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# FORMING A GOVERNMENT IN THE EVENT OF A HUNG PARLIAMENT THE UK'S RECOGNITION RULES IN COMPARATIVE CONTEXT

PETRA SCHLEITER, VALERIE BELU AND ROBERT HAZELL

# Forming a government in the event of a hung parliament

## The UK's recognition rules in comparative context

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## **Contents**

<b>Executive summary .....</b>	<b>1</b>
<b>The need for clearer rules on government formation.....</b>	<b>2</b>
<b>Two government formations which followed two different principles .....</b>	<b>3</b>
<b>Recognition rules: importance, variation, challenges .....</b>	<b>4</b>
<b>A hung parliament - projections in 2015.....</b>	<b>5</b>
<b>Six recognition principles .....</b>	<b>6</b>
<b>Implications .....</b>	<b>9</b>
<b>An alternative to ex-ante recognition rules .....</b>	<b>9</b>
<b>Ending a gridlocked government formation process.....</b>	<b>10</b>
<b>Models: the procedure in other European countries, and in Scotland, for appointing the Prime Minister.....</b>	<b>11</b>
<b>Transferring the Scottish procedure to Westminster .....</b>	<b>13</b>
<b>Realising reform .....</b>	<b>14</b>
<b>Summary of recommendations.....</b>	<b>14</b>

## Executive summary

This paper considers government formation in a hung parliament, in which more than one potential government is viable. In such situations, constitutional rules and conventions, which are referred to in the academic literature as *recognition rules*, guide which actors will be asked to form the government (i.e. to act as the *formateur*) and in what order.

The academic literature identifies six possible recognition rules to guide who should be asked to form a government. These are the majority principle, the continuation rule, and the gravitational, plurality, fault and plebiscitary principles.

Recognition rules have political consequences. They may influence which parties form the government, and what policies are then implemented. To protect the monarchy and its political impartiality, the recognition rules need to be clear, democratic and effective.

In the past the UK has applied a range of different conventions and principles which are potentially contradictory, and do not all follow an equally democratic logic. This can jeopardise the Monarch's role in the government formation process.

An alternative to the use of *ex ante* recognition rules is a vote in parliament to nominate the new Prime Minister (in the form of a request to the Monarch). This would protect the monarchy and its political impartiality by separating the *political choice of a formateur* (made by parliament) from the *formal act of appointing the formateur*, made by the Monarch.

Parliament could choose a *formateur* by directly voting on the candidates nominated by political parties, as happens in other European countries, and in Scotland and Wales.

Rules are also needed to terminate a government formation process which has become gridlocked. The UK could adopt the 28 day time limit which applies in Scotland.

## The need for clearer rules on government formation

As the May 2015 general election approached, pollsters, journalists and politicians were predicting a hung parliament in which more than one potential government was expected to be viable. As late as 4 May, Labour was considering a minority coalition government with the Liberal Democrats. The Conservative Party was discussing a single-party minority government as well as potential coalition options. The former Cabinet Secretary, Gus O'Donnell, thought that it could be weeks before a new government was formed and speculated that it 'could be multi-party, it could be mixtures of coalitions and deals – and the deals may be written or unwritten.'<sup>1</sup> In the event, the election of a Conservative majority government with 36.9 per cent of the vote surprised observers. However, in future, underlying electoral trends are likely to raise again the question how government formation negotiations proceed in the context of a hung parliament.

Electoral experts continue to view hung parliaments as increasingly likely for several reasons. The vote share of the two largest parties has been eroding for some time. Since 2001 no single-party government has commanded more than 40 per cent of the vote. In 2015, parties other than the Conservatives, Labour and the Liberals garnered an unprecedented 24.8 per cent of the vote and seven parties took part in the pre-election debates. After the 2015 election John Curtice wrote

The range of results that would result in a hung parliament in which no one party would have an overall majority is wide indeed. Any outcome between a Labour lead of 12.5 points and a Conservative one of 5.8 points would result in no single party winning an overall majority. This range is wider than it has been after any previous election.<sup>2</sup>

With the election behind us, we return to the questions that attracted extensive speculation and contradictory predictions in the run-up to 7 May. What rules apply to government formation negotiations in the UK in the context of a hung parliament? Which actor is accorded the privileged role of *formateur* in the bargaining process? How clear and effective are the current provisions?

In parliamentary democracies, the authority of governments derives from the confidence of a legislative majority. When elections return no single-party majority, parties must negotiate amongst themselves to form a government which enjoys this support. When several potential governments are viable, negotiations, guided by constitutional rules and conventions, determine which one of these prospective governments will be given the first opportunity to test its confidence and, if successful, to exercise power.

There are two potentially separate questions at stake in such negotiations: (i) which party or parties will form the government, and (ii) which parties are prepared to support it. The bargaining process need not result in a majority coalition – it can also result in the formation of a minority coalition, or a single-party minority government, as was the case in February 1974, when Harold Wilson formed a minority Labour administration. But minority governments, like majority governments, have to find a mechanism to secure parliamentary support, either on the basis of *ad hoc* bargaining or through a more stable supply and confidence agreement such as the Lib-Lab Pact from 1977 to 1978.

In such situations, government formation is guided by constitutional rules and conventions, which often help to narrow the range of potential options. Most parliamentary systems in Europe have developed such rules. In this paper, we focus on the constitutional rules referred to as *recognition rules* in political science. Recognition rules regulate which actors will be asked to form the government and in what order. They determine (i) who will be *formateur*, i.e. the person tasked with the first attempt at forming a government, and (ii) to whom this role will pass next, should the attempt fail.

In the UK, it is the sovereign's prerogative to appoint a Prime Minister designate. The Monarch is expected to discharge this role in the government formation process without becoming involved in any negotiations – 'she is [a] recipient of advice but not an active participant'.<sup>3</sup> In the simplest scenario a single party

commands an outright legislative majority and the Prime Minister is directly identified by the election result so that no choice is required on the part of the Monarch and her advisers. However, if the election returns a hung parliament, the task of naming an appropriate government *formateur* often involves political choices, which can crucially influence the nature of the government that is then formed. In this situation it is desirable that the procedure for government formation separates the political choices from the formal and ceremonial aspects of government formation in order to protect the Monarch from political controversy. This is not currently the case in the UK.

This paper reviews the UK's constitutional conventions and past precedents in *formateur* selection and places them in the context of six principles that other parliamentary democracies use to guide actors outside parliament, who have a role in government formation negotiations. We show that, in the past, the UK has applied five of these six principles in selecting *formateurs*, and that these principles are potentially contradictory. Moreover, not all of these principles follow an equally evident democratic logic. A lack of clear and democratically robust guidance is problematic because it can spark controversy and call into question the Monarch's role in the government formation process. Box 1 illustrates this risk, drawing on the example of Queen Beatrix of the Netherlands.

#### **Box 1: Risks to the Monarch, the example of Queen Beatrix of the Netherlands**

In 2010 charges that the Monarch's political impartiality had been compromised entangled Queen Beatrix of the Netherlands, and ultimately contributed to the decision of the Dutch parliament in 2012 to end the Queen's involvement in the government formation process. Following the 2010 elections, the Queen tasked several party leaders, in succession, to explore the options of forming a coalition, but government formation proved difficult, contentious and protracted. Controversy erupted when the Queen was accused of (i) exercising discretion in her choice of party leaders tasked with exploring the coalition options, and (ii) seeking to prevent the third largest party, the right wing anti-immigrant Party for Freedom of Geert Wilders (PVV), which had won substantial gains in the elections, from entering the government. In 2012 the law was changed so that the party with a plurality of votes is responsible for taking soundings of the other parties, and then reporting to parliament on who should be appointed as *informateur*.

Given the long-term changes in electoral behaviour, which are rendering hung parliaments more likely, there is a case for resolving the contradictions in the conventions and precedents that guide government formation. We outline options to address the problem and argue that the most appropriate mechanism to nominate a *formateur* is a vote in parliament (in the form of a recommendation to the Monarch). This would protect the monarchy and its political impartiality by separating the *political choice of a formateur*, made by parliament, from the *formal act of appointing a formateur*, made by the Monarch. We also discuss how parliament might best choose a *formateur*, and suggest the need for rules to address the possibility of an unsuccessful and gridlocked government formation process.

#### **Two government formations which followed two different principles**

The UK's post-war history of government formation negotiations is short. Before the 2010 election and the resulting coalition, the need for negotiations had arisen only once, following the February 1974 general election which also resulted in a hung parliament. Heath, the incumbent Prime Minister, remained in office for four days, attempting to form an administration by offering coalition participation to the Liberals.<sup>4</sup> Only when these negotiations failed did Heath resign, and Labour, the largest party by five seats, was invited to form the next government. At the time, the choice to entrust the incumbent Prime Minister rather than the leader of the largest party with the first attempt to form a government had cross-party approval. As Wilson, then leader of the Labour Party, writes

There were suggestions in March 1974, that as Labour had more seats than any other party [...] the Sovereign should have sent at once for the Labour leader. This is not so. A Government was in existence, and until it resigns, following the election results, or a defeat on the Queen's speech, the Palace can only observe the classical doctrine, "We have a Government".<sup>5</sup>

Yet, despite this constitutional precedent, politicians appealed to a different guiding principle during the 2010 negotiations. Nick Clegg, the leader of the Liberal Democrats, stated before the election that the party with the most votes and seats should have the initial say on forming a government. He proceeded according to this view after the election, and negotiated primarily with the Conservatives, who had won 48 more seats than the incumbent Labour Party. The contrast between the two principles that were applied by political actors in negotiating government formation concerns the nature of the UK's *recognition rules*.

## Recognition rules: importance, variation, challenges

Recognition rules are the constitutional principles that determine which actor is asked to form the government – i.e., to assume the role of the *formateur* – and in what order different actors are invited to take on this role. These constitutional rules have political consequences. They shape the negotiations about government formation after an election and in the event of a mid-term resignation by a government. They also condition the probability with which different parties enter the government, affect a government's majority and coalition status, and may have an influence on the relative advantage of the *formateur's* party in securing key cabinet posts (*formateur advantage*).<sup>6</sup> As Box 2 illustrates, changes to a country's recognition rules can significantly shape its politics.

### Box 2: The political consequences of a change in the recognition rules, the example of Israel

Israel briefly transferred the first opportunity to form a coalition from the largest party in parliament to the directly elected Prime Minister from 1996 to 2001. The change altered the benefits for parties of joining the cabinet. It conditioned whether Labour or Likud would be in the coalition, and thus whether Israel's defence policies would be left or right of centre.<sup>7</sup>

Recognition rules vary across several dimensions: (i) The power to designate the *formateur* may lie directly with parliament, or involve the head of state (the Monarch or the President). (ii) The discretion that these actors enjoy in selecting the *formateur* may vary. In some countries the actors have little leeway because their choice is precisely dictated by constitutional law or by well-established customs. In other countries the rules are less codified, affording the actors more freedom in their decision. (iii) The legal status of recognition rules can vary. They may take the form of constitutional law or convention.

Recognition rules, which, like those in the UK, give the Monarch a formal role in the process of government formation present special challenges. Because monarchs are not democratically elected there is a broad consensus that the Monarch must remain politically impartial (and be perceived as such). This places a particular onus on the recognition rules to protect the Monarch from having to make political choices. When the rules and principles that guide a Monarch's choices contradict each other, or yield results that are perceived as democratically problematic, government formation choices can become contested. Contradictory rules and principles can place monarchs under tremendous pressure which may result in the exercise of personal discretion. As box 3 illustrates, the negative repercussions of the exercise of personal discretion by a Monarch can be extensive.

### **Box 3: George V and the formation of the National government in 1931**

In the context of the Great Depression in the early 1930s, for instance, George V felt pushed to play a personal role in government formation after the split and collapse of the minority Labour government in 1931. Fearing the disruption of an election and the possibility that Britain might be forced off the gold standard, he repeatedly refused to accept the resignation of the incumbent Prime Minister, Ramsay McDonald, and pressed for the formation of a coalition, the National government, under McDonald's leadership. The decision proved controversial, resulted in McDonald's expulsion from the Labour Party, and caused significant reputational damage to the monarchy.<sup>8</sup>

Today, the UK Cabinet Manual seeks to rule out all personal discretion. It envisages that a Monarch acts on the advice of politicians (i.e., ministers, party leaders, channelled through the Monarch's private secretary). However, contradictory rules can leave that advice contestable, and may make the Monarch vulnerable to the charge of having favoured a particular outcome.

Below, we review the different recognition principles that can be invoked, and chart how they have been used in the UK in the past to select the *formateur*. To illustrate the contradictions between these rules and how they can give rise to controversy, we rely on some potential outcomes for which parties were preparing before the 2015 general election, given the predictions of polling firms.

### **A hung parliament - projections in 2015**

In the last 21 days before the 2015 UK general election, ukgeneralelection.com and ukelect.co.uk were predicting the following seat and vote distributions:

**Table 1: Predicted seat and vote distributions, UK general election, May 2015**

Party	Seats <sup>†</sup>	Vote share <sup>††</sup>
Conservatives	275	33.5%
Labour	273	34%
SNP	47	
Liberal Democrats	28	8.5%
UKIP	3	13%

Sources: <sup>†</sup><http://ukgeneralelection.com/2015/05/07/final-prediction/>; <sup>††</sup><http://www.ukelect.co.uk/HTML/forecasts/20150412ForecastUK.html>

These forecasts, like nearly all other forecasts, showed neither main party securing the required majority of 326 seats. They also envisaged that Labour would have won fewer seats than the Conservatives, but the largest vote share. Now imagine the following scenario: as the election result becomes clear, the Conservative Prime Minister, David Cameron, claims the right to govern and argues that it would be 'illegitimate' for Labour, as the party that came second in terms of seats, to form a government. Labour argues that a Conservative-led government, which has lost votes and seats compared with 2010 (when the Conservatives won 307 seats and 36.1 per cent of the vote), would be a 'government of election losers'. Labour should now be given the right to form a government. After bargaining between the parties two viable camps emerge, one led by the Conservatives, one by Labour. Neither side concedes defeat. In this scenario who would govern?<sup>9</sup>

## Six recognition principles

Comparative studies in political science identify six principles that are applied to select a *formateur* when an actor other than parliament itself is involved in that choice.<sup>10</sup> Five of these principles have at some point been invoked in the UK. Three of them are reflected in the 2011 Cabinet Manual, which is currently the most comprehensive guide to the laws, conventions and rules on the operation of government.

### 1. The majority principle

The principle that is most frequently applied in the UK is the *majority principle*. It is regarded as a clear constitutional convention. As the Cabinet Manual states, governments that retain their parliamentary majority in an election normally continue in office. Moreover, ‘[i]f the election results in an overall majority for a different party, the incumbent Prime Minister and government will immediately resign and the Sovereign will invite the leader of the party that has won the election to form a government’ (Cabinet Manual 2011, § 2.11).

### 2. The continuation rule

When no party achieves an overall majority, the majority principle cannot apply so alternative conventions must be invoked. At this point the distinction between informal negotiations and the formal recognition rules becomes important. Informally, any party can negotiate with any other party about government formation in a hung parliament. But the formal recognition rules determine which actor has the ‘first right’ to attempt to form a government after those negotiations and to test whether it has the confidence of the legislature. The Cabinet Manual seeks to establish that the formal principle which applies in a no-majority situation is the *continuation rule* (Cabinet Manual 2011, § 2.12), which was appealed to by Heath and Wilson in 1974. This principle stipulates that the ‘incumbent government is entitled to wait until the new parliament has met to see if it can command the confidence of the House of Commons’ (Cabinet Manual 2011, § 2.12). A consequential question, which introduces a degree of ambiguity, is whether the *continuation rule* applies to the incumbent government collectively, the Prime Minister, or the Prime Minister’s party. While the Cabinet Manual refers to the incumbent government, Vernon Bogdanor suggests that the *continuation rule* can apply either to the Prime Minister, or their party, depending on whether the party is largest after the election.<sup>11</sup> All of these interpretations, though, privilege the incumbent in some form as the first mover in government formation. Only if it emerges that the incumbent is ‘unlikely’ or unable to command the confidence of parliament in the vote on the Queen’s speech, and there is a clear alternative, is the government expected to resign.

In our forecast scenario, this rule would have given the incumbent Prime Minister, David Cameron, the first right to form a government and test his ability to command the confidence of parliament. This rule becomes problematic, however, when the incumbent Prime Minister’s party lacks the parliamentary support or legitimacy to form a government because it has lost votes and seats (as is the case in our scenario), or if it no longer controls the largest number of seats. In this case, the *continuation rule* conflicts with two other rules, which will be discussed in more detail below, the *plurality* and the *plebiscitary principles*. These two principles dictate respectively that the winner of the largest seat share (*plurality principle*) or the largest vote share (*plebiscitary principle*) gets the first chance to form the government. Precisely this conflict between the *continuation rule* on the one hand and the *plebiscitary and plurality principles* on the other arose in 2010, when the Labour government lost votes and its parliamentary majority. Following the election, Gordon Brown, was decried as the ‘squatter in Downing Street’ when he did not resign instantly, despite the fact that there was a hung parliament and he was the incumbent Prime Minister. Our scenario is more ambiguous than the situation in 2010, because it envisages that the incumbent Prime Minister, while losing votes and seats, still remains the leader of the largest parliamentary party. In this situation, Cameron could have attempted to argue for the first right to form a government under the *continuation rule*. Labour could have challenged his right to do so by appealing to the *plebiscitary principle*. If neither side had conceded defeat, the continuation rule would have taken precedence and the incumbent would have formed the

government. But as the ‘squatter in Downing Street’ episode following the 2010 elections illustrates, that choice might have triggered intense controversy and challenging legitimacy questions.

### **3. *The gravitational principle***

In practice, the resolution of such conflicts often depends on the next step in the government formation sequence. The Cabinet Manual specifies the rules in the UK as follows: if the incumbent does not form the new government, ‘the Sovereign will invite the person who appears most likely to be able to command the confidence of the House to serve as Prime Minister and to form a government’ (Cabinet Manual 2011, § 2.8). This is the *gravitational principle*, according to which the person mostly likely to succeed at the task is entrusted with forming the government. It was in fact applied in 2010, after Gordon Brown resigned and the Queen invited David Cameron to form a Conservative-led coalition government. The principle emerged as a recognition rule in the UK during the middle of the 19<sup>th</sup> century, when the two-party system in place at the time was declining.<sup>12</sup> It was revived in the first draft of the Cabinet Manual ahead of the 2010 election, when the polls were predicting a hung parliament. But because this rule potentially allows the sovereign significant discretion in choosing the *formateur*, which is at odds with the impartiality required of the Monarch today, it is supplemented by the following convention: ‘If there is doubt, it is the responsibility of those involved in the political process, and in particular the parties represented in parliament, to seek to determine and communicate clearly to the sovereign who is best placed to be able to command the confidence of the House of Commons’ (Cabinet Manual 2011, § 2.9). In other European democracies, the *gravitational principle* is usually viewed as the principle of last resort because it does not provide unambiguous guidance. Indeed, applied to our illustrative scenario, in which either a Conservative-led or a Labour-led government is viable, and neither side concedes defeat, the gravitational principle would, by definition, fail to offer sufficiently clear guidance.

### **4. *The plurality principle***

Most European democracies which regularly work with coalitions prioritise the *plurality principle*. It dictates that the largest parliamentary party should be the first to designate a *formateur*. Only if the first formation attempt fails should the nomination pass on to the second largest party, then to the third, and so forth. By focusing on the seat distribution in parliament as the determinant of the order in which actors are invited to form a government, this principle follows a clear democratic logic. In Europe, it is for instance applied in Finland, Belgium, the Netherlands, Sweden, Greece and Bulgaria. Note, however, that it can potentially be contradicted by the *plebiscitary principle* (as in our example), which follows an equally clear electoral and democratic logic. This was in fact the case in the UK in October 1951, when the Conservatives, who commanded seven seats more than Labour, went on to form the government, although Labour had polled almost a quarter of a million votes more than the combined vote of the Conservatives and their Liberal National allies. This precedent would suggest that the *plurality principle* would dominate the *plebiscitary principle* in our scenario, so that the Conservative Party would have exercised the first right to form the government. In practice, though, which of these equally democratically anchored principles takes precedence often depends on the political viability of the alternative governments.

### **5. *The culpability principle***

In the 19<sup>th</sup> century, when UK governments were frequently ousted by no-confidence votes, a fifth principle, the *culpability principle*, was often applied. It envisages that the opposition party most responsible for toppling the government should form the next administration. This principle was last used in January 1924, when the Conservative government under Baldwin was defeated through a no-confidence amendment to the King’s speech. As a result, the leader of the Labour party, which had initiated the amendment, was asked to form the government, even though Labour had won only a third of the vote. Asquith, the Leader of the Liberal Party, which held the balance of power in parliament at the time, declared, ‘if the Labour party is willing, as I understand it is, to assume the burden of office in such conditions, it is the[sir] absolute undoubted right to claim it’.<sup>13</sup> This episode is also an illustration of the *plurality principle* discussed above. Baldwin as leader of the largest party had tried to command the

confidence of the new parliament but failed. It then fell to the leader of the second largest party, the Labour party, to try to form a government.

The *culpability principle* has not been invoked recently because governments have used their power to dissolve parliament upon losing its confidence. However, under the Fixed-term Parliaments Act 2011, the principle may regain relevance. The Act removes the Prime Minister's discretion to dissolve parliament and instead creates a constitutional expectation that opportunities to form a new government will be explored for a period of two weeks following a successful no-confidence vote.<sup>14</sup> The 2015 election was a regular election, triggered by the expiry of the parliamentary term, rather than early government failure, precipitated by the opposition. The *culpability principle* could therefore not have been applied in the government formation process.

### **6. The plebiscitary principle**

As noted above, the *plebiscitary principle* dictates that the winner of the largest vote share gets the first chance to form the government. It is often applied in European democracies when the strongest parliamentary party seems disqualified from forming a government because its vote share has stagnated or even decreased since the preceding election, as is the case in the scenario described above. Under these circumstances, the *plebiscitary principle* may trump the *plurality principle*. This is what happened after Belgium's 1954 elections, when the Christian Social Party government lost its majority. This was seen as justifying the formation of a coalition of left parties, despite the fact that the Christian Social Party remained the strongest party in parliament. A similar situation emerged in Iceland in 1956, and led to the dissolution of a coalition between the two strongest parties, when the Conservative Independence Party lost two seats while its coalition partner, the Progress Party, gained one. The Progress Party appealed to the *plebiscitary principle* and formed a left coalition; the election had been fought over the question of the withdrawal of US troops, and even the relatively small shift in vote share was interpreted as a clear indication of the will of the people.<sup>15</sup> In our example, as we have seen, the *plebiscitary principle* contradicts the *continuation rule* and the *plurality principle*. In particular, it would have given Labour a basis to claim that a Labour-led government was a government of 'election winners', with a broader mandate than a Conservative government.

Table 2 summarizes the results that would have obtained if these different rules had been applied to the situation outlined in Table 1, and illustrates the contradictory nature of the precedents and conventions, which have in the past been applied in the UK.

**Table 2: Recognition principles and *formateur* selection in the hung parliament described above**

Principle	Summary	Outcome
Majority principle	The party that commands a Commons majority names the <i>formateur</i>	Not applicable
Continuation rule	The incumbent Prime Minister makes the first attempt to form the government	Conservative <i>formateur</i>
Gravitational principle	The party that is most likely to be able to form a government names the <i>formateur</i>	Indeterminate
Plurality principle	The party that commands the largest seat share in the Commons names the <i>formateur</i>	Conservative <i>formateur</i>
Culpability principle	The party that bears responsibility for bringing down the previous government names the <i>formateur</i>	Not applicable
Plebiscitary principle	The party that commands the largest vote share names the <i>formateur</i>	Labour <i>formateur</i>

## Implications

Recognition rules matter because government formation often involves choices of far-reaching importance. During the late 1800s and early 1900s, for instance, government formation in the UK engaged the question of national unity and Irish independence – a major and deeply divisive cleavage in UK politics at the time. In May 2015, the questions of Scottish independence, English votes for English laws and the UK's future in Europe, were similarly salient. Because recognition rules may influence which government is formed and how such questions are resolved, these procedures should (i) be seen as democratically legitimate and (ii) protect the Monarch from controversy. These two central normative concerns have implications for the process as it currently operates in the UK, because, as we have seen above, the conventions and principles which have been applied in the past vary in their democratic rationale and potentially contradict each other.

When coalition formation negotiations have the potential to result in more than one viable government, this can render the sovereign's role in appointing the *formateur* fraught in two respects. First, any nomination in such contexts involves political judgement, which can leave the recommendation of the Queen's advisers, and by implication the Queen's decision, open to political controversy. This risk is particularly pronounced when the *formateur* appointment is based on a recognition rule such as the *continuation rule* that conflicts with alternative recognition rules (i.e., the *plurality* or the *plebiscitary principle*), which have a superior democratic justification. Second, the choice between alternative *formateurs* may be contested among the Monarch's advisers, especially when the political and economic context is particularly challenging – as was the case in the early 1930s. In such contexts, contradictory recognition rules can put tremendous pressure on the Monarch to exercise personal judgment in *formateur* selection, compromising the sovereign's political impartiality. For a monarch, the repercussions of any exercise of personal judgement can be serious. As noted above, such charges entangled Queen Beatrix of the Netherlands in political controversy and contributed to the decision of the Dutch parliament in 2012 to end the Queen's involvement in the government formation process. In sum, complex government formation processes, in combination with ambiguous recognition rules, can put a monarch in a potentially difficult and democratically problematic position. This, we argue, is a harm to be avoided. The next section outlines a government formation process that would effectively address these problems.

## An alternative to ex-ante recognition rules

Is there an alternative to the use of potentially contradictory *ex ante* recognition rules? Any discussion of the options might focus on three questions:

- First, which actor and mechanism might be most appropriate for recommending a *formateur*?
- Second, what role for the Monarch might best protect the Queen and her political impartiality?
- Third, what procedure of *formateur* selection is most practical, effective and democratically defensible?

The key to the first question of identifying the actor and mechanism best suited to choose the *formateur* lies in the first test that every UK government must pass in order to govern, namely the vote on the Queen's speech which outlines the government programme. This test ensures that no government can take power unless it can command the support of the democratically elected House of Commons. It establishes a positive expression of support in parliament as the mechanism by which governments are made (or blocked). Consequently, a vote by the same body – parliament – not advice by the incumbent government or any other adviser to the Queen, is the best mechanism to nominate a viable *formateur*. The House of Commons Political and Constitutional Reform Committee recently recommended a reform which would make precisely this change: the introduction of a legal requirement for a parliamentary vote to formally nominate the incoming Prime Minister (in the form of a recommendation to the Queen).<sup>16</sup> In

comparative context, parliamentary selection of the *formateur* is common. Within the UK, it is current practice in the Welsh Assembly and the Scottish Parliament.<sup>17</sup> Internationally, the Irish, Japanese, Swedish and Dutch (since 2012) parliaments, amongst others, choose *formateurs* themselves.

This reform proposal also offers an answer to the second question outlined above – how best to protect the Monarch and her political impartiality. One of the proposal’s merits is that it would safeguard the neutrality of the Monarch by making the *appointment of the formateur* a formal act that is separated from the *political choice of the formateur*, which would be placed in the hands of parliament. There are precedents for the successful operation of this procedure – both the Scottish Parliament and the Welsh Assembly currently use it. Japan and Ireland, likewise, separate the formal *formateur* appointment (by the Emperor and President respectively), from the political choice of *formateur* nomination, which is made by parliament.

That raises the question of how parliament might choose, and vote on, potential *formateurs*. A direct vote in parliament to select the *formateur* is the simplest and quickest procedure. All parties may nominate a candidate. Parliament votes on all candidates simultaneously (each member may vote for only one candidate). The candidate who wins an absolute majority is recognised as the *formateur*. If no candidate wins an absolute majority either a run-off system or an elimination rule (elimination of the weakest candidate in each round) is applied in subsequent ballots to determine which candidate has the strongest support. This type of system is currently used in the Scottish Parliament and in Japan. In more complex coalition systems a degree of exploration and facilitation is often desired. In such cases, parliament may designate the Speaker or a party leader to explore what coalitions are viable (in the literature, this person is called the *informateur*). On the basis of this person’s report and recommendation, parliament may then choose a *formateur*. Versions of this type of system are used by Sweden and the Netherlands (since 2012). Either approach sidesteps the awkwardness of an *ex ante* choice among recognition principles, which the involvement of an actor outside parliament, such as a monarch or a president, typically requires.

## **Ending a gridlocked government formation process**

A further consideration is whether a mechanism is desired to terminate gridlock in the government formation process. The overwhelming majority of parliamentary constitutions establish such a mechanism either by limiting the number of formation attempts or by imposing a time frame on government formation. In Sweden, for instance, mandatory elections must be held if parliament has rejected four proposals for a Prime Minister designate by the Speaker. The Hungarian constitution stipulates a time frame of 40 days for government formation. The constitutions of Bulgaria, the Czech Republic, Estonia, Germany, Greece, Hungary, Israel, Malta, Poland, Romania, Slovakia, Slovenia, Spain, and Sweden all permit early elections as a mechanism to end gridlocked government formation processes. The UK’s constitutional rules currently lack consistency in this regard, with a time limit on government formation negotiations in some contexts but not in others. The Fixed-term Parliaments Act 2011 imposes a limit of 14 days on government formation attempts that follow a mid-term vote of no confidence. If no government is formed within that time period, mandatory elections are called. No such time limit currently applies to government formation attempts following other types of mid-term failures or general elections. In New Zealand, with no legal time constraint on the formation of a new government, it took two months to negotiate the Liberal-New Zealand First coalition after the 1996 election. It might be preferable to impose a time limit, such as the 28 days which applies in Scotland (after which fresh elections must be held, if no government has been formed). For consistency the same time limit should apply to the formation of a new government mid-term. In the interim government is carried on subject to the caretaker convention.<sup>18</sup>

## **Models: the procedure in other European countries, and in Scotland, for appointing the Prime Minister**

The bulk of this paper has described different ways of determining how to appoint a Prime Minister in a hung parliament, and suggested a formal vote in parliament as the most democratic solution, which would also protect the political impartiality of the Monarch. This final section considers the feasibility of introducing such a procedure at Westminster, building on the process in other European countries and in Scotland for appointing the First Minister. The main difficulty is over the timetable, given the Westminster tradition for very quick government formation after an election.

Although most European countries hold a vote in parliament to choose the Prime Minister, there are many variations in the process. Prior negotiations between the parties may lead to only one candidate being put forward for election by the parliament; or the vote in parliament may be contested with multiple candidates. Under the German Basic Law a candidate is proposed by the President, and the Bundestag then votes in a secret ballot without any prior debate. Similarly in Sweden the Speaker proposes a single candidate. By contrast in Ireland and Japan multiple candidates may be proposed, and the parliamentary vote is not simply a confirmation of a single candidate.

### **Box 4: Nomination of the Taoiseach in Ireland**

To start the process of selecting the Irish Taoiseach (Prime Minister), the Ceann Comhairle (Speaker) calls on a member of the party with the largest number of seats to nominate their party leader. Once that member has been nominated, it is possible, and quite likely, that other members (usually party leaders) will be nominated. Where there is more than one candidate, there then follows a debate on the merits of the various candidates. Following the debate the Ceann Comhairle puts the question on the nominations, in the order in which they were made. By electing a candidate, parliament nominates that person for formal appointment by the President.

A parliamentary vote is an open and transparent way of choosing a Prime Minister, which may also help voters to understand that formation of a government in a parliamentary system is a two stage process: first we elect a parliament, and then the parliament decides who will form the government. It is more open still if several candidates can be proposed, even if prior negotiations have determined that only one is likely to win. Scotland provides a good example of such a system, and the remainder of this paper considers the feasibility of transferring Scottish procedures to Westminster.

### **Box 5: Nomination of the First Minister in Scotland**

The process for appointing the First Minister is prescribed in the Scotland Act 1998, with details of the voting procedure laid out in the standing orders of the Scottish Parliament. Section 46 of the Scotland Act provides that after a general election, or following the resignation of the First Minister, the parliament must nominate one of its members as First Minister within 28 days. The Presiding Officer must then recommend that person for appointment by the Queen. The Standing Orders provide for election of the First Minister after members have been sworn in, on a date decided by the Parliamentary Bureau. Candidates must be nominated in writing to the Clerk, with nominations seconded by one other member.

Discussions at Westminster have identified three possible ways of holding a vote to select the Prime Minister:

- Tabling a motion (potentially amendable) that X be the next Prime Minister.
- Holding an election by secret ballot, as is now done for election of the Speaker and committee chairs.

- Holding an open election in the chamber, on candidates nominated in advance by a prescribed procedure.

Of these the third seems the most promising. Open election in the chamber is going to be more transparent than a secret ballot; but to avoid the risk of open ended motions which can be amended ('agree that X be PM so long as his government modifies its policy of austerity, or abandons Trident') there needs to be a prescribed procedure for nominations, which limits debate and voting to names, not bargaining over policies. As in Ireland and Scotland, those nominated could make short speeches, before moving straight to a vote on the rival candidates.

There are also three possible ways in which any new procedure might be implemented: by statute; by standing orders; or by resolution of the House of Commons. Statute seems too inflexible for a novel procedure which may require amendment. Resolution of the House seems likely to be too vague and general. Putting the new procedure into standing orders offers the best way forward, and the standing orders of the Scottish Parliament provide a possible model.

The nomination process in Scotland provides the answer to those at Westminster who fear that a nomination vote would involve rival parties tabling motions which could then be liable to amendment. No such motions or amendments are possible: the written nomination simply nominates X as candidate to be First Minister. Under Rule 11.10 of the standing orders, the voting procedure then varies depending on whether several candidates are nominated, or just one. Where there is only one candidate, a simple majority is sufficient to gain the parliament's nomination. Where there are two or more candidates and none gains an absolute majority in the first vote, successive rounds of voting are held, with the candidate receiving the fewest votes in each round being eliminated. This procedure is repeated until only one candidate remains or until a candidate receives more votes than the total number of votes for all other candidates.

#### **Box 6: Scottish Parliament nomination votes in 2007 and 2011**

How this procedure operates in practice can be illustrated by the nomination votes in 2007 and 2011. The 2007 elections in Scotland held on 3 May produced a hung parliament, in which the results were:

• SNP	47
• Labour	46
• Conservatives	17
• Liberal Democrats	16
• Greens	2
• Independent	1

Thirteen days later, on 16 May, the parliament held a series of votes to select the First Minister.<sup>19</sup> Four candidates were nominated, who were the leaders of the four largest parties: Alex Salmond (SNP), Jack McConnell (Labour), Annabel Goldie (Conservative) and Nicol Stephen (Liberal Democrat). MSPs voted in their party blocs, save for the two Greens, who supported the SNP. In the first round Alex Salmond received 49 votes, Jack McConnell 46 votes, Annabel Goldie 16 and Nicol Stephen 16. The Conservative and Liberal Democrat candidates were then eliminated. In the second round Alex Salmond received 49 votes against 46 for McConnell, with 33 abstentions, and the SNP leader won the nomination.

In 2011 matters were simpler because the SNP had won an overall majority in the election on 5 May, with 69 seats against 37 for Labour, 15 Conservative and 5 Liberal Democrat. The nomination vote was again held thirteen days later, on 18 May. Only one candidate was nominated, Alex Salmond, and he won the nomination with 68 votes, while 57 MSPs from the other parties abstained.

## Transferring the Scottish procedure to Westminster

How might this process translate to Westminster? The voting rules could be adopted without significant change, since they are intended to ensure an eventual winner even when the first round voting seems close.<sup>20</sup>

The timetable of government formation would need to be slightly extended, although it could still be swift. The UK has a tradition of very quick government formation. Whether the incumbent government wins or loses the election, the media and the public expect the new government to be formed within a day or two of the election. The four days in February 1974 (while Heath negotiated unsuccessfully with the Liberals), and the five days in May 2010, were regarded as departures from this norm.

A nomination vote to select the Prime Minister could be held on an accelerated timetable. The date of first meeting of the new parliament is set by proclamation. Until 2010 the normal interval was five days between the election and date of first meeting of parliament. To allow more time for the induction of new MPs, in 2010 and 2015 the gap was extended to 12 days. The first business of a new parliament is electing the Speaker, and swearing in new members (which takes 2-3 days, but with doubling up could be done in a day). If time was of the essence, the fastest track timetable for holding a nomination vote might be as follows:

Thursday 7 May	General election
Monday 11 May	First meeting, election of speaker
Tuesday 12 May	Swearing in of new members
Wednesday 13 May	Nomination vote, and appointment of new Prime Minister.

This accelerated timetable was viewed as feasible by David Natzler, Acting Clerk of the House of Commons, in March 2015.<sup>21</sup> In practice it would probably be followed only where one party had won an overall majority, and it was obvious who was going to be Prime Minister. In a hung parliament there would generally need to be more time for negotiations between the parties about coalition or minority government. If more time was required, the nomination vote could be postponed by simple adjournment.

This kind of time frame for government formation is well within the normal range among Westminster democracies. The Institute for Government's 2009 report on Transitions pointed out that in Westminster democracies such as Australia, Canada and New Zealand it can take a week or more to prepare for and appoint a new government.<sup>22</sup> In Canada in 2015 it took 16 days after the election before Justin Trudeau took office as Prime Minister, even though his party had won an overall majority. His predecessor Stephen Harper similarly took two weeks to form a new government in 2006.

To objectors who ask, why wait even five days when it is obvious who is going to be PM, the answer is that the current recognition rules present major risks when they are applied to hung parliaments. In a political context in which the vote shares of the two largest parties continue to shrink, these risks need to be addressed. As we have shown above, the UK has in the past applied a range of potentially contradictory conventions and principles to determine who should be invited to form a government. These rules provide insufficient guidance when parliament's composition is complex and as a result, they risk sparking political controversy and can place the Monarch in a deeply awkward position. A government formation procedure that will operate reliably in majority parliaments and in hung parliaments is preferable to a procedure that results in very quick government formations only in parliaments with a single party majority, but may deliver no clear result when politicians are confronted with a parliament in which no party controls a majority.

## Realising reform

This reform could be implemented on the basis of a cross-party agreement before an election; with draft standing orders prepared or even adopted. After an election, it is too late to introduce a nomination vote as the first item of business. The challenge now lies with politicians to acknowledge the risks presented by hung parliaments and to reform the government formation procedures before we have another election resulting in a hung parliament, and the risk of a messy and contested process of government formation.

## Summary of recommendations

- In the past, the UK has applied a range of potentially contradictory conventions and principles to determine who should be invited to form a government. These rules can provide insufficient guidance when parliament's composition is complex and can place the Monarch in an awkward position.
- To provide clear guidance to the Monarch, there should be a vote in parliament to determine who should be appointed as Prime Minister (in the form of a recommendation to the Monarch), as is the case in Scotland.
- On a fast track timetable, this nomination vote could be held within a week of the election. If more time is required, the date could be adjourned.
- There ought to be a provision to terminate gridlocked government formation processes after general elections as well as after a mid-term loss of parliamentary confidence in the government. One option could be to impose a time limit of 28 days on the formation of a new government, failing which fresh elections would be held.

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<sup>1</sup> <http://www.independent.co.uk/news/uk/politics/generalelection/general-election-2015-david-cameron-may-attempt-to-form-minority-tory-government-10223166.html>

<sup>2</sup> John Curtice 'How the Electoral System operated' in Andrew Geddes and Jonathan Tonge, *Britain Votes 2015*, Oxford, OUP, 2015, pp 39-40.

<sup>3</sup> Peter Riddell, cited in Nicholas Watt, "Not out of it, but above it": how the Queen will engineer a royal retreat to keep out of a hung parliament, *The Guardian*, 6 March 2015.

<sup>4</sup> For details see the Armstrong Memorandum, 'Events leading up to the resignation of Mr Heath's administration on 4 March 1974', National Archives PREM 16/231.

<sup>5</sup> Harold Wilson, *Final Term: The Labour Government 1974-1976*, London, Weidenfeld and Nicolson, 1979, p. 11.

<sup>6</sup> Daniel Diermeier and Peter van Roozendaal, 'The Duration of Government Formation Processes in Western Multi-Party Democracies', *British Journal of Political Science*, 28(4), 1998, p. 621; Arthur Lupia and Kaare Strøm, 'Bargaining, Transaction Costs and Coalition Governance', in Kaare Strøm, Wolfgang C. Müller and Torbjörn Bergman, eds., *Cabinets and Coalition Bargaining: The Democratic Life Cycle in Western Europe*, Oxford, OUP, 2008, p. 65.

<sup>7</sup> Lupia and Strøm, 2008, p. 65.

<sup>8</sup> Robert Blackburn, *King and Country*, Politico's 2006, at p 85.

<sup>9</sup> Hazell discusses precisely this question in <http://www.theguardian.com/politics/2015/apr/22/a-hung-parliament-dont-panic-democracy-will-take-its-course>.

<sup>10</sup> Klaus von Beyme, *Die parlamentarischen Regierungssysteme in Europa*, München, Piper, 1970. Published in English as *Parliamentary democracy*, Basingstoke, Macmillan, 2000, pp. 492-521. Diermeier and van Roozendaal, 1998, pp. 609-626.

<sup>11</sup> Vernon Bogdanor, *No overall majority: forming a government in a multi-party parliament*, London, Constitutional Reform Centre, 1986, p. 16.

<sup>12</sup> von Beyme, 1970, p. 516.

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<sup>13</sup> Cited in *Ibid.*, p. 504.

<sup>14</sup> Petra Schleiter and Sukriti Issar, ‘Fixed-term Parliaments and the Challenges for Governments and the Civil Service: A Comparative Perspective’ *The Political Quarterly*, 85(2), 2014, pp. 178-186; Petra Schleiter and Valerie Belu, ‘The Decline of Majoritarianism in the UK as a Cause and Consequence of the Fixed-term Parliaments Act’, *Parliamentary Affairs*, forthcoming.

<sup>15</sup> Foregoing examples are from von Beyme, 1970, p. 514.

<sup>16</sup> House of Commons Political and Constitutional Reform Committee, 2015, *Government Formation Post-Election*, HC 1023.

<sup>17</sup> Under section 46 of the Scotland Act 1998, and section 47 of the Government of Wales Act 2006.

<sup>18</sup> See paras 2.27 to 2.31 of the Cabinet Manual 2011.

<sup>19</sup> See the Scottish Parliament Official Report for 16 May 2007, at

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=4723&mode=html>

<sup>20</sup> An alternative option would be the Alternative Vote, used in elections for the Speaker and Select Committee chairs, enabling MPs to express second preferences in the first round; but it would be a less open and transparent procedure than the knock out system described above, in which it is clear how the minor parties have cast their votes. Any candidate could be nominated subject to a threshold requirement.

<sup>21</sup> David Natzler, submission to the Political and Constitutional Reform Committee, *Government Formation post-Election*, Appendix 1 to HC 1023, March 2015, and paras 63 to 66 of the report.

<sup>22</sup> Peter Riddell and Catherine Haddon, *Transitions: Preparing for Changes of Government*, London: Institute for Government, 2009.

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