Legal Studies, Vol. 36 No. 1, 2016, pp. 75–92
DOI: 10.1111/lest.12090

Amending the constitution

Ian Cram
School of Law, University of Leeds

How easy ought it to be to enact constitutional amendment? In the absence of constitutionally prescribed procedures, fundamental reforms in the UK can often appear hurried, under-consultative and controlled by transient political majorities. In the recent referendum on Scottish independence, the NO *campaign's promise of additional powers to Holyrood in the face of a possible 'Yes' vote appears to fit this pattern (even if, for reasons of political sensitivity, it was not driven directly by members of the Coalition government). A recent sample of concluded constitutional reforms, including the Constitutional Reform Act 2005, the Constitutional Reform and Governance Act 2010 and the Fixed-term Parliaments Act 2011, have drawn criticism from within Westminster on the grounds of defective process. Specific options to improve pre-parliamentary and parliamentary stages of constitutional reform have been proposed with a view to attaining principled procedures of constitutional reform removed from executive control that signal attachment to process values such as wide and effective consultation, deliberation outside and inside Parliament, and informed scrutiny. The foregoing prescriptions for remedying defective processes may, however, be said in the ultimate analysis to retain a normative preference for a more formal, elite-managed vision of constitutional change that is premised upon a limited conception of the citizens' 'informed consent'. In any case, in purely descriptive terms, top-down managed change does not capture the totality of patterns of past constitutional reform in the UK. In the nineteenth and early twentieth centuries, for example, radical grassroots campaigns for the extension of the franchise resulted ultimately in universal adult suffrage. More recently, the Scotland Act 1998 can be seen as the culmination of a civic society–led, deliberative engagement with ordinary voters over decades that offered an alternative vision of 'bottom-up' constitutional reform to that seen in more formal, elite-led processes of constitutional reform. The inclusive and participatory nature of the campaign for Scottish devolution marked out a radically different model of constitutional reform to that which has typified Westminster-style amendment and which is still largely directed by political elites. In such circumstances as prevail currently at Westminster, it is difficult to give much credence to claims that the outcomes of constitutional reform processes enjoy the 'informed consent' of the people.*

Ian Cram, School of Law, University of Leeds, Moorland Road, Leeds LS2 9JT, UK. Email: i.g.cram@leeds.ac.uk

INTRODUCTION

How changeable ought constitutions to be? This is a strange question, perhaps, for a UK constitutional lawyer to pose given, at the outset, a degree of fuzziness around the definition of what qualifies as constitutional change and, secondly, the relative ease with which political majorities in this jurisdiction can swiftly effect far-reaching constitutional revision. A bill amending the constitution is no different in form from another, non-constitutional piece of primary legislation. Nonetheless, most would

accept that there are qualitative differences between say the Fixed-term Parliaments Act 2011 and the Scrap Metal Dealers Act 2013 or the Dangerous Dogs Act 1991. For the purposes of this paper, it is proposed to treat as 'constitutional' all those proposals to amend the laws and conventions governing: (i) the composition and powers of the basic institutions of the state; (ii) the relationship between those institutions; and (iii) the relationship between the citizen and the aforementioned institutions.

The ease with which constitutional amendment can occur in any given constitution is often described as lying at a point somewhere on a spectrum at whose polarities lie 'rigid' and 'flexible' constitutions. The more 'rigid' a constitution is said to be, the harder it will be to amend the constitutional text.[1] For example, a constitution that constrains the actions of legislatures or state officials via procedurally entrenched foundational norms or basic constitutional commitments will be deemed 'rigid'. This might be considered attractive from the perspective of establishing a set of underpinning commitments or values such as core democratic norms (eg the regular holding of free and fair elections, the protection of individual rights to vote, expression, association etc.), but how desirable is it for the commitment strategy of an earlier set of framers and their electorate to bind via special majority procedures the hands of the current generation? And what of the yet more rigid position of putting certain constitutional provisions beyond amendment altogether, as occurs in Germany, where neither the federal system of government nor the basic principles of Art 1 (human dignity) or Art 20 (state order) may be amended?[2] Can an absolute bar on amendment at any time in the future ever be justified? In the US Constitution, Art V expressly rules out the possibility that the equal suffrage of each state in the US Senate will ever be revised,[3] but does not prohibit constitutional revision in respect of its core democratic, rule of law–enforcing features. Instead, proponents of change must meet special majority requirements (two thirds in both the House and Senate and ratification by three quarters [38] of the state legislatures). In this way, the Constitution can be seen to uphold procedural values such as deliberation and wide geographical consultation prior to any constitutional amendment.[4]

1. Of course, the actual degree to which special majority requirements make constitutional amendment difficult depends in part on the alignment and voting strengths of the various parties on either side of the debate. Thus a 'rigid' constitution requiring three-quarters majorities in the legislature to authorise constitutional revision may prove in practice relatively easily amendable where one party enjoys 80% of the parliamentary seats. Equally, a 'flexible' constitution that is alterable via simple majority voting in the legislature may in fact be difficult to amend where party representation in the legislature is split 35:30:25:10 across four main parties.

2. For an early example of an attempt to entrench a constitution against *all* future revision, see John Locke's draft *Fundamental Constitutions for the Carolinas* (1699), available at http://avalon.law.yale.edu/17th_century/nc05.asp (accessed 22 July 2015). Clause 120 states 'These fundamental constitutions, in number a hundred and twenty, and every part thereof, shall be and remain the sacred and unalterable form and rule of government of Carolina forever.' The draft was never ratified.

3. Art II s 3 cl 1.

4. For a recent analysis of constitutional change in 18 countries across Europe, Canada and the United States, see X Contiades (ed) *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Abingdon: Routledge, 2013). See also D Oliver and C Fusaro (eds) *How Constitutions Change*: *A Comparative Study* (Oxford: Hart Publishing, 2013)

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

In the UK, the lack of formal procedures requiring special majorities points up the ease of constitutional amendment.[5] More than this, however, it is the absence of any set procedures requiring advance publication and inclusive consultation among affected parties that typifies constitutional reform processes in the UK. The obvious advantage in such a system is that it allows a democratically elected majority in the legislature to act swiftly to address unanticipated external threats, as well as to update/amend laws to reflect changed social/moral attitudes.[6] Ordinary parliamentary majorities can also act swiftly to overturn judicial rulings, a feature that considerably lowers the stakes when a UK court is asked to rule on a constitutional matter. In their discussion of constitutional revision in post–Soviet bloc East European states, Holmes and Sunstein have claimed that there is a further reason for preferring undemanding revision procedures in newly established polities. Given the political turbulence surrounding the emergence of new constitutional orders and the significant realignments of parties and personnel that have tended to occur in a number of these new states, to attempt to create definitive or virtually unalterable institutions via stringent amendment procedures may hinder efforts to deal with unexpected crises that no amount of foresight on the part of the framers would have anticipated.[7]

The downsides of procedurally undemanding requirements include the concern that constitutional revision can occur in a hurried and partisan fashion, without adequate consultation among all affected/interested individuals and groups. Here, change can be forced through in an unprincipled fashion using the governing party's/parties' parliamentary majority. Consider also the circumstances surrounding the eve of independence poll announcement by former Prime Minister Gordon Brown of a tight timetable for greater devolved powers to Holyrood in the event of a 'No' vote. At the time of the announcement, the three main Westminster parties had not agreed on the content of the new powers.[8] Many believed that the timing of this announcement and the speedy process it envisaged was prompted by the apparent polling strength of the 'Yes' campaign. It is certainly difficult to see on a matter of such constitutional magnitude how this schedule would allow for informed consultation with all interested parties (including the citizens of Northern Ireland, Wales and England) or how effective pre-legislative scrutiny might occur.

The absence of procedural requirements raises a yet more fundamental void – namely the lack of constitutional values inherent in the amendment process, which allows the executive to treat the accompanying processes of fundamental change at best as an

5. See, however, the draft Scotland Bill 2015, s 4 inserting s 30A into the Scotland Act 1998, which would prevent a future Scottish Parliament from altering the rules governing its own composition unless an amending bill was able to command the support of two thirds of MSPs.

6. The then Deputy Prime Minister, the Rt. Hon. Nick Clegg MP, referred to this as 'a suppleness, a fluidity and a pragmatism … which many constitutional experts around the world would recognise as a strength', as quoted in evidence to the House of Lords Constitution Select Committee *The Process of Constitutional Change* Fifteenth Report of Session 2010–12, HL 177, July 2012 at para 20.

7. S Holmes and C Sunstein 'The politics of constitutional revision in Eastern Europe' in S Levinson (ed) *Responding to Imperfection – The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995) pp 283–284.

8. Mr Brown, at that time a backbench MP in the last Parliament, indicated that that cross-party talks would start the day after the poll and that the Coalition government would publish a command paper in October, a White Paper in November and a set of draft laws in January 2015. The draft Scotland Bill 2015 was subsequently published on 22 January 2015.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

afterthought or, at worst, an inconvenience. The above concern rests upon the premise that constitutional change is qualitatively different from ordinary, non-constitutional change. Amending a constitution amounts, uniquely, to an alteration of the basic framework of societal rules that underpin all political, legal and economic relations. The process of amendment is usually intended to establish rules or norms of an enduring nature. Once a constitution is amended, the pattern of interactions in ordinary politics changes too. To be considered democratically legitimate then, it is crucial that the outcome of the reform process enjoys the 'informed consent' of voters, whereby the latter are given the chance to indicate agreement with or opposition to any proposed change. Sometimes this can be achieved via a referendum in which citizens directly participate in the re-making of their constitution and where the majority preference is automatically enacted.[9] Conversely, some instances of wider consultation and participation over proposed constitutional change remain overall within a process shaped and controlled by political elites (national politicians, expert opinion and mainstream news organisations). In the latter case, the outcomes of consultative and deliberative processes may be used by elected politicians to initiate and guide the direction of reform according to a time schedule that suits elite interests. The notion of 'informed consent' to elite-managed reform processes in these circumstances may merely serve as a legitimating device, lacking in any substantive meaning.

Some commentators have argued that continued reliance upon elite-managed constitutional reform processes has contributed to a longer-term decline in voters' trust of governments.[10] Attempts to regain trust focus in part, therefore, upon achieving more meaningful and inclusive forms of engagement by ordinary citizens as active deliberators through institutional innovation. In Canada, for example, in the 'Citizens' Assemblies on Electoral Reform' in British Columbia in 2004 and Ontario in 2007, randomly selected voters received briefings from experts on a current topic of constitutional reform and deliberated among themselves before deciding to endorse a particular reform option to be put to the whole electorate in a referendum.[11] In the Netherlands, citizen juries have been deployed to feed into regional land planning decisions.[12] Following the collapse of Icelandic financial institutions in 2008 and growing distrust between government and citizens, a civic initiative without government funding – the National Forum – brought together 950 randomly selected Icelandic citizens and 300 others (representing interest groups and government officials) on a day in November 2010 to define the key values in Icelandic society and set out a vision for the country's constitutional future. The vision statement and

9. See R Levy '"Deliberative voting": reforming constitutional referendum democracy' [2013] PL 555; S Tierney 'Constitutional referendums: a theoretical enquiry' (2009) 72 Mod L Rev 360, who refers to the sense of common constitutional venture and shared identity among citizens that referendums produce.

10. R Levy 'Breaking the constitutional deadlock: lessons from deliberative experiments in constitutional change' (2010) 34 Melbourne U L Rev 805 at 807; P Norris (ed) *Critical Citizens: Global Support for Democratic Government* (New York: Oxford University Press, 1999), noting the paradox in the 1990s of growing democratisation and increasing distrust in governmental institutions.

11. For analysis of Canadian and other examples of deliberative practices, see S Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012).

12. D Huitema, M van de Kerkhof and U Pesch 'The nature of the beast: are citizens' juries deliberative or pluralist?' (2007) 40 Pol'y Sci 287.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

accompanying values then served as guidance for the Constitutional Assembly that was charged with drafting Iceland's reformed constitution, which was later ratified by the people in a referendum.[13]

The choice and design of procedures that are used to structure deliberation among citizens will themselves embody substantive values. In Gutmann and Thompson's *Democracy and Disagreement*, for example, the attempt to resolve political disagreements among the people requires a commitment to substantive values such as reciprocity in public reasoning, by which the participants undertake to present claims in terms that are accessible and persuasive to others who reasonably disagree.[14] On this view, reciprocal deliberation will eschew the making of narrow, self-interested claims and instead seek fair terms for agreement and cooperation among citizens with diverse backgrounds even if, ultimately, not all the differences among the participants are satisfactorily resolved. Reciprocity for Gutmann and Thompson also requires the inclusion of affected citizens. Where deliberative forums are under-inclusive, deliberative practice will be less legitimate. The authors draw upon the example of the Oregon Health Services Commission's procedures for determining priorities for its publicly funded Medicaid programme in the early 1990s.[15] Oregon's consultation exercise engaged a broad range of citizens who had hitherto been excluded from participating in priority setting and ultimately produced a less unfair healthcare policy when the Commission revised its priorities list. Subsequently, legislators found extra resources to extend the range of funded treatments. Nonetheless, the process still failed to include some of Oregon's very poorest (and hence most affected) citizens, leading Gutmann and Thompson to conclude that Oregon's consultation fell short, as in general do all such exercises, of the deliberative ideal.[16] In defending their position more broadly from charges of utopianism, Gutmann and Thompson deny that deliberative democrats require public deliberation of *every* single law and policy:

> There are good reasons of economy and competence that argue against universal deliberation Taking such reasons into account, citizens and officials may abridge or omit deliberation in making some decisions. Deliberative democracy requires only that the decision not to deliberate be made publicly and by agents who are accountable. Citizens or their accountable representatives decide deliberatively the circumstances and nature of the policies that are not to be deliberatively decided.[17]

For reasons outlined previously, the case for more exacting standards of reciprocal, inclusive participation in public deliberation is much stronger in respect of gaining the informed consent of citizens to constitutional change.

Domestically, the recent use of referendums on Scottish independence, proportional representation and regional assemblies in English counties could be cited as providing

13. For discussion, see H Fillmore Patrick *The Iceland Experiment (2009–13): A Participatory Approach to Constitutional Reform* (Sarajevo: Democratization Policy Council, 2013); and openDemocracy at https://www.opendemocracy.net/can-europe-make-it/spotlight-on-icelandic-experiment (accessed 22 July 2015). Whether the deliberative exercise in Iceland can be easily replicated in countries with much larger populations is perhaps open to doubt.

14. A Gutmann and D Thompson *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996); and for a range of critical commentaries, see S Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (New York: Oxford University Press, 1999).

15. Gutmann and Thompson, above n 14, pp 143 et seq.

16. A Gutmann and D Thompson 'Democratic disagreement' in Macedo, above n 14, p 245.

17. Ibid, pp 245–246.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

recent evidence of a trend towards more inclusive public consultation in constitutional reform. This feature is returned to below. Those seeking a loosening of elites' management of constitutional reform procedures might look favourably on formal amendment procedures of the sort enshrined in written constitutions that insist upon slower-paced, more deliberative processes that command wide geographical acceptance across the different parts of the polity. In this regard, in the run-up to the September 2014 vote on Scottish independence, the Scottish government proposed, in the event of a 'Yes' vote in the independence referendum, a constitutional convention of the Scottish people to consider whether to entrench a written constitution by means of a special amendment procedure.[18]

Making reference to examples of constitutional reform proposals spanning both the 2005–2010 Labour administration and the 2010–2015 Coalition government, the discussion below reveals how the different political dynamics that have existed at times of (i) single-party and (ii) coalition government have nonetheless yielded a common complaint – inconsistent and unclear processes through which constitutional change is proposed by the executive.[19] The party political machinations that determine which procedures are employed at any time are almost always deficient in what Madison required of amendment procedures, albeit in a different constitutional setting, in *The Federalist No 43* – namely considered, deliberative scrutiny. As will be shown below, however, the case studies of 'defective process' analysed below have generated a set of reform proposals that may be located within an overall preference for elite-managed, expert-driven, technocratic change. For example, while it is true that some suggested reforms appear to open up some space for non-elite initiation of constitutional reform proposals (especially at the pre-parliamentary stage), there is a tacit assumption that governments will continue to take the lead in framing the possible reform options and setting out the nature and timing of any consultation exercise. Being partly or wholly Westminster-centric, it is moreover difficult to see how consultation can reach out beyond the usual individuals and groups who have in the past participated in constitutional reform debates. Likewise, at the parliamentary stage, discussion of whether Committees of the whole House or public bill committees would be better placed to scrutinise proposals appears to accord primacy to the respective capacities of each committee to conduct expert detailed scrutiny.

In contrast to this more formal, top-down view of constitutional change, it is possible to posit a more radical model of constitutional change, one that draws upon the direct engagement of ordinary citizens in deliberative and inclusive political debate to secure informed consent. The decades-long, communities-based campaign for a Scottish Parliament provides a good example of such a bottom-up model of constitutional reform. In empirical terms, formal, top-down reform change does not capture in any case the entire spectrum of successful constitutional reform in the UK.[20] Grassroots campaigns for fundamental constitutional change have occurred at key periods of UK history. The extension of the franchise, for example, was eventually secured by the active struggle of workers' associations and women's groups in the nineteenth and twentieth centuries.[21]

18. *The Scottish Independence Bill*: *A Consultation on an Interim Constitution for Scotland* (Edinburgh: The Scottish Government, 2014) p 65.
19. See thus Blackburn's comment in 2010 that 'process has been a constant problem in constitutional change', in evidence given to the HL Select Committee on the Constitution *The Government's Constitutional Reform Programme* Fifth Report of Session 2010–11, HL 43.
20. K Ewing 'The politics of the British constitution' [2000] PL 405.
21. A Lyon *Constitutional History of the UK* (London: Cavendish, 2003) chs 20, 24.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

FLAWED CONSTITUTIONAL REFORM PROCESSES: THE VIEW FROM ABOVE

A good sense of the formal, top-down model's understanding of the deficiencies of constitutional reform processes in the UK may best be attained through an analysis of discrete proposals for constitutional reform (not all of which successfully found their way on to the statute book). As will be shown, on this view process-centred deficiencies may be detected at both the pre-legislative and legislative stages of constitutional reform in respect of the Constitutional Reform Act 2005, the Constitutional Reform and Governance Act 2010, the Parliamentary Voting and Constituencies Act 2011, the Fixed-term Parliaments Act 2011 and the Succession to the Crown Act 2013.

The Constitutional Reform Act 2005 created a new judicial institution – the Supreme Court – whose members would no longer sit as members of the House of Lords to hear appeals from lower courts.[22] In its initial form, the Act also proposed to replace the office of Lord Chancellor by a new Cabinet post – the Secretary of State for Justice.[23] A new body – the Judicial Appointments Commission – was also proposed to recommend candidates for judicial appointments. Within government circles, the opposition of Lord Irvine, the Lord Chancellor, was made manifest in a briefing to a House of Commons Select Committee that there were no plans for a new Supreme Court building. In fact, just 10 weeks later, on 12 June 2003, 10 Downing Street announced the details of the reform package. As Le Sueur notes, the proposals were not discussed in Cabinet subcommittee or subsequently by full Cabinet.[24] Furthermore, Lord Irvine's opposition made prior public consultation extremely awkward for the government. The senior judiciary, who were the most directly affected individuals, received a few hours', or in some cases minutes', advance notice of Downing Street's announcement. Lord Woolf CJ later remarked that the proposals 'came as an immense shock'.[25] The consultation process that did follow the June 12 announcement sought responses on issues such as the composition and jurisdiction of a new court. Whether there should be a new court

22. It is fair to acknowledge background tensions between certain government ministers including, on one side, the Prime Minister Tony Blair and the Home Secretary David Blunkett MP and, on the other, the judiciary over judicial rulings in immigration and asylum matters as well as an attempt by the government to oust the jurisdiction of the courts altogether in certain asylum decisions: see, for discussion, A Le Sueur 'From Appellate Committee to Supreme Court: a narrative' in L Blom-Cooper, B Dickson and G Drewry (eds) *The Judicial House of Lords 1876–2009* (Oxford: Oxford University Press, 2010) pp 70–71. Much of the discussion that follows below on the 2005 Act is indebted to Le Sueur's account.

23. The 2005 reforms also created a new Judicial Appointments Commission.

24. Ranking, as Le Sueur (above n 22) puts it, as one of the low points of collective Cabinet government. Ibid, p 68. There was no discussion with the Scottish government either. One of two Scottish Law Lords – Lord Hope of Craighead – gave an interview to the BBC in Scotland in June 2003 in which he spoke of the importance of upholding the integrity of the Scottish legal system and said that the proposals had left many 'unanswered questions'. Cited in Le Sueur, above n 22, p 69.

25. 'A new constitutional consensus' talk delivered at the University of Hertfordshire on 10 February 2005 and cited in Le Sueur, above n 22. Oliver, rather understating the ructions caused by the government's failure to consult in advance, merely notes in passing that the changes were 'controversial among the judges and other lawyers at the time'. D Oliver 'Politics, law and constitutional moments in the UK' in D Feldman (ed) *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2013) p 247.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

was simply not up for discussion, although six of the ten Law Lords did in fact indicate their opposition to the government's proposal for a Supreme Court.

Constitutional reform, successful or otherwise, under the previous Coalition government was similarly characterised by a tendency to rush out under-scrutinised bills. At the outset, however, it is right to note that the dynamic of constitutional change is different. Where the coalition partners were agreed on the necessity for constitutional revision, swift/hurried amendment would still follow, a good example of which is provided by the Fixed-term Parliaments Act 2011. The Act fixed the date of the following general election for 7 May 2015 unless one of two triggers for an earlier election were satisfied – namely if a two-thirds majority of the total number of MPs in the House of Commons passed a motion for an early general election or, where a vote of no confidence was passed by the Commons, an alternative government that commands majority Commons support was not formed within 14 days. Whatever one thinks of the purposes behind and the merits of the Act, the processes by which it was enacted (including the use of a three-line whip of MPs and peers) were sharply criticised. While understanding the need for progress on the matter, the Commons Political and Constitutional Reform Committee stated that

> bills of such legal and constitutional sensitivity should be published in draft for full pre-legislative scrutiny, rather than proceeded with in haste … we regret … the rushed timetable that the Government has unnecessarily adopted for the Bill, and the incremental and piecemeal approach to constitutional change that the Bill seems to represent.[26]

The House of Lords Constitution Select Committee took an even more critical line that extended to the merits of the measure, commenting that 'the origins and content of this Bill owe more to short-term considerations than to a mature assessment of enduring constitutional principles'.[27]

The tensions inherent in coalition politics mean, however, that achieving constitutional change can be more fraught than occurs under single-party government. Thus where the political agendas of the coalition partners are in conflict, constitutional reforms will, in the absence of additional parliamentary support, fail to progress. The 2015 general election was fought on old constituency boundaries that departed significantly from the principle of approximate equality of electors after the Liberal Democrats refused to support boundary review proposals put forward by the Conservatives in the Parliamentary Voting and Constituencies Bill that would have ensured greater mathematical parity of voter numbers and reduced the Commons size to 600 MPs.[28] This refusal followed upon the Coalition government's decision to drop plans to enforce a strict timetable for parliamentary consideration that would have ensured timely

26. *Fixed-term Parliaments Bill* Second Report of Session 2010–11, HC 436, September 2010.
27. *Fixed-term Parliaments Bill* Eighth Report of Session 2010–11, HL 69, December 2010.
28. P Wintour 'Lib Dems vote with Labour to reject constituency boundary review' *The Guardian* 29 January 2013. The proposal would have given paramountcy to the criterion of equal-sized constituencies (over and above other factors such as geographical and traditional boundaries). Demographic changes since the 2010 general election mean that the failure to reform constituency boundaries produces, at the lower end, constituencies containing around 60,000 electors and, at the upper end, others with 80,000 electors. Notwithstanding the actual result of the 2015 general election, the retention of the old boundaries is generally thought to have favoured the Labour Party, whose main support lies in urban constituencies with decreasing populations, and the Liberal Democrats, who were predicted to lose around 10–15 MPs solely on account of the planned reduction in total parliamentary constituencies to 600.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

progress of Liberal Democrat proposals to introduce elected peers into the House of Lords.[29] The demise of the Liberal Democrats' House of Lords reforms was greeted joyously by one backbench Conservative MP, Rory Stewart, who tweeted

> Looks like sense won + program motion on Lords reform is withdrawn – now to make sure in future all constitutional change needs referendum.[30]

Although the boundary proposals fell victim to internal Coalition fault lines, two parliamentary select committees were critical not merely of the substantive effect of the changes but also of the processes by which they were introduced. Thus the House of Lords Constitution Select Committee noted that the proposal to reduce the number of MPs to 600 had not only failed to take the logically prior step of ascertaining precisely what functions MPs ought to fulfil; it had also omitted consideration of the impact of any reduction on the relationship between the executive and the legislature. This was a significant failing, since the reduction appeared to be achieved in its entirety from a cull of backbench MPs, rather than a reduction spread proportionately across both backbench MPs and government members of the Commons. Consequently, the relative strength of ministers and others on the government payroll would have increased vis-à-vis the rest of the legislature.[31] The House of Lords Constitution Select Committee's criticisms ranged beyond issues of content to defects in procedures. Noting the lack of consistency in the type of procedures and mechanisms that were being used when proposals for constitutional reform were put forward, the committee argued the case for establishing an agreed process.[32] It was 'essential' for a clear and consistent process of constitutional change to be adopted. In this way, important constitutional values such as democratic involvement and transparency in policy making might be upheld.[33] Otherwise, as Baroness Jay of Paddington observed, the constitution would be 'vulnerable' to the political agendas of successive governments. For its part, the Political and Constitutional Reform Committee of the House of Commons (PCRC) had previously criticised the government for allowing just two clear sitting days between the presentation of the bill and its second reading in September 2010. This short timeframe had 'denied … [the PCRC] an adequate opportunity to scrutinise the Bill before second reading'.[34] By January 2013, the House of Lords Constitution Select Committee was expressing concern over the Coalition's resort to fast tracking procedures, this time

29. J Jowit 'Nick Clegg blocks boundary changes after Lords reform retreat' *The Guardian* 6 August 2012.

30. See https://twitter.com/RoryStewartUK/statuses/222713428349947906 (accessed 22 July 2015).

31. The proposal to equalise constituency sizes also received criticism from the House of Lords Constitution Select Committee and the House of Commons Political and Constitutional Reform Select Committee for the lack of pre-legislative scrutiny and public consultation, see HL Constitution Select Committee *Parliamentary Voting System and Constituencies Bill*, 2010–11, available at http://www.publications.parliament.uk/pa/ld201011/ldselect/ldconst/58/5803.htm (accessed 22 July 2015) at para 47; and HC Political and Constitutional Reform Committee *Parliamentary Voting System and Constituencies Bill – Third Report*, 2010–11, HC 437, available at http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/437/43702.htm (accessed 22 July 2015) at para 70.

32. HL Constitution Select Committee, HL 177, above n 6, at para 55.

33. Ibid, at para 1.

34. HC Political and Constitutional Reform Committee *Parliamentary Voting Systems and Constituencies Bill* First Report of Session 2010–11, HC 422, August 2010, at para 2. In the event, the PCRC was able to produce a report for use by the Commons during the committee stage of the bill.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

in respect of the Succession to the Crown Bill. In the House of Commons, just 2 days were allocated for the second reading, whole House Committee and third reading stages of this legislation.[35]

A specific complaint about parliamentary timing lay at the centre of criticisms of the measures that became the Constitutional Reform and Governance Act 2010. The bill, which inter alia proposed to reform the legal basis upon which the appointment and management processes of the civil service rested, was timetabled for the 'wash-up' period at the end of the Brown administration. Significant amendments were made at a late stage in the bill's parliamentary passage that could not be considered by the House of Commons. In the case of the House of Lords, the bill reached the upper house just 1 month before the likely date of dissolution.

A 'CLEAR AND CONSISTENT PROCESS' OF CONSTITUTIONAL CHANGE

The recurring theme in complaints about constitutional reform, then, is quite clear; namely, an inconsistent and democratically deficient mix of processes selected by the executive. As *Democratic Audit* has remarked, 'significant constitutional change can be driven through by the executive with minimal consultation …'[36]

Reforms under consideration may be subdivided into changes to (i) the pre-legislative stages or (ii) the legislative stage of constitutional reform. A separate issue concerns the role of referendums in sanctioning constitutional change.

Each is considered in turn.

The pre-legislative stages

In 2011, the House of Lords Constitution Select Committee declared that

> [i]n general, we regard it as a matter of principle that proposals for major constitutional reform should be subject to prior public consultation and pre-legislative scrutiny[37]

– a position shared by the House of Commons' Political and Constitutional Reform Committee. The major benefit of early consultation is generally seen to be the possibility of influencing the policy making process before a preferred option emerges and ministers/civil servants assume a proprietorial attitude towards that option.[38] Nonetheless, the process is usually initiated by governments and the consultation proceeds accordingly upon the terms set out by the executive. While it is true that parliamentary select

35. The bill had been prompted by the imminent announcement of the Duchess of Cambridge's pregnancy. The then Deputy Prime Minister had stated that the decision to fast track this constitutional change was for 'pragmatic business management reasons', which drew a response from the HL Select Committee that this could never afford an adequate basis for fast-tracking legislation. See http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/news/succession-to-the-crown-bill/ (accessed 22 July 2015).

36. Democratic Audit 'How democratic is the UK – the 2012 audit' (S Wilks-Heeg, A Blick and S Crone) available at http://democracy-uk-2012.democraticauditarchive.com/assets/documents/how_democratic_is_uk.pdf (accessed 22 July 2015), at para 1.1.5.

37. HL Constitution Select Committee *Parliamentary Voting System and Constituencies Bill*, 2010–11, above n 31, at para 12, which recognised at the same time that exceptional circumstances might require departure from this principle.

38. R Fox and M Korris *Making Better Law: Reform of the Legislative Process from Policy to Act* (London: Hansard Society, 2010).

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

committees, campaign groups, NGOs and media organisations have also taken the lead in engaging the wider public on constitutional reform issues in the past, there remains a view at Westminster that governments will lead the process of outlining reform options. The House of Lords Constitution Select Committee's report into the Fixed-term Parliaments Bill clearly endorsed this aspect of top-down orthodoxy when seeking greater 'democratic involvement and transparency' in constitutional reform processes:

> Save where there are justifiable reasons for acting more quickly, the proper way to introduce a constitutional reform proposal is to publish a green or white paper or draft bill, and take the comments and concerns raised in the process of consultation and pre-legislative scrutiny into account in the legislation that follows.[39]

The Code of Practice on Consultation issued by the Brown administration in 2008 did set out some important criteria for 'meaningful consultation', including conducting consultation at a stage that permits influence over the outcome; allowing at least 12 weeks for consultation and even longer where sensible; clarity over what is being proposed and the associated costs/benefits of proposals; and being written in accessible terms and clearly targeted at the intended recipients.[40]

The House of Lords Constitution Select Committee has suggested that ministers should then consider the responses and modify their proposals or, where no change is proposed, explain in a written ministerial statement to Parliament the basis of this stance.[41] A White Paper containing a draft bill on constitutional matters would then be published to allow pre-legislative scrutiny by Parliament and interested parties, with a view to improving the quality of the bill prior to its introduction to Parliament. Where the government chooses not to publish a draft bill, the Lords Constitution Select Committee states that the onus should be on the government to explain the fact of non-publication in a written statement to Parliament, without resort to 'formulaic assertions of the difficulties of scheduling parliamentary business.'[42]

Notwithstanding the nod towards 'greater democratic involvement', it is notable that the House of Lords Select Committee proposals are silent on the vital question of how to enhance citizens' meaningful participation in reform processes. The failure to address participation issues in constitutional reform processes undermines the democratic legitimacy of reform outcomes and raises significant doubts over claims regarding the electorate's 'informed consent' to such change. Neglect of legitimacy issues may be thought symptomatic of a wider disregard for the pressing problem of citizen disengagement with politics.[43]

The legislative stage

I. MINISTERIAL STATEMENTS

Following the requirement on ministers under s 19 of the Human Rights Act 1998 to make a statement about the compatibility of a bill's provisions with the European

39. HL Constitution Select Committee *Fixed-term Parliaments Bill* Eighth Report of Session 2010–11, HL 69, December 2010, at para 179.
40. HM Government *Code of Practice on Consultation* (July 2008) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/100807/file47158.pdf (accessed 22 July 2015).
41. HL Constitution Select Committee, HL 177, above n 6, at para 90.
42. Ibid, at para 93.
43. For a contrastingly candid expression of parliamentary concerns in this area, see the work of the House of Commons Political and Constitutional Reform Committee *Voter Engagement in the UK*: *Follow Up*, 2014–15, HC 938, February 2015, at paras 1, 2.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

Convention on Human Rights, the Lords' Constitution Select Committee has proposed that ministers normally[44] be required to state at second reading stage of a public bill whether, in the view of the government, the provisions amount to a significant constitutional change.[45] Where an affirmative statement is made, the minister would then be expected to describe inter alia the impact of the changes; whether and how the government engaged the public at a formative stage of the proposals and what the outcome of that engagement was; whether Green and White Papers were published; whether the proposals were scrutinised in Cabinet committee; whether pre-legislative scrutiny occurred and what the response of government is to such scrutiny; when it is proposed to hold a referendum; and what justification is offered for such a move. For all the transparency benefits the above proposals would bring, it remains nonetheless unclear how the House of Lords Constitution Select Committee envisaged that the requirement to make a ministerial statement would be enforced.

II. SCRUTINY IN COMMITTEE – COMMITTEES OF THE WHOLE HOUSE VERSUS PUBLIC BILL COMMITTEES[46]

Erskine May refers to a convention that bills of 'major' or 'first class' constitutional importance ought to be deliberated upon by a Committee of the whole House of Commons.[47] In truth, however, this practice has not always been adhered to,[48] something that is in part attributable, as *Erskine May* notes, to the fact that there is no settled definition of what constitutes a bill of 'major/first class' constitutional importance.[49] The previous Coalition administration's record in this regard was also mixed, although a number of key pieces of constitutional reform legislation were sent to a Committee of the whole House of Commons at committee stage, including the Fixed-term Parliaments Act 2011, the Parliamentary Constituencies and Voting Act 2011, the Succession to the Crown Act 2012[50] and the Scotland Act 2012. It remains the case that timetabling motions introduced by the government can dramatically cut back on the scope for

44. Exceptionally, a minister would be relieved of this obligation where there were 'clearly justifiable reasons for so doing'; ibid at para 73.

45. Ibid, at paras 71–74. The statement should also be included in the Explanatory Notes accompanying the bill.

46. For useful background on the parliamentary timetabling of constitutional bills, see House of Commons Library Standard Note (R Kelly and S Lester) *Timetabling of Constitutional Bills since 1997* SN/PC/06371.

47. TE May *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (ed. M Jack) (London: LexisNexis, 24th edn, 2011) p 566.

48. Committees of the whole House were used during the passages of what became the European Communities Act 1972, the Northern Ireland (Entry to Negotiations) Act 1996, the Human Rights Act 1998; the European Union (Amendment) Act 2008; the Constitutional Reform and Governance Act 2010; the Fixed-term Parliaments Act 2011 and the Parliamentary Constituencies and Voting Act 2011; and the Scotland Act 2012. Other important pieces of arguably constitutional legislation were sent instead to public bill committees, including the Bank of England Act 1998, the Freedom of Information Act 2000, the Justice and Security Act 2013 and the House of Lords Reform (No 2) Act 2014.

49. May, above n 47, p 555. It is also possible for bills to be split between a public bill committee and a Committee of the whole House. For analysis of Labour's resort to splitting bills at committee stage, see R Hazell 'Time for a new convention: parliamentary scrutiny of constitutional bills' [2006] PL 247.

50. Although see the earlier criticism about the rushed nature of parliamentary consideration of this Act.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

detailed legislative scrutiny by the whole House (as, indeed, they can at public bill committee stage).

Hazell has doubted the capacity of whole House Committees to engage in detailed scrutiny of constitutional bills, proposing instead that public bill committees should normally undertake this role with the possibility of receiving evidence from expert witnesses if needed.[51] The results of scrutiny by public bill committees would still be brought before the whole House at report stage. To this end, he has called for a new convention to be established that would be binding on the proponents of constitutional change. Viewed on its own terms, the major downside, however, in any proposal such as Hazell's that relies upon a convention for its enforcement is the inherent malleability of conventional obligations and the fact that these are prone to ditching when no longer convenient to the executive. An arguably more effective means for the legislature to assert its interests in being afforded an opportunity for adequate scrutiny of bills is via parliamentary resolution, as has occurred in a different context in the aftermath of the Scott Inquiry into the Arms to Iraq scandal in relation to ministers' duties to account to Parliament.[52] Viewed from the more radical perspective of inclusive, deliberative constitutional change, however, the fine tuning of committee-stage proceedings appears inwardly focused upon a technocratic quest to bring 'expertise' into the chamber to secure the best 'quality' reform output.

GRASSROOTS RADICALISM NORTH OF THE BORDER – THE SCOTLAND ACT 1998 AND A DIFFERENT MODEL OF CONSTITUTIONAL CHANGE

If, at best, top-down elite-managed processes of constitutional reform pay lip service only to the ideal of the 'informed consent' of the people, what alternative conceptions of constitutional reform exist and to what extent do they embody values of inclusive, reciprocal deliberation? A frequently cited example of a deliberative, unhurried and inclusive constitutional process leading to significant legislative reform is that which occurred in Scotland in the 1980s and 1990s, culminating in the creation of a devolved Scottish Parliament in 1998.[53] Notable features of this reform process include the lead role played by individuals and organisations in making the argument for a both a Scottish Assembly in *A Claim of Right for Scotland* (a grouping whose members were drawn from well outside the usual Whitehall/Westminster enclave of senior politicians and civil servants) and the mobilisation of Scottish public opinion via a Constitutional Convention – itself called for by the authors of *A Claim of Right*.[54] Membership of the Constitutional Convention included mainstream political parties (the Scottish Labour Party; Scottish Liberal Democrats) and smaller political parties (the Scottish Green Party; the Scottish Democratic Left; the Orkney and Shetland Movement), but extended more widely to include regional and island council representatives; trades unions,

51. Hazell, above n 49. The possibility should remain, however, of controversial/large constitutional bills being split between the floor of the House (on matters of principle) and in committee (for matters of detail).

52. A Tomkins *The Constitution after Scott* (Oxford: Oxford University Press, 1998).

53. HL Constitution Select Committee, HL 177, above n 6, at para 38; and see for background A Brown 'Designing the Scottish Parliament' (2000) 53 Parliamentary Affairs 542.

54. The Convention was attended by Labour and Liberal Democrat politicians, church groups, trades unions, business groups, voluntary sector and members of ethnic minorities, but was boycotted by the Scottish Nationalists and the Conservatives.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

church groups, ethnic minority representatives and the Scottish Women's Forum. The Convention's report *Towards Scotland's Parliament – A Report to the Scottish People by the Scottish Constitutional Convention* set out proposals for a devolved Parliament – its powers and responsibilities, with specific attention to fiscal matters, as well as the case for a system of proportional representation to the Parliament. The proposals were refined further by working groups in accordance with overarching principles of 'accountability, balance, efficiency, participation and subsidiarity'. Once the re-election of the Conservatives at Westminster in 1992 had ensured that a Scottish Parliament would not be delivered in the immediate future, the Convention continued its work, appointing a commission to make detailed proposals on the preferred form of proportional representation and gender/ethnic balance in any new assembly. Academics were engaged to report on model operating procedures for the new Parliament that would reflect Scotland's distinctive political culture. The resulting document, *To Make the Parliament of Scotland a Model for Democracy*, co-authored by Sir Bernard Crick and David Millar, was premised upon the likely creation in the near future of a Scottish Parliament and proposed radical new procedural forms to be adopted by the new Parliament.[55] The authors' motivation was a concern that, in the early exhilarating days of a restored Parliament, MSPs would have little time for debating the procedures by which parliamentary business was to be conducted. As such, there was a real danger that the new Parliament would simply 'adopt or fall in with whatever is most familiar to most of the new members', which meant effectively some version of Westminster practice, as happened at Stormont.[56] Draft standing orders were proposed that consciously sought to break away from executive- and party-dominated processes found south of the border. The important function played by these standing orders in maintaining a more consensual style of politics led the authors to propose that they be entrenched against future repeal by requiring a two-thirds majority of members to be amended.

The Constitutional Convention had shown how a more inclusive and deliberative style of politics among persons and groups of differing perspectives was possible. Party differences did still play out at times in the Convention, but the presence of many other bodies representing strands of civic society helped focus participants' minds on the search for agreeable compromise. Crick and Millar advocated that the new Parliament should operate with a similarly wide degree of openness of proceedings to members of the public and civic bodies, in a conscious attempt to make proceedings there 'closer to that of the Convention than to the automated dog-fights of Westminster …'.[57] Standing Order 32, for example, provided for any question or petition submitted by 1000 or more electors to a minister or convenor of a parliamentary committee 'shall receive as of right a reasoned response from that Minister or Convenor to be published in "The Record of the Parliament of Scotland"'. In the case of petitions signed by 10,000 or more electors, a parliamentary debate would be triggered.

The final report by the Convention reflected much of the work by the Commission, working groups and Crick and Millar. In the face of Conservative Party hostility to devolution, more grassroots campaigns emerged, some with overlapping memberships

55. B Crick and D Millar 'To make the Parliament of Scotland a model for democracy' (Edinburgh: Centre for Scottish Public Policy, 1995).
56. Ibid, at 2.
57. Ibid, at 6–7.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

producing what Paterson notes was a 'bottom-up' pressure for change.[58] New pro-devolution campaign groups appeared on the scene and an umbrella organisation – the Scottish Civic Assembly – was formed from a range of civic bodies and sought the 'democratic renewal of the system of governance in Scotland'.[59] As Brown concludes,

> It is clear … that a considerable amount of discussion and political campaigning, constitution building and planning had taken place in the years since the failure of the 1979 referendum to deliver constitutional change for Scotland.[60]

From the early 1980s until 1997, the campaigning and planning activities reveal a pattern of political activism and engagement outside the exclusive direction and control of the main political parties.

The election of a sympathetic Labour government in May 1997 was followed swiftly by a White Paper, *Scotland's Parliament*, in July of that year.[61] This document reflected the desire to establish a new type of politics, somewhat removed from the adversarial Westminster model. The paper thus drew heavily upon the recommendations of the Scottish Constitutional Convention, noting for example the expectation that the new Parliament

> will adopt modern methods of working; that it will be accessible, open and responsive to the needs of the public; that participation by organisations and individuals in decision-making will be encouraged …[62]

The proposal to set up a Scottish Parliament secured the support of 74% of voters at a referendum in September 1997. The Scotland Bill was published the same year and received royal assent in 1998. In response to the concerns raised by Crick and Millar, ministers by this time had co-opted members of the Consultative Steering Group (comprised of members of the main political parties, and representatives from the business community, local authorities and civic-society organisations, some of whom had previous involvement in the Convention and Commission) to produce proposals concerning rules of procedure for the new Parliament and other aspects of its working practices. Expert advisory groups were employed to brief the Steering Group. The proposals thus generated were then discussed at public meetings across Scotland.[63] Previously identified themes of an accessible, open and responsive Parliament were reiterated in the Steering Group's report. The value of developing 'genuine consultation and participation' by citizens in both the generation and scrutiny of policy (including legislative policy) was emphasised.[64] The importance of reaching out to groups not

58. L Paterson 'Why should we respect civic Scotland?' in G Hassan and C Warhurst *A Modernisers' Guide to Scotland* (Glasgow: The Big Issue/Edinburgh: Centre for Scottish Public Policy, 1999).
59. Brown, above n 53, at 546.
60. Ibid.
61. Scottish Office *Scotland's Parliament* Cm 3658 (London: HMSO, 1997).
62. Ibid, at 30.
63. Scottish Office *Shaping Scotland's Parliament*, Report of the Consultative Steering Group on the Scottish Parliament, (Edinburgh: The Stationery Office, 1998).
64. 'The Scottish Parliament should be accessible, open, responsive and develop proposals which make possible a participative approach to the development, consideration and scrutiny of policy and legislation.' Steering Group *Shaping Scotland's Parliament* (1998) – *Principle 3 Access and Participation* and see para 30.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

usually engaged in the political process was underscored, something that the Steering Group conceded would require

> immediate recourse to a programme of education for all citizens. Courses would cover aspects of researching issues, developing negotiating skills, lobbying and campaigning skills as well as the matter of understanding the system of government that will be put in place.[65]

A positive vision of the potential role of national representative forums that the executive might be required to consult was also outlined.[66] Young people needed to be given 'every encouragement to make their voices heard'.[67] Parliamentary committees would be expected to meet and take evidence away from Edinburgh and, in some cases, have their permanent base somewhere other than the capital.[68] Committees might formally adopt inclusive consultation structures via policy forums on business, transport and youth matters.[69] Further evidence of the Steering Group's willingness to open up political processes was apparent in their support for public petitions to Parliament. The Steering Group rejected the requirement of a specified minimum level of support before the petition was considered by Parliament, noting the difficulties in obtaining large numbers of signatures in a remote Highland village.

Additionally, the importance of abiding by and promoting equal opportunities for all was highlighted, including the adoption of family friendly hours of parliamentary business.[70] In June 1999, the Steering Group's Proposals received parliamentary approval in the following terms: 'That the Parliament … agrees that its operations should embody the spirit of the Group's key principles.'[71] The Scottish Executive then moved to set up a Scottish Youth Parliament and announced its willingness to work with the Women in Scotland Consultative Forum.[72]

Of course, as is known, the reality of partisan Holyrood politics would subsequently and inevitably intrude in other ways into the work of the newly convened Parliament, thereby quashing some of the more idealistic aspirations of its progenitors. However, the deliberative processes leading to the formation of the Parliament and the formulation of its working practices have been justly acclaimed as offering an alternative, more participatory, model of how constitutional amendment might be realised, thereby making more credible claims of having secured the 'informed consent of people'.

THE USE OF REFERENDUMS IN UK CONSTITUTIONAL REFORM

Referendums in 1979 and 1997 played central roles in determining whether Scotland was to have its own Parliament. In 2014, the referendum on Scottish independence

65. Ibid, Annex D at para 7.3.
66. Ibid, Annex G.
67. Ibid, s 2 *The Key Principles*: *Putting Them into Practice* at para 34.
68. Ibid, at para 37.
69. Ibid, at para 38.
70. Ibid, at para 49.
71. Scottish Parliament Official Report (9 June 1999); available at http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=4167&i=26614#ScotParlOR (accessed 22 July 2015).
72. For background and analysis, see E Breitenbach 'Briefing note for the Strategic Group on Women'; available at http://www.gov.scot/Publications/2003/12/18595/29805 (June 2003) (accessed 22 July 2015).

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

secured a staggering 85% turnout among eligible voters, supporting earlier claims that large swathes of the public had become engaged and energised as active participants in a vital constitutional decision. Persons who would not describe themselves as 'political' or 'usually interested' in politics became immersed in arguments over the political, economic and cultural ramifications of a 'Yes' or 'No' vote.[73] While sometimes falling short of Gutmann and Thompson's ideal of mutually respectful discourse, the debate among participants sought for the most part to present claims in reasoned and accessible terms in an effort to persuade others. Many opportunities existed for ordinary voters to make their contributions. In such circumstances, it is not empty rhetoric to claim that the result producing a 55%:45% result in favour of remaining within the UK reflected the 'informed consent' of voters.[74] In the initial period after the result, the heightened level of interest in politics seems set to continue. Membership of the Scottish National Party and the Scottish Greens increased significantly in the aftermath of the September 2014 vote.[75] In the May 2015 general election, the Scottish Nationalists were triumphant, winning 56 out of a possible 59 seats on the back of a turnout of 71% of voters in Scotland. The turnout figure north of the border compares favourably to the equivalent figures for England (65%), Wales (65%) and Northern Ireland (58%).[76] The referendum in Scotland points to an invigorated citizenry that takes seriously its political role in a way that republican political theory would wish to see emulated elsewhere. In other cases, while referendums are often seen as a necessary component in the legitimation of ultimate policy outcomes, a perception remains that they tend to be used tactically, in an ad hoc manner, by the party(ies) in power.[77] At Westminster, there is broad support for the adoption of a principled position whereby referendums would be used to decide upon proposals of a 'major' or 'fundamental' constitutional nature,[78] and for Parliament to decide when such issues should be put to a referendum.[79] Leaving definitional issues aside, recent Scottish experience shows that the value of referendums in resolving major constitutional questions hinges to some considerable extent on the degree to which members of the public become engaged in campaign issues and, consequently, whether the result can be claimed in truth to be a product of the informed consent of the electorate. Where campaigns are perceived to be controlled by political elites, this may dampen overall levels of citizen engagement. Recent referendums on the alternative vote and a regional assembly for North-East England secured low-voting turnouts of 42% (AV) and 48% (North-East England), respectively. Aside from the turnout figures, criticisms of the AV referendum included the fact that Westminster politicians and party politics dominated the campaign.

73. See thus http://www.huffingtonpost.co.uk/richard-jones/social-media-is-revolutio_b_5837246.html (accessed 22 July 2015).
74. Of course, it needs to be noted that referendums run risks of simply replicating majoritarian preferences and/or being non- or under-deliberative.
75. See http://www.bbc.co.uk/news/uk-scotland-scotland-politics-29311147 (accessed 22 July 2015).
76. See http://www.ukpolitical.info/Turnout45.htm (accessed 22 July 2015).
77. HL Constitution Select Committee *Referendums in the United Kingdom* Twelfth Report of Session 2009–10, HL 99, 7 April 2010, at para 62.
78. Ibid, at para 65. In a non-exhaustive listing, the HL Constitution Select Committee recommended referendums for decisions about the abolition of the monarchy or either House of Parliament, leaving the EU, for any nation of the UK to secede from the Union, changing the electoral system, the adoption of a written currency and changing the currency; see para 94.
79. Ibid, at para 118.

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press

A spokesperson for the *Yes to Fairer Votes* complained that

> The referendum hasn't been the debate on issues of democracy that people would have hoped for. Too often the debate has been about party politics and the public has been shut out of discussing how we choose our MPs.[80]

This indicates that the real challenge for those that advocate the use of referendums to settle major constitutional questions is to improve levels of public engagement and deliberation prior to voting day. Existing (and widely held) unfavourable assessments of Westminster politicians would seem to point towards the imperative of facilitating more localised campaigns in which greater community/civic group/individual participation is made possible.

CONCLUSION

The absence of prescribed procedures for enacting constitutional change in the UK leaves open domestic arrangements to a number of criticisms, not least the degree of control conferred upon the executive over the nature and timing of reform processes. More fundamentally still, given the extraordinary significance of constitutional (as opposed to non-constitutional) amendment, there is a pressing issue concerning the democratic legitimacy of outcomes in which ordinary voters are rarely active participants. This discussion has examined some criticisms of, and proposed improvements to, recent examples of constitutional reform emanating from within Westminster itself. The paper has argued that, despite nods in the direction of greater inclusivity and voter engagement, these proposals continue to reflect a 'top-down' view of elite-managed technocratic reform. As such, serious questions arise about the extent to which reform outcomes may meaningfully be said to enjoy the 'informed consent' of the people.

An alternative model of constitutional reform that could be said to make a more credible claim of having secured informed consent would be one in which the elements of inclusive, reciprocal public reasoning are present. As the example of Scotland in the 1980s and 1990s shows, a range of deliberative structures exists through which the grip of elites may be loosened and ordinary electors brought, over time, into the deliberations about constitutional reform. The shared commitment among pro-devolutionists to carrying forward campaign process values of inclusivity, accessibility and participation into the actual design of decision making arrangements in the new Parliament is noteworthy. As more recent experience in Scotland also shows, constitutional referendums are also potentially valuable mechanisms for securing democratic legitimacy for major alterations to the polity. Such plebiscites can clearly invigorate the engagement of ordinary voters in political debate, though this should not be taken as a foregone conclusion. Evidence from south of the border indicates that, where the framing of the terms of debate is perceived to remain in the hands of professional, centralised political parties, voter non-engagement remains a real risk.

80. K Ghose, scited in article on the BBC website 'AV referendum: No vote a bitter blow says Clegg' (6 May 2011); available at http://www.bbc.co.uk/news/uk-politics-13311118 (accessed 22 July 2015).

https://doi.org/10.1111/lest.12090 Published online by Cambridge University Press