and partly a principled attempt to end the gaming of the electoral cycle. Much criticised for prolonging the Brexit agony of the 2017 parliament, the will of parliament in fact overrode the Act to allow both the 2017 and 2019 general elections. In a neat demonstration of the ability of a prime minster who commands the will of the House of Commons to overturn even constitutional statute at will, the Johnson government repealed the Act in 2022. UK general elections will now be held at a time that best suits the prime minister and their party.

The prorogation episode of 2019 illustrates the constitutional vulnerability to abuse of the prerogative powers. The executive exploited the inability of parliament to defend convention by proposing an excessively long prorogation that would have limited parliament's ability to debate Brexit and prevent a no-deal Brexit, in the run-up to the scheduled date of exit from the EU on 31 October of that year. It took the Supreme Court's unanimous finding that the prorogation was unlawful to stay the government's hand. This threw into sharp relief the weakness of convention alone to hold the executive in check in troubled times.

One final example shows the difficulty parliament has had in adapting its own procedures to the new reality of devolved government in the UK. Some would claim that the best way of dealing with the so-called West Lothian question – the conundrum that MPs from Scotland, Wales and Northern Ireland can vote on devolved matters that affect England only – is not to ask it all. But the question reveals a democratic lacuna: the lack of any legislative institution to represent the interests of England. Polling has long shown popular resentment at the lack of English representation and recognition that some sort of provision for English votes for English laws (EVEL) would at least in part fill the gap.

On this, as other issues, the political parties have failed to arrive at a consensual solution that might stand the test of time. The coalition government established the McKay Commission but could not agree on its proposals. David Cameron angered both his coalition partners and the Labour Party, and delighted then first minister of Scotland, Alex Salmond, by unilaterally announcing on the morning after the Scottish referendum

that he would pursue a form of EVEL. He got his chance after the 2015 general election and the procedures of the House of Commons were adapted to effectively give English MPs a veto over legislation that pertained to England only.

With a working majority of English MPs through the Cameron, May and Johnson governments, the EVEL procedures were never used to cause a rethink on legislation pertaining to England only (or England and Wales only). The Johnson government found it convenient to quietly drop the whole concept. The West Lothian question once again remains unanswered.

Is the functioning of parliament in a better shape now than it was at the turn of the century? In some procedural respects, the answer is yes; for example, parliament has more control over the membership and business of select committees. But on the big questions of the composition and role of the second chamber, the use of the prerogative powers and the accommodation of the new distribution of powers through devolution, parliament remains broadly unreformed. Despite periodic commitment to change, reform has rarely commanded either priority attention or cross-party consensus. The institution of parliament is becoming as idiosyncratic as the building it inhabits. It treats constitutional issues much as it does any other policy domain. It does not assert itself to take the long view, leaving the constitution largely subject to the vagaries of the short-term political process.

Who should vote and how?

The right to cast a vote in a free and fair election is the absolute bedrock of democracy. Knowing that the vote will count, that the system of translating votes into seats in parliament will allow fair representation of voters' interests across the country, is also central to trust in the democratic process. The management of the electoral system, like much of the rest of the constitutional infrastructure, is in the hands of an executive that can command majority support in the House of Commons. This places a high degree of trust in the commitment of the political parties to the integrity of the electoral system. Inevitably, there is likely to be resistance to change a system that has delivered power to the ruling party, but there will also be a temptation to tilt the electoral system to party advantage. How has it fared over recent years?

One significant reform that has had cross-party support and has bedded in well has been the move to individual voter registration. Introduced by the coalition government, this has genuinely transformed the ease of voter registration, changing a system that relied on the outdated concept of the head of household to put the power in the hands of the individual. It is also a good example of how government can use cross-checks on records it already holds to confirm an individual's identity, making the whole process quick and easy for most individuals and for government. (The only time the system has failed was in the hours before the registration deadline ahead of the EU referendum. Traffic spiked at 10 times previous highs and the system fell over, requiring emergency legislation to extend the deadline by a couple of days.) So here is an example of a sensible, uncontentious reform that has benefitted voters.

The passing of the Political Parties, Elections and Referendums Act in 2000, an important part of the Labour government's constitutional reform programme, also commanded cross-party support, drawing on the work of the independent Committee on Standards in Public Life. By setting up the Electoral Commission and putting in place new rules on the registration of political parties, permissible donations and campaign spending, the Act was important in re-establishing trust in the integrity of the electoral system.

But subsequent attempts to take forward wider reform of party funding stalled. Desultory conversations between the parties took place under the auspices of the coalition government but got nowhere, caught between the reliance of the Labour Party on union funding on the one hand, and of the Conservative Party on major individual donors on the other. State funding, in part or in whole, was deemed anathema to a public suspicious of political parties.

Party self-interest, and the challenge of having to justify any system that relies to any degree on state funding, are likely to keep further reform of party funding on ice. Meanwhile, the Political Parties, Elections and Referendums Act itself is not immune to revision. The Electoral Commission was faced with two immense challenges with the Scottish and EU referendums. It passed those tests creditably, although unsurprisingly gained detractors in the process. Its independent wings have now been clipped; the Elections Act 2022 requires it to have regard to a strategy and policy statement set out by government. The executive has reasserted itself into the supervision of the electoral process.

That same Act introduced other changes that appear to confer direct advantage on the party that took the legislation through. Use of voter ID in polling stations has long been required in Northern Ireland. But there is very little evidence that voter fraud has been a problem in GB elections; enforcing voter ID in those elections therefore looks very much like a solution in search of a problem. That this is likely to have an impact on younger and poorer voters is well attested, even down to the form of ID required. That those voters are more likely to vote Labour than Conservative makes this piece of law look like a species of gerrymandering.

The Act has another provision that turns the clock back: that is the change of mayoral and police and crime commissioner elections from a supplementary vote to a first-past-the-post system. This is another change with weak justification that gives the appearance of a move motivated mainly by party advantage. The same may be said of the lifting of the restriction on voting in UK elections that previously applied to British citizens who had lived abroad for more than 15 years on the basis that older voters are more likely to vote Conservative, although there is at least an argument of natural justice in this instance.

The reform movement that has comprehensively failed in recent years is to change the first-past-the-post system for Westminster elections into something that is more proportionate. The inequity of the system can reach quite staggering proportions. For

example, in the 2015 general election, it required 3,881,099 votes to elect one United Kingdom Independence Party (UKIP) MP and, on average, just under 26,000 votes to elect one SNP MP. This system already produces hung parliaments – two out of the last four; and the history of the coalition government shows that a single-party majority is not a necessity for strong and stable government.

Nevertheless, support for electoral reform has never gained enough momentum for it to become a central plank of policy for either of the two major parties. The incentives work one way. Any party that has won power under the existing system is always going to be reluctant to change it for something more proportionate. The Labour Party manifesto of 1997 had a commitment to hold a referendum on voting reform;[15] that never happened. The Conservatives conceded a referendum on an alternative vote system as part of the coalition agreement and then campaigned vigorously against it. There is not enough extra-parliamentary agitation to make this a popular cause; only when one of the main parties' own electoral fortunes hinge off a more proportionate system is there likely to be a more rigorous drive for change.

The story of reform of the electoral system illustrates again the lack of coherence in the approach to a fundamental part of the UK's democratic infrastructure. Meaningful reform is not impossible, as the introduction of individual voter registration has shown. But there is no bar other than self-restraint on government introducing changes that seek to take party-political advantage, like the requirement for ID in polling stations. Above all, there are only weak incentives for political parties to break the inertia of inherited structures, even if these have long passed their democratic sell-by date.

Conclusion: where does this leave us?

In addition to the three waves of constitutional reform driven by the Labour government in 1997, the coalition government in 2010 and the Cameron government in 2015, there has been a fourth wave, not so much of reform as of retrenchment, driven by the Johnson government.

It is hard to discern the extent to which this was a concerted effort to define a new version of Westminster sovereignty or just a haphazard agglomeration of opportunistic responses to political exigencies. Perhaps it had elements of both. But the list of actions that challenged all other institutional power bases other than that of the executive was growing. It included:

- the attempt to clip parliament's wings through what turned out to be an illegal prorogation
- the aggressive assault on the devolution settlements through the United Kingdom Internal Market Act 2020
- the repeal of the Fixed-term Parliaments Act 2011

- the undoing of the EVEL procedures
- the imposition of ministerial oversight on the previously independent Electoral Commission
- the requirement for ID in polling stations
- the ending of a proportionate system of election for mayors and police and crime commissioners.

Each of these measures could perhaps be argued on its own merits, but taken together they show the way in which an executive with a sufficient majority in the House of Commons can remake the constitution to its own advantage. Alongside the flouting of international commitments and the shredding of standards and ethical codes, this is Lord Hailsham's 'elective dictatorship' flexing its muscles.

The inchoate nature of reform in recent decades has left the British constitution in a ramshackle state. The failure to treat constitutional change as any different from the ordinary run of policies has left it exposed to comparative neglect as other priorities crowd in and often at the mercy of political-party positioning. For most governments, that has meant mostly a missed opportunity to embark on and complete a coherent suite of reforms. But for a determined government with only a shadow of the self-restraint that is meant to be the hallmark of the British system, the way lies open to degrade the UK's constitutional infrastructure for narrow partisan advantage. Once through that gate, the destination becomes dangerously unpredictable.

What can be done?

The argument of this paper, then, is that the way in which constitutional change is managed in the UK has led to sub-optimal outcomes and constitutional incoherence and that the bar to the erosion of democratic norms by a determined executive is dangerously low. So what can be done?

There is no *deus ex machina* to put the British constitution back on its feet. Change, rightly, can only come through the political process. It is unlikely that popular pressure will drive constitutional reform. In a world in which the failings of the political system have generated public cynicism about politics as a whole, politicians have to carry the burden of the argument for sustaining the UK's democratic infrastructure.

Some would argue that the way forward is a complete upheaval of the British constitution; a substantive pause moment to create a written constitution. There is merit in that argument; the UK would then follow the norms of the vast majority of democratic countries. But it would be a massive and controversial undertaking. Without the forcing moment of a serious national crisis, it is difficult to see such a process surviving the crush of party politics.

Others might argue that there should be some limit placed on parliamentary sovereignty. That quickly becomes a recursive argument; how can a representative chamber bind itself in the face of all future exigencies?

As a political process, constitutional change has always been contested. All constitutional reform should be subject to vigorous debate, not least in the UK parliament and the other legislative bodies of the UK. There are moments when consensus emerges through the process of debate, as was the case for example around the Political Parties, Elections and Referendums Act 2000. More often, consensus emerges post-hoc, when the losing side of the argument comes to accept the validity and permanence of the reform in question. To take an obvious case in point, no serious politician would argue now against universal adult suffrage, despite vigorous opposition within the political process to reform from the 1830s until full suffrage was achieved in 1928. To take a more contemporary example, while a Conservative government in London might nip at the devolution settlements, no senior Conservative politician now advocates a return to what came before devolution, despite the hostility of the party to devolution in the 1990s.

Arguments will continue too over when it is right in a representative system for parliament to take decisions on major constitutional change at its own hand or when the ultimate source of sovereignty – the British people – should be consulted in referendums. Few would argue that a majority in the Scottish parliament alone should make a decision on independence for Scotland, even with the blessing of the UK parliament. Similarly, if the prospect of rejoining the EU ever emerged as a serious proposition, then that too would surely have to be confirmed in a referendum.

But what about other constitutional reform, in particular of the electoral system? Was the 2011 alternative vote referendum a necessary precedent? There is no simple answer to that question. A party, or coalition of parties, elected to office on an explicit and unambiguous commitment to electoral reform as a primary and immediate purpose could argue that a referendum would be superfluous. A proposal by a party seeking to introduce major change late in its parliamentary term without a referendum would face stronger objections.

The key on this and other constitutional issues is to emphasise the special character of constitutional change and to oblige a deeper process of debate and justification. Given parliamentary sovereignty, this has to be an exercise in self-restraint, a reframing of political culture to develop the expectation that governments, and parliament in general, will approach constitutional matters through a more self-reflective and publicly consultative route.

Such system change would not of itself prevent the exercise of executive fiat, but it would raise the salience of constitutional issues in a way that could lead to a more coherent approach, better informed by consideration within as well as outside of

parliament. While constitutional change is always likely to be contested, a requirement for a more self-conscious approach to the guardianship of the constitution would enhance the prospects for a more consensual approach; at a minimum, it would raise the bar on attempts to exploit the vulnerabilities of the British constitution for party advantage.

Below are six proposals for such system change. Combined, these changes would both entrench the special character of constitutional issues within parliament and buttress parliamentary debate through external challenge. The proposals are not as thorough going as the creation of a written constitution but, with will, they are more achievable in the short term. They are:

- Raise the political bar on changes to core constitutional statute. Entrenching such statute to require, for example, two thirds majority in the House of Commons for repeal or amendment would signal the special status of constitutional law. Such entrenchment is precedented, as in New Zealand. A determined executive might seek to undo retrenchment by repealing the relevant statute, but the requirement to do so would generate a greater level of scrutiny; it would be evident that the government was stepping into sensitive constitutional territory.
- Give a reformed second chamber a role as guardian of the constitution. This might require the chamber to periodically review the functioning of the constitution through extensive public engagement. The chamber might also have powers to refer the government to the Supreme Court if it deemed that core constitutional norms were at risk of being breached.
- Put the *Cabinet Manual* on a statutory basis. The aim would be to codify convention and make clearer when governments were approaching a line that precedent previously guarded. This need not require legislation to change the code, but would as a minimum trigger debate in parliament.
- Create an independent extra-parliamentary body to advise on constitutional issues. Such a body could serve as a constitutional 'conscience' for the government, political parties and civil service. It could test the health of the democratic system and make proposals for change to ensure coherence across the system. Its views would not be binding, but government would be obliged to explain if it chose not to act on them.
- Strengthen understanding of the constitution in the civil service. Establishing a permanent constitutional secretariat in the Cabinet Office, with oversight of both the constitution and devolution, would ensure that the cabinet secretary had the capacity to sustain robust advice to ministers on their constitutional responsibilities. This could also act to reinforce the salience of constitutional understanding across the civil service; the body of permanent secretaries should feel some obligation to relate their individual responsibilities to the overall health of our democratic processes.

- Build consent for change. These reforms will help establish as a norm that proposals for significant constitutional change should be subject to extensive and meaningful public consultation. Self-evidently, the firmer the base for important constitutional change, the more enduring it is likely to be. The UK has a tradition of independent royal commissions or similar. Other countries have gone beyond that with more deliberative processes involving a representative citizenry through standing or ad-hoc citizens' assemblies; that might be a preferable approach to take.

No constitution is perfect, and none ever will be. But the UK has not made a good job of managing constitutional change over the past few decades. The result is a loss of popular consent, a sense of disenfranchisement and an erosion of democratic norms. Change must always be the prerogative of democratically elected politicians, but constitutional change should ideally be rooted in deep public debate and driven by an understanding of the coherence of the constitution as a whole. This will require a change of political culture and expectations; difficult, but not impossible, if responsible politicians from all parties recognise their especial responsibility for sustaining our democratic infrastructure. This they should see as a primary duty. The constitution, after all, is there to serve the people, not politicians.

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November 2022