

International Best Practice and the Constitution, Democracy and Rights Commission

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Abstract

The UK government has pledged to establish a Constitution, Democracy and Rights Commission. This body will have a wide remit to recommend potentially sweeping constitutional change. This article draws on international experience and best practice to outline how the commission might best organise the process to produce proposals which are widely supported, fit for purpose, and durable. We argue that to achieve these goals the commission's organisation should reflect three key principles: impartiality, expertise, and public participation. This would reflect international best practice and build on recent domestic developments. We argue that these principles can best be achieved if the commission works through a citizens' assembly that combines members of the public with party politicians. This would be a new departure for the UK, but a necessary one given the scale of the government's constitutional reform agenda, and its stated goal of restoring public trust in politics.

Keywords: citizens' assembly, constitutional change, Constitution, Democracy and Rights Commission

THE UK'S Conservative government has promised to establish a Constitution, Democracy and Rights Commission, tasked with investigating constitutional reform. This new body will have a wide-ranging remit, considering reforms to the roles of government, Parliament, and the judiciary, as well as the relationship between citizens and the state. The government is, therefore, envisaging far-reaching constitutional change. It has not yet provided any detail on how the commission will be appointed or organised. Yet, these are consequential choices which are likely to have implications for the substance of the reforms and their likely success.

The goal of this article is to draw on comparative evidence and international best practice to outline how the Constitution, Democracy and Rights Commission might best be structured if it is to produce constitutional changes which are widely supported, fit for purpose, and durable. These attributes are desirable in all constitutional reforms. They are particularly important for wide-ranging constitutional reforms such as might be proposed by the commission. Existing evidence shows that the probability of

achieving these goals depends, in part, on the process that is used to develop reform proposals. We therefore draw lessons from international best practice to inform the discussion of how the Constitution, Democracy and Rights Commission should be organised.

We argue that constitutional change is most likely to be successful and durable if it is drafted through a process that is characterised by impartiality, expertise, and public participation. We argue that these qualities are best realised by a citizens' assembly that involves both the public and politicians. Such a body would give the public (informed by experts) a direct role in considering reform proposals, while also including the political parties which will ultimately need to implement those proposals.

The article proceeds as follows: we first outline the Johnson government's constitutional reform agenda in more detail and place it in context. We then draw on comparative evidence to outline the attributes which characterise successful constitutional reforms, as well as how they map onto different models for organising constitutional

reform bodies. The following section evaluates the relevance of these international lessons for the UK context. We conclude by summarising the benefits that would be realised if the commission formed a citizens' assembly with broadly representative participation from the public and political parties. This would undeniably be a novel departure for the UK. But the sheer scale and ambition of the government's reform plans, and its stated goal of restoring public trust in politics, make this innovative approach necessary and appropriate.

Johnson's constitutional reform agenda

The Conservative government's pledge to establish a Constitution, Democracy and Rights Commission was first made in the party manifesto for the 2019 general election. The remit of the commission would be to 'look at the broader aspects of our constitution ... [and] ... come up with proposals to restore trust in our institutions and how our democracy operates'.¹ However, this broad ambition was not combined with any detail on how the commission would be organised or operate in practice. The manifesto simply promised that it would be set up in some form during the government's first year (that is, by the end of 2020).

This lack of clarity is important, because the Conservatives' manifesto suggested the commission's remit could be very wide indeed. It listed a number of areas which the commission would examine, including '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'.² The commission would also be tasked with investigating the Human Rights Act, the balance between individual rights and national security, and the proper scope of judicial review. Several longer-standing Conservative proposals, such as repealing the Fixed-term Parliaments Act 2011, were repeated in the manifesto but not placed within the purview of the commission. Altogether, this suggests it will be asked to investigate almost all major aspects of the UK's constitution.

These constitutional reform proposals have their roots in the politics of the Brexit process. The manifesto makes that clear in its framing of the reforms. The proposal to establish a commission is entirely new, and the 2019 manifesto explicitly frames these proposals as arising from a 'destabilising and potentially extremely damaging rift between politicians and people' opened up by '[t]he failure of Parliament to deliver Brexit'.³ Hence, the commission's remit focusses particularly on branches of government and aspects of the constitution which had frustrated the Brexit policy of successive Conservative governments between 2016 and 2019. In the autumn of 2019, for instance, the government lost various parliamentary votes and legal challenges. This provoked angry reactions from the Prime Minister and government, and seemed to inform the pledge to create the commission tasked with investigating the role and powers of Parliament and the courts, with the apparent intention of strengthening the position of the executive.⁴

There will inevitably be a range of opinions about the precise proposals which the commission should adopt. Any attempts to strengthen the executive will likely prove especially controversial, given its already strong position. There are also obvious downsides to changing long-term constitutional rules in response to short-term political battles and controversies.⁵ However, there are some characteristics which are desirable in all constitutional reform proposals, regardless of their substantive content. In particular, successful constitutional reforms command widespread public support and legitimacy, are fit for purpose and minimise unexpected consequences, and prove durable. The following section discusses how the process of drafting constitutional reform can be organised in order to best achieve these goals.

International best practice and experience

International experience suggests that the organisation and process followed by constitutional review bodies affects the substance and success of the proposals they produce.

Durable, widely supported, fit for purpose constitutional reforms are most likely to be achieved by processes that are characterised by three normatively desirable principles: impartiality, expertise, and public involvement. Here, we discuss each of these principles and the underpinning reasoning.

Constitutional reform processes should be impartial and inclusive of a broad and balanced range of partisan and institutional interests. Impartiality and balance are desirable because these properties ensure that the process is not dominated by any single political party or institution which may try to fashion proposals for its own benefit.⁶ Procedural impartiality and balance give all relevant actors a role in shaping the reform proposals, which increases the probability that they prove acceptable and therefore durable. The importance of impartial reform processes is reflected in the widespread international use of supermajority rules for approving constitutional changes. Written constitutions in other democracies typically contain provisions that ensure a temporary governing majority is unable to alter the constitution for its own purposes. By diffusing the power to approve constitutional amendments among multiple actors and institutions, they ensure constitutional change requires widespread negotiation. For example, amendments to the German Basic Law require a two thirds majority in both the Bundestag and Bundesrat. Similarly, amendments to the United States constitution must be approved by three quarters of the states.

Constitutional reform processes should also be informed by expertise.⁷ Constitutional rules are complex and without expert knowledge and advice, political actors often do not anticipate the full implications of a change, or misperceive and miscalculate the likely consequences. International experience offers evidence of many such instances. Andrews and Jackman, for example, note that several East European political parties supported electoral rule changes which subsequently 'eliminated them from politics'.⁸ When multiple interrelated constitutional changes are made simultaneously, their interacting consequences become increasingly difficult to gauge, which magnifies the risk of miscalculation. Major constitutional reform therefore requires expertise. Expert

guidance provides drafters of constitutional change with a better understanding and systematic analysis of the likely effects of their proposals. This minimises unexpected consequences and increases the chances that the constitutional changes are fit for purpose. An example that illustrates the importance of expertise in the constitutional reform procedures of comparable democracies is the process used to develop the current Finnish constitution, adopted in 2000. While politicians drafted the substance of this constitution, they worked within an overall framework provided by an expert group of researchers and civil servants.⁹

Finally, major constitutional reform processes should involve direct public participation. Because constitutions represent the fundamental rules governing how democracies function, they must enjoy legitimacy in the eyes of the citizens of those democracies.¹⁰ The principle of public involvement in constitution drafting and reform has therefore become an established part of international best practice, endorsed by the United Nations, the Organisation for Economic Co-operation and Development, and the Council of Europe.¹¹ It not only engenders public confidence, but direct public involvement also ensures that reforms are not recommended unless they are regarded as legitimate by citizens. This enhances public acceptance and the durability of any resulting changes. The Irish Citizens' Assembly, established in 2016 to deliberate constitutional reform, is a case in point. It was composed of members of the Irish public, selected to be representative of the population in terms of age, gender, social class, and location, and who considered major constitutional reforms. Its work proved vital in bringing several contentious constitutional questions, including the issue of abortion, to a resolution: its careful public deliberations paved the road to a referendum for constitutional change.

Taken together, this suggests that impartiality, expertise, and public participation are desirable features of any process for developing major constitutional reform. Processes organised in line with these principles are more likely to produce constitutional changes that are accepted by the public as legitimate, functional, and likely to endure.

What does this best practice imply for the process through which the Constitution, Democracy and Rights Commission should work? International experience shows that constitutional reform bodies like the commission can be organised according to four broad types of models, each offering a different balance of these normatively desirable features.¹² First, constitutional reforms can be considered by elite commissions—small groups of experts and public or political figures with relevant experience and knowledge.¹³ For instance, in 1985 New Zealand established a royal commission to examine electoral reform, which was composed of experts in law, statistics, and political science.¹⁴ Second, reforms can be considered by representative conventions. These are larger bodies, containing a broad balance of civil society groups, political parties, and institutional actors. An example of this approach is Australia's 1998 Constitutional Convention, which discussed whether Australia should become a republic.¹⁵ Third, constitutional reforms can be recommended by a citizens' assembly: a deliberative body composed of randomly selected members of the public. This approach has recently been adopted for considering electoral reform in Canada and the Netherlands.¹⁶ Fourth, the citizens' assembly model can be extended to include a mixed membership of representatives of the public and a balanced selection of party politicians.

The fourth of these models—a citizens' assembly with party involvement—best incorporates the principles of impartiality, expertise, and public involvement. Only a citizens' assembly provides *direct* public involvement. This contrasts with elite commissions, which may allow public input through consultations, and larger constitutional conventions, where the public are indirectly represented by parties and civil society groups. Citizens' assemblies incorporate expert involvement through expert witnesses who inform their deliberations. They thus acknowledge and make room for the need for expertise. Moreover, a citizens' assembly combining both the public and politicians representing all parties satisfies the principle of impartiality. In addition, it mitigates the main downside of a pure citizens' assembly without party political

participation—the potential lack of practical political support for its proposals.¹⁷ By combining the public and politicians in one deliberative body, this approach allows for members of the public to participate in developing constitutional reform proposals, which are informed by relevant expertise, and supported by those politicians who will ultimately be responsible for their implementation. This approach has recently been adopted in Ireland, where a Constitutional Convention combining party representatives with randomly selected members of the public considered various constitutional reforms between 2012 and 2014.¹⁸

Changing practice in the UK

This international best practice and experience with procedural models for constitutional reform offers useful lessons for the Constitution, Democracy and Rights Commission. While the UK's uncodified constitution, which rests on the principle of parliamentary sovereignty, differs from those of many other countries, this does not limit the applicability of international best practice to the UK. The desirability of impartiality, expert input, and public involvement in constitutional reform processes is neither specific to particular countries, nor to particular kinds of constitution. These principles offer general guidance for the development of successful constitutional reform in any democratic system. Precisely how they are implemented in practice may vary across contexts. But, in the UK it is as important as in other contexts that major constitutional change is developed by a process that produces legitimate, functional, and durable reforms.

The importance of impartiality, expert input, and public involvement in achieving successful constitutional reform is increasingly recognised in the changing choices that the UK has made with respect to constitutional reform procedures. Changing UK practice demonstrates a growing acceptance of these three normative principles: we have seen a clear increase since the 1990s in the use of elite commissions, characterised by impartiality and expertise, for the examination of constitutional questions. Expert

commissions have been particularly prominent in relation to devolution to Scotland and Wales, which has seen proposals from the Richard Commission, Calman Commission, Silk Commission, and Smith Commission. In addition, elite commissions have been established to consider Lords reform, electoral reform, and human rights.¹⁹ While governments often decline to implement the proposals produced, the increasing use of commissions suggests a growing acceptance of the principle that constitutional reforms should be developed by processes characterised by expertise and impartiality.

Moreover, the UK has seen a growth in the use of referendums to endorse constitutional change. Referendums were relatively rare in the UK prior to the 1990s, but since then they have been held on national and regional devolution, electoral reform, Scottish independence, and EU membership. Several pieces of legislation have also preemptively created requirements for referendums to be held before future specified constitutional changes. For example, the Scotland Act 2016 and the Wales Act 2017 established that any attempt to abolish the devolved institutions would have to be endorsed in a referendum beforehand. This growth in the use of referendums seems to indicate the emergence of a norm that certain kinds of major constitutional change cannot take place without public consent.

While the direction of travel is clear, it is important to note that the UK has further to go in fully embracing international best practice in its constitutional reforms processes. Elite commissions have so far produced successfully implemented constitutional reform relating to devolution, but not beyond this area. Moreover, public participation in constitutional reform in the UK has been confined to referendums, which only give the public a chance to endorse or reject proposals drafted by politicians *ex post*, as opposed to the direct involvement of members of the public in deliberating and recommending constitutional change.

Nonetheless, changing practice indicates that expertise, impartiality, and public involvement are increasingly accepted normative principles in the UK's approach to constitutional reform. There is thus both international and domestic precedent for

taking these principles seriously when establishing the Constitution, Democracy and Rights Commission.

Embracing best practice

Boris Johnson's government has laid out an ambitious agenda for wide-ranging constitutional reforms, to be proposed by a Constitution, Democracy and Rights Commission. However, it has not detailed the process by which the commission is to work. In this article, we have focussed on procedural choices for major constitutional reform, considered international best practice, and recommended that the commission should work through a process characterised by three key principles—impartiality, expertise, and public involvement. International experience suggests that a process characterised by these principles increases the chances that the reform proposals which are produced enjoy popular legitimacy, prove functional and fit for purpose, and have a good chance of enduring.

In practice, these goals would best be met if the commission organised a citizens' assembly that involved both the public and political parties. While this approach would be a novel departure for the UK, it would be consistent with the direction of travel of the UK's own changing practice in constitutional reform over recent decades. Citizens' assemblies have also been used in a number of other countries, and there have been several experiments in applying them in the UK.²⁰ Nonetheless, this would represent a break with the UK's past approach to constitutional reform.

The sheer ambition of the government's proposals calls for such a step change in procedure. The government is envisaging major constitutional reform, with simultaneous changes to many of the UK's most fundamental institutions, rights and constitutional rules. The piecemeal and elite-led processes that the UK has previously used to address constitutional change in a succession of specific areas—such as during New Labour's constitutional reforms—have been widely criticised as unfit for developing coherent reforms of this order of magnitude across multiple interacting areas that enjoy the required political and public support.²¹ Nor are procedural choices that exclude direct public participation (such

as expert commissions) commensurate with the Johnson government's declared aim of launching a constitutional reform agenda to rebuild public trust and reconnect politicians with the people.²² In a country that is deeply divided with respect to Brexit, choosing an inclusive reform process that gives a representative selection of members of the public an active role in deliberating and recommending the reforms will be essential in inspiring public trust in any constitutional changes that result.

The procedural choice that will most obviously enable the proposed commission to satisfy these multiple requirements is to convene an impartial and politically balanced citizens' assembly, with direct participation by the public alongside politicians, and informed by expert witnesses. This is the time for the UK to embrace international best practice in constitutional reform.

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Notes

¹ Conservative and Unionist Party, *The Conservative and Unionist Party Manifesto 2019*, London, Paragon, 2019, p. 48.

² *Ibid.*

³ *Ibid.*, pp. 47–48.

⁴ See M. Russell, 'Brexit and Parliament: the anatomy of a perfect storm', *Parliamentary Affairs*, 2020, online first; <https://doi.org/10.1093/pa/gsaa011> (accessed 10 September 2020); P. Schleiter and T. Fleming, 'Parliamentary prorogation in comparative context', *The Political Quarterly*, vol. 91, no. 3, 2020, pp. 641–648; L. Thompson, 'From minority government to parliamentary stalemate: why election 2019 was needed to break the Brexit logjam', in J. Tonge, S. Wilks-Heeg and L. Thompson, eds., *Britain Votes: The 2019 General Election*, Oxford, Oxford University Press, 2020, pp. 48–64.

⁵ See M. Russell and A. Renwick, 'The government's proposed Constitution, Democracy and Rights Commission: what, why and how?', *Constitution Unit Blog*, 14 February 2020; <https://constitution-unit.com/2020/02/14/the-governments-proposed-constitution-democracy-and-rights-commission-what-why-and-how/> (accessed 24 December 2020).

⁶ T. Ginsburg, Z. Elkins and J. Blount, 'Does the process of constitution-making matter?', *Annual Review of Law and Social Science*, vol. 5, no. 1, 2009, p. 212.

⁷ A. Renwick, *After the Referendum: Options for a Constitutional Convention*, London, The Constitution Society, 2014.

⁸ J. Andrews and R. Jackman, 'Strategic fools: electoral rule choice under extreme uncertainty', *Electoral Studies*, vol. 24, no. 1, 2005, p. 69.

⁹ See J. Nousiainen, 'From semi-presidentialism to parliamentary government: political and constitutional developments in Finland', *Scandinavian Political Studies*, vol. 24, no. 2, 2001, p. 105.

¹⁰ Ginsburg, et al., 'Does the process of constitution-making matter?'

¹¹ M. Dakolias, 'Are we there yet?: Measuring success of constitutional reform', *Vanderbilt Journal of Transnational Law*, vol. 39, no.4, 2006, pp. 1210–1211.

¹² For a more comprehensive and complex typology than the one described here, see Renwick, *After the Referendum*.

¹³ Renwick, *After the Referendum*, pp. 31–34.

¹⁴ See J. Boston, 'Electoral reform in New Zealand: the report of the Royal Commission', *Electoral Studies*, vol. 6, no. 2, 1987, pp. 105–114.

¹⁵ Renwick, *After the Referendum*, pp. 74–83.

¹⁶ *Ibid.*, pp. 66–74.

¹⁷ D. Farrell, J. Suiter, C. Harris and K. Cunningham, 'The effects of mixed membership in a deliberative forum: The Irish Constitutional Convention of 2012–2014', *Political Studies*, vol. 68, no. 1, 2020, pp. 54–73.

¹⁸ *Ibid.*, pp. 56–58.

¹⁹ See M. Elliott, 'A damp squib in the long grass: the report of the Commission on a Bill of Rights', *European Human Rights Law Review*, vol. 2, 2013, pp. 137–151; I. McLean, 'The Jenkins Commission and the implications of electoral reform for the UK constitution', *Government and Opposition*, vol. 34, no. 2, 1999, pp. 143–160; L. Wakeham, 'The lords: building a house for the future', *The Political Quarterly*, 2000, vol. 71, no. 3, pp. 277–281.

²⁰ Renwick, *After the Referendum*, pp. 66–73; M. Flinders, K. Ghose, W. Jennings, E. Molloy, B. Prosser, A. Renwick, G. Smith and P. Spada, *Democracy Matters: Lessons from the 2015 Citizens' Assemblies on English Devolution*, London, Democracy Matters, 2016; Farrell, et al., 'The effects of mixed membership'.

²¹ A. King, *The British Constitution*, Oxford, Oxford University Press, 2007, Chapter 14.

²² Conservative and Unionist Party, *The Conservative and Unionist Party Manifesto 2019*, p. 48.