Written Evidence submitted to the House of Lords Select Committee on the Constitution

**The Constitutional Reform Process**

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**OUTLINE**

**I. What is constitutional reform?** (Paragraphs 1-26)

A. What is meant by ‘constitutional’? (Paragraphs 2-17)

1. Impact on citizens (Paragraphs 3-7)

2. Constituting the state and its institutions (Paragraph 8)

3. Formal criteria: self-description and special procedures (Paragraphs 9-10)

4. The character of the body making the legislation (Paragraphs 11-15)

5. Limiting or controlling governmental power (Paragraph 16)

Conclusion on the meaning of ‘constitutional’ (Paragraph 17)

B. What is reform? (Paragraphs 18-26)

1. The inevitability of constant change (Paragraphs 18-19)

2. Kinds of constitutional change (Paragraphs 20-25)

a) ‘Reform’ (Paragraph 21)

b) ‘Change *simpliciter*’ (Paragraph 22)

c) Constitutional ‘revolution’ (Paragraphs 23-25)

Conclusion on ‘reform’ (Paragraph 26)

II. Does constitutional reform differ in character from other public-policy proposals? (Paragraphs 27-34)

III. Should special rules or procedures apply when constitutional reform is proposed? (Paragraphs 35-54)

IV. The process of constitutional change in the UK (Paragraphs 55-60)

V. How can the constitutional reform process be improved? What ‘good practice’ principles should be adhered to? (Paragraphs 61-72)

1. Who should initiate constitutional reform? (Paragraphs 65-67)

2. Should cross-party consensus be required? (Paragraphs 68-70)

3. What specific role should a) the House of Lords and b) this Committee play in the consideration of constitutional reform proposals? (Paragraphs 71-72)

VI. Would it be possible or desirable to design an enforceable ‘rulebook’ for the consideration of constitutional reform? If so, what rules should it contain? (Paragraphs 73-75)

The Constitutional Reform Process

Professor David Feldman QC, FBA

# I. What is constitutional reform?

1. From the perspective of the Committee’s current inquiry there is a difficulty in that there is no accepted process for constitutional reform. There are two further problems. First, it is not always easy to know what is and what is not constitutional. Secondly, it is quite hard to distinguish reform from change. This section addresses those two issues.

## A. What is meant by ‘constitutional’?

2. I do not agree with those who argue that it is impossible to distinguish constitutional rules from other rules, or that the only workable approach would be to rely on the scale of the impact of a rule, practice or change. One can identify the constitutional realm in a number of different ways. These indicators of constitutionality can be (and usually need to be) applied in combination; for reasons explained below, none on its own provides a completely satisfactory account of the constitutional realm. Nevertheless, collectively they provide useful guidance which allows us to distinguish the constitutional realm from the non-constitutional realm.

### 1. Impact on citizens

3. The first approach concentrates on the impact of legislative provisions on citizens and their relationship with the state.

4. In *Thoburn v Sunderland City Council*[[1]](#footnote-1)Laws L.J., with whom Crane J. agreed, said that there is a class of constitutional statutes, which either provide for the relationship between state and individual in a general, overarching way, or limit or extend fundamental, constitutional rights. These are common-law rights which have been said not to be subject to implied legislative restriction, including due process rights (especially access to court),[[2]](#footnote-2) and substantive rights such as freedom of expression,[[3]](#footnote-3) freedom from torture,[[4]](#footnote-4) and a right not to be left destitute and denied legal means of obtaining essential resources.[[5]](#footnote-5) Constitutional statutes cannot be impliedly amended or repealed; express words are required as evidence of actual parliamentary intention.

5. Substantive rights arising from Community law are not *as such* constitutional rights in the United Kingdom,[[6]](#footnote-6) and rights derived from public international law (such as human-rights treaties) would be in the same position: neither are domestic, common-law rights. Their foreign sources and the UK’s dualist constitution, requiring legislation, such as the Human Rights Act 1998, to give effect to such treaties in domestic law, weaken their claim to be considered fundamental, constitutional rights.

6. Nevertheless, they overlap common-law rights. For example, Article 6.1 of the ECHR guarantees a right of access to court to determine civil rights and obligations and criminal charges. Freedom from torture and protection against destitution and degradation are guaranteed by Article 3.[[7]](#footnote-7) The right to liberty is protected by Article 5. It follows that the Human Rights Act 1998 can be properly considered a constitutional statute both because it regulates the relationship between state and individual in a general, overarching manner, and because it extends protection of at least some fundamental, constitutional rights which overlap the Convention rights.

7. That characterization of constitutional legislation presents three difficulties.

* First, the idea of actual parliamentary intention is a fiction. However, that does not matter too much as long as it is accepted that the only way of establishing the fiction is by way of express language in the statute.
* Secondly, Laws L.J.’s definition is under-inclusive. It does not cover the full range of matters which would normally be regarded as constitutional. One expects constitutions to establish institutions of the state and confer appropriate functions, powers and responsibilities on them. Some constitutions do little else. For example, the Constitution of the Commonwealth of Australia embodies few rights and is heavily concerned with institutions and their inter-relationships. The same was true of the US Constitution before the addition of the first ten amendments. Legislation of this kind would not be constitutional according to Laws L.J.’s criteria.
* Thirdly, the criteria are also over-inclusive. Most legislation is concerned with the relationship of the state and individuals by conferring powers on state agencies to interfere with or regulate individuals’ activities or imposing criminal liability on people. Some legislation affects the relationship ‘in a general, overarching way’. Yet even very technical, narrowly focused legislation may limit fundamental, constitutional rights.

### 2. Constituting the state and its institutions

8. Another possible test for constitutional statutes is based, like that of Laws L.J., on subject-matter and effect, but has an institutional focus: constitutional legislation establishes state institutions and confer functions, responsibilities and powers on them. Such legislation constitutes the state and lays out its structure, core functions of a constitution.

### 3. Formal criteria: self-description and special procedures

9. A third test is purely formal: legislation is constitutional if it describes itself as constitutional or is made according to a special procedure laid down for making constitutional legislation. In the UK, unlike most countries (where such legislation often takes the form of an amendment to a codified constitution) there are special procedures for deliberating on private Bills, hybrid Bills, and local Bills, but there is no special procedure for making constitutional Bills. The test must therefore depend wholly on the title of the legislation, unless and until the constitution is changed.

10. Leaving aside Acts creating or amending constitutions for colonies, dominions and newly independent states, and the Air Force (Constitution) Act 1917 unifying the air forces of the Army and Royal Navy in a single entity, there are several statutes applying to the British Islands which carry the word ‘constitution’ or ‘constitutional’ in their short titles. Several of these relate to the Isle of Man[[8]](#footnote-8) or Northern Ireland.[[9]](#footnote-9) Only two Acts currently in force in relation to other parts of the British Islands have ‘constitutional’ in their short titles: the Constitutional Reform Act 2005 and the Constitutional Reform and Governance Act 2010. A Lexis search on 12 January 2011 indicated that those were the only statutes then in force in relation to any part of the British Islands to contain the words ‘constitution’ and ‘constitutional’ referring to state constitutions in their substantive provisions of any Act. It is fair to assume that all of these would be regarded as constitutional. However, this need not be decisive.

### 4. The character of the body making the legislation

11. Courts may introduce a fourth additional or replacement test relating to the character and role of the body which made the legislation. If it is judged to be made by the legislature normally constituted and in its normal role, legislation would not be constitutional. If it is made by a body acting in a constituent role, it would be constitutional. (To some degree this overlaps with the ‘special procedure’ test in subsection I.A.1.3, above.)

12. The Supreme Court of Israel adopted this approach as a step in the process of deciding that the Basic Laws, passed periodically by the Knesset since 1948, have fundamental, constitutional status, and ordinary laws are invalid if inconsistent with them.[[10]](#footnote-10) The Court distinguishes between the Knesset in its normal capacity and the Knesset in its role as a constituent body for the State of Israel. The first Knesset, in 1948, was empowered to make a constitution for the new state, but failed to agree one. After it was dissolved, subsequent Knessets from time to time made what were called Basic Laws, passing them by an absolute majority of the members rather than a simple majority of those in attendance. The question arose whether ordinary legislation was invalid to the extent of an incompatibility with a Basic Law. By a majority, the Supreme Court held that the first Knesset as an absolutely sovereign legislature had handed on the power to make a constitution to its successors, which were therefore entitled to make Basic Laws limiting the power of later Knessets to make ordinary laws. Essentially the majority adopted a ‘self-embracing’ rather than ‘continuing’ model of legislative sovereignty on account of the authority given to the first Knesset to make a constitution.

13. A dissenting minority took the view that the first Knesset’s authority as a constitutive body expired with it, and each subsequent Knesset was an ordinary legislature with no constitution-making authority. It followed that the second and subsequent Knessets were sovereign in the ‘continuing’ sense: they had no power to limit the legislative authority of any subsequent Knesset by making legislation.

14. For the majority, however, subsequent Knessets were entitled to sit in two different capacities: as a normal legislature when passing legislation by a simple majority of those present and voting; and as a constitution-making body when passing Basic Laws by an absolute majority of all the members of the Knesset. When acting in the latter role, the Knesset makes legislation which has higher normative (constitutional) status than the legislation made at other times and with ordinary majorities, which would therefore be valid only to the extent to which they are compatible with the Basic Laws.

15. Does this mean that the Supreme Court could decide that the Knesset has acted as a constituent assembly when passing a particular piece of legislation even if the legislation was not called a Basic Law, for example because the subject-matter was significant for a central, structural characteristic of the state? Alternatively, could a piece of legislation described as a Basic Law be held to be an ordinary law, if for example its subject-matter was insufficiently significant for the structure of the state? Logically it must be possible, as the Supreme Court held that the subject-matter of the law would be relevant to this assessment. The power of judges to tell the Knesset not only what its legislation means and how it is to apply to individual cases but also the capacity in which it was acting when it made the legislation puts them at the heart of the process of making the constitution as well as that of operating it.

### 5. Limiting or controlling governmental power

16. A fifth possible test for constitutional laws might be that they have the function of limiting or controlling the power of government. This, however, derives from a US model of constitutionalism based on an ideal form of the US constitution rather than reflecting the reality of constitutions at large. It does not provide a model for understanding the UK’s constitution with the Westminster Parliament’s theoretically unlimited legislative power. It is not a sound basis for defining constitutional laws.

### Conclusion on the meaning of ‘constitutional’

17. **In practice, one usually needs to combine two or more criteria in order to get a useful definition of constitutional statutes.** An institutional approach may be particularly valuable because not all constitutions recognize fundamental rights, and because the key function of a constitution is (in my view) to constitute the state and its institutions and confer functions, powers and duties on them. This Committee’s predecessor in 2001 adopted a test of this kind for the purpose of determining its own remit. In its first report, the Committee adopted as a working definition for its purposes:

**…’the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.**[[11]](#footnote-11)

On this view, rules (including rules about rights and the rights themselves) are constitutional if and so far as they operate as part of the definition of the power of state agencies. This institutional approach can be applied to the UK’s constitution.

## B. What is reform?

### 1. The inevitability of constant change

18. Change is constantly going on in every constitution. It is unavoidable, largely because people do not agree about (a) how to interpret and apply the text and (b) what the non-textual rules or conventions demand. Working out a practical way of doing business in those circumstances involves a constant renegotiation of the relationships between key institutions and officials, occurring outside the formal process for constitutional reform.

19. For example, in the UK’s constitution everyone would agree that ministers are, by convention, accountable to Parliament for the activities of their departments, and that one aspect of that accountability is that ministers must not mislead the two Houses of Parliament. However, there is continuing tension between ministers and other members of the two Houses as to whether the minister has a duty merely to the truth, or to tell the whole truth, and nothing but the truth. There is a lack of agreement as to whether there are circumstances in which ministers may tell less than the truth, or be justified in actively misleading the Houses; an example might be lying to the House about a planned devaluation of the currency. The constitution provides a framework within which that debate can be conducted, a process of negotiation, rather than prescribing an outcome of the negotiation.

### 2. Kinds of constitutional change

20. We can distinguish between three broad kinds of constitutional change.

#### a) Reform

21. The least radical kind of change is achieved within the framework of the existing Constitution, by way of the machinery for amendment contained within the Constitution or by a re-interpretation or re-working of existing constitutional provisions or traditions. Such a change may be achieved self-consciously, in accordance with a principle or in pursuance of a plan, recognizing that the constitutional structure will be different afterwards. This sort of self-conscious, planned, constitutional development I will call ‘reform’.

#### b) Change simpliciter

22. Alternatively, change may simply happen without those responsible for it recognizing the significance of their actions for the nation's fundamental legal and political structure or principles. This I shall call ‘change’ *simpliciter*. Such change will usually necessitate the subsequent re-interpretation of the Constitution by others (often academics) in order to create a constitutional tradition which is capable of validating the new situation. A good deal of Dicey's writing was of this kind, providing a rationalization for changes which had occurred piecemeal over the previous three hundred years or so. This process is itself a kind of ‘reform’, being re-interpretative in nature.

#### c) Constitutional revolution

23. The more radical change occurs when it is not validated by existing constitutional provisions, and this invalidity is recognized by those who are responsible for the change, or by those whose job it is, under the Constitution, to decide whether the new situation is or is not constitutional. The result is a constitutional revolution (although not in Kelsen's sense[[12]](#footnote-12)) rather than a reform. I shall accordingly describe this kind of development as a ‘revolution’.

24. A ‘revolution’ is not principally based on a re-interpretation of past constitutional events, although there may be a degree of revisionism in order to justify the change. It is rather an interpretation for a particular society and particular circumstances of a set of social aspirations. It is a vision of the good society. Like all visions, it has to be dreamed first, and the dream must then be interpreted. The process starts unconstrained by constitutional history and theory, and participants feel free to make their own. To do so, the vision must derive its authority, and the legitimacy of the resulting Constitution, from non-constitutional or non-native sources. Considerations of stability, the need to maintain the moral authority of the Constitution after its institution, and a keenness to show that the process by which the Constitution has been made is fair to all parties, are all factors which are more significant to the ‘revolutionary’ than to the ‘reformer’. However, that is not to say that these factors have no relevance to the ‘reformer’. An existing constitutional structure will be more likely to command continuing respect if it can be shown that adjustments to it are achieved in a way which is fair to all parties, an enterprise to which Brian Barry's notion of ‘justice as impartiality’ may be important[[13]](#footnote-13).[[14]](#footnote-14) Here, wide consultation is important.

25. A constitutional revolution may come about in different ways.

* Political change may make the assumptions underpinning the existing constitution untenable, or existing structures may be incapable of performing a Constitution's symbolic role of unifying the nation by overcoming the strains of commitment. That is the position, for example, in post-apartheid South Africa.
* A new sovereign State may have been created as a result of decolonization, rebellion against a colonial power, or civil war, as in Ireland in the 1920s, or Namibia in 1990.
* A nation defeated in war may face the necessity of revising its Constitution in line with the wishes of the conquering power, as in Japan in 1945.

In any of these situations, a significant part of the old Constitution is unsuited to new needs, and the necessary change cannot be achieved from within the existing constitutional structure.

### Conclusion on ‘reform’

26. **The kind of constitutional change with which the Committee is concerned is what I have described as ‘reform’. It will be self-conscious, reflective, and seeking a justification by re-interpreting basic values within the UK’s already prevailing constitutional tradition.** This affects both the types of legitimating factors which might apply and the most appropriate procedure for reform.

# II. Does constitutional reform differ in character from other public-policy proposals?

27. Constitutional reform is distinctive. The main difference between it and other kinds of public policy relates to the obligations on the people who propose or oppose the reform. There are some principles governing the legitimacy of constitutional ‘reform’ which do not apply to other kinds of change. The main one is that all concerned, whether politicians, voters or judges, should respect the principle of constitutionality, which may be formulated as follows: *everyone acting in a public capacity should respect the fundamental rules, values and traditions of the Constitution for the time being, unless there are principled, constitutional advantages to changing them which outweigh the merits of constitutionality.*

28. As Peter Morton has pointed out, this willingness to work within, and to extend, a constitutional tradition established previously, together with a willingness to regard that tradition as imposing obligations in a normative way, must apply to constitutional conventions as well as to rules of positive law[[15]](#footnote-15).[[16]](#footnote-16) ‘Reform’ re-interprets and revalues a tradition; it re-interprets rather than ditches fundamental values.

29. Of course, it is not easy (and may sometimes be impossible) to decide what values are fundamental. If we could agree, for example, that democracy is a fundamental value in the UK's constitution, we might not be able to agree on the model of democracy which forms such an important part of the Constitution. If we did disagree on that, we might then disagree again on whether our first-stage disagreement related to a fundamental value within the tradition.

30. Suppose some of us thought that the underlying idea was an ideal form of participatory democracy, imperfectly realised. Those people would be inclined to argue that, on a proper interpretation of the Constitution, any move from the present practice towards greater participation would enhance, rather than alter, the existing tradition of democratic government.

31. Others, by contrast, would be inclined to take the view that any move away from representative and responsible government (in which the executive is accountable to members of a supreme legislature who are free to exercise their untrammelled judgment in the public interest between elections) would undermine rather than advance existing constitutional values. It would be seen as a ‘revolution’ rather than a ‘reform’ of the Constitution.

32. Characterising an adjustment as ‘reform’ or ‘revolution’ affects the kinds of argument which need to be brought to bear to legitimise them, and the appropriate methods of settling on the terms of the adjustment. If one is working within a constitutional tradition in a ‘reformist’ way, the proper way of justifying changes is re-interpretative. One locates them within, and justifies them at least in part by reference to, an interpretation or re-interpretation of the Constitution as currently established. ‘Reform’, whether by legislatures, executives or judges, is an organic form of development, in which the proposed new arrangements derive their authority at least in part from the continuity which can be demonstrated with existing constitutional arrangements. This need not be at any particular level of abstraction or concreteness. What is important is that the ‘reform’ programme will operate so as to maintain continuity and draw legitimacy from that continuity. Existing practices or institutions may be accepted but re-theorised, with increasing consequences for the way in which they develop, and this may well be a quiet ‘revolution’.

33. On the other hand, existing arrangements may be radically changed on the ground that they fail to advance the values implicit in the normative theory which is supposed to justify them, and that may be a noisy ‘reform’. A ‘reform’ looks to its own constitutional system for support. Comparative constitutional law offers little normative help to the ‘reformer’, but may be extremely helpful to the ‘revolutionary’. It is vital for those instituting the adjustments to know what they are aiming to achieve, because it will affect where they must look for their authority and legitimacy.

34. If the object is to change fundamental values, it is a constitutional revolution, and the constraints attaching to reform do not apply. Therefore the answer to the question posed above (does constitutional reform differ from other kinds of public-policy proposals?) depends to some degree on what sort of ‘reform’ is being discussed. But the common feature of all reform is that it requires decision-makers to engage with fundamental values, and to do so in an spirit of loyalty to them rather than of rejection.

# III. Should special rules or procedures apply when constitutional reform is proposed?

35. Generally, *the method by which a constitutional change is achieved affects its legitimacy*, and *different kinds of change require different methods in order to be legitimate.*

36. When we consider the basis for saying that any one kind of constitutional alteration is legitimate, it is immediately obvious that the criteria for legitimacy are likely to be different in each case. It is important to bear in mind the varieties of legitimacy which jostle with each other for attention in political and constitutional discourse. A rule, decision or act may be legitimate or illegitimate in many ways. Some examples include legitimacy assessed:

(a) constitutionally, in the sense of being accepted by the ultimate arbiters of constitutionality as consistent (or not inconsistent) with relevant constitutional norms and values;

(b) politically, in the sense of being accepted by some or all participants in political discourse as justified (or at any rate not condemnable) by reference to principles concerning the proper allocation or use of state power to which those participants are prepared to subscribe;[[17]](#footnote-17)

(c) morally, in the sense of being accepted by those who hold particular moral standards as justified (or not condemned) under those standards;

(d) consequentially, in the sense of being calculated to promote some objective which is regarded as being specially valuable, including the stability of the Constitution;

(e) procedurally, in the sense of being entitled to special respect by virtue of having been arrived at by way of a specially approved decision-making procedure.

37. These forms of legitimacy overlap, and are expressed at a high level of abstraction. Constitutional principles are likely to have been informed by political, moral, procedural and sometimes consequentialist considerations. A person's more concrete, lower-order political views are likely to be influenced by moral and particularly by consequentialist considerations. These may induce a commitment to *constitutionalism* (which can be briefly explained as a willingness to work within, and to extend, a constitutional tradition established previously, together with a willingness to regard that tradition as imposing obligations in a normative way) and to a type of decision-making procedure as means of conferring or denying obligations of obedience. And so forth.

38. Rodney Barker sees legitimacy as a reason for obedience to government.[[18]](#footnote-18) In that form it may be seen as an ideological tool which the State can deploy, which works to the advantage of particularly powerful groups in society such as major corporations.[[19]](#footnote-19) However, other people with a distinctive geographical base, coherent political claims and the capacity to make them heard distinctively through élite advocates in the political process can turn claims about legitimacy against the State. Thus Scottish Nationalists can assert claims about the illegitimacy of government from Westminster more easily and successfully than the economically disadvantaged class in England and Wales or in Scotland[[20]](#footnote-20). In the Scottish Nationalist example the questions are: ‘When should we not be asked to obey? What form of Constitution, and what kind of State, should be put in place in order to ground renewed acceptance of a duty of obedience?’ When we talk of reforming constitutions in ways which are legitimate, the continuation of the existing constitutional arrangements, to which the ideology of legitimacy attaches, cannot be assumed.

39. How do the criteria for legitimacy affect the different kinds of constitutional re-orientation which I identified earlier?

40. **Adjustments within existing constitutional constraints** (reform): the constitutional propriety of any such adjustment will depend on the institution concerned acting within its constitutional powers, as defined by whatever body is the ultimate arbiter of constitutionality. Political acceptability may be differently assessed: the details of the political theory adopted to explain and justify the Constitution may not accord with either popular or élite assessment for the time being of the best political theory, not least because there may be a divergence between those who consider that the Constitution should impose primarily procedural constraints on political power and those who would prefer that it should set substantive objectives or values. In the same way, the currently dominant moral or religious tradition in a society may produce a different assessment from the dominant political or constitutional one.

41. **An historical, unplanned process of change** (change *simpliciter*): in most constitutions it will be impossible to achieve change without conscious reforms, which will need to comply with the principle of constitutionality, above. A rare example of a constitution which may be seen as being in large part historical and unplanned is that of the United Kingdom. Yet even here, the main elements in the Constitution have been carefully planned and argued over. The shape and terms of the various Unions, the dualist approach to public international law, the commitment to parliamentary supremacy (at least as an ideological matter), the institutionalisation of the Churches of England and Scotland within the State, the rule of law (including the principles of legality and the decision in *Anisminic Ltd. v. Foreign Compensation Commissio[[21]](#footnote-21)n*[[22]](#footnote-22)) are all examples of reflective choices encapsulating fundamental values. The paucity of other fundamental rules also reflects, in some degree, a conscious choice in constitution-making which needs to be respected by people wanting to achieve ‘reform’.

42. **Replacing the foundations of the Constitution** (revolution): here, consistency with the pre-existing constitution is not a criterion at all. In other words, constitutional legitimacy is not a proper criterion for evaluating the work of Constitution-creators. The legitimacy of the Constitution may fall to be assessed by reference to other criteria: consistency with political values, morality, fairness, etc. The special role of Constitution-makers as such does, however, attract its own very particular criteria for evaluation. These concern what Rawls called the ‘strains of commitment’.[[23]](#footnote-23)

43. To be effective, it is important for a constitution to command sufficient public respect and support to be stable, and to be regarded as authoritative by those whose activities are governed by it. Achieving this may demand respect for tradition, if the people or their élites see their State as encapsulating a particular tradition or set of values which is important in legitimating its demands on them. It may involve going back to an older tradition: one of the reasons, perhaps, why so many post-colonial constitutions have been unsuccessful is that they have tried to institutionalise a colonial form of government in societies for which the colonial administration was never more than a superficial veneer over a more traditional social structure.

44. On the other hand, the more revolutionary the revolution, the less inclination there will be to instantiate former traditions of government and power. The difference can be seen between those who overthrew their colonial masters, like the USA, and those who merely grew away from them, like Australia and Canada. The background of constitutional tradition is less significant when a revolution is in contemplation, although maintaining some continuity may even then be a useful course where that bolsters post-revolutionary stability, as may be the case in Northern Ireland should it ever be ceded. In American constitutional thought, there is a growing recognition of the continuing importance of English common law tradition for constitutional thinking in the USA in the 19th century[[24]](#footnote-24).[[25]](#footnote-25)

45. When ‘revolution’ is contemplated, the question then is not, ‘What should this institution do?’ but ‘What institutions should we have, and what should the new institutions do?’ The fairness of the process by which the new rules are settled is likely to be a key factor in overcoming the ‘strains of commitment’, but the substantive fairness, political acceptability to the people (or important people - the political or economic élite), and morality of the final settlement are likely to be equally important.

46. The best chance of successful constitutional ‘revolution’ will be secured where the process of negotiating the terms of the new Constitution is public, open to legitimate influence (so that all - or all who are considered important - have a ‘voice’ in the drafting), and the framers take account of the needs which led to the ‘revolution’, the aspirations of all, and the practical institutional problems which are likely to attend the implementation of the new scheme.

47. South Africa's constitutional ‘revolution’ in the mid-1990s provides a good example - perhaps the best in the world so far - of how this can be achieved, applying the expertise of lawyers, political scientists and politicians to the needs and desires of the people by harnessing modern communications technology - the press, the World Wide Web, E-mail, and telephone - to allow people to understand and participate in the process of negotiation and framing.

48. This requires a particular attitude on the part of politicians and statesmen if a ‘revolution’ process is to be both consultative and successful. Sir Sydney Kentridge QC, *quondam* judge of the Constitutional Court of South Africa, has paid tribute to the spirit in which the leaders of the country approached the task of constitution-making[[26]](#footnote-26).[[27]](#footnote-27) This constructive and reconciliatory attitude was perhaps an essential condition for achieving fairness and establishing the legitimacy of the Constitution in the eyes of the population as a whole, in the light of the history of South Africa. It made possible among other things a constitutional Bill of Rights, drafted in the light of the needs and conditions of South Africa, and motivated by the fact that ‘those who had suffered most under the old regime, and those who were now about to come into power, not least Mr. Nelson Mandela, had a deep and genuine desire to ensure that no future government, even their own, should be able to act against any individual or group as the National Party had acted during its 46 years of power.’[[28]](#footnote-28)

49. It depends on exceptionally able politicians leading at least two of the opposing factions. In South Africa, they were Nelson Mandela in the African National Congress and President F. W. De Klerk who set the tone for the National Party. De Klerk decided in 1993 that the best hope for peaceful transition to democratic government was a U-turn, moving from a confrontational approach to the ANC to an alliance with it[[29]](#footnote-29). In July 1993 he ditched Inkatha, which had previously been used by the Government in an attempt to undermine the ANC and bolster the tribal homeland policy. The result was an opportunity to marginalise both Inkatha and the Afrikaner Resistance Movement (AWB), which was taken up with dramatic effect in the period after July 1993.[[30]](#footnote-30)

50. In the same way, as suggested above, the attitudes of actors are important in ‘reform’ processes. If constitutional ‘reform’ is to be able to bring to bear the special kind of authority conferred by constitutional legitimacy, those responsible for initiating the reform and those who will be bound by it must display a particular attitude which I described earlier as *the principle of constitutionality*.

51. Who should be consulted and how? Is the job of framing the Constitution to be an élite job or a popular job? Is the final draft to seek the legitimacy of expert rationality or of popular endorsement? One model involves specialised consultation with an expert élite. A Speaker's Conference would probably be similarly limited. A Constitutional Commission, on the Australian model, is likely to be perceived by constitutional actors and others as lacking in authority. Despite the wide consultation which the Commission carried out, its Final Report has not been implemented in any particular.

52. On the other hand, a four-stage procedure might be followed, as in South Africa. First, establish the constitutional principles which are to legitimate the constitution. Secondly, draft a provisional or interim Constitution, in a special forum (the Constitutional Assembly) during a wide public consultation. Thirdly, the provisional Constitution would be tested (perhaps by a court) against the constitutional principles agreed at the first stage. Finally, a revised draft Constitution would be enacted by the Legislature in accordance with provisions made under the Interim Constitution, perhaps requiring (as under South Africa's arrangements) a special majority to be adopted, but with a tie-break system including a referendum in the event of the necessary majority not being obtained.

53. For the moment, there are two special difficulties of achieving radical but legitimate change in the UK. The first is the absence of consensus or willingness to reach a negotiated compromise among the main political parties in England. This is even more difficult when one goes on to look at the positions in Scotland, Wales and Northern Ireland, where there are additional ‘strains of commitment’ in the forms of nationalism and historical suspicion of any threat to the Union(s), and still greater difficulties in achieving a negotiated cross-party settlement. The second problem is the absence (as in Australia) of a tradition of non-élite participation in constitutional development in Westminster-style constitutional systems. These are typically top-down rather than bottom-up. As Brian Barry observes parenthetically:

‘A few years ago a senior Indian political scientist remarked to a conference in New Delhi that the `Westminster model' had not served India well; I could not forbear to comment that it had not done too well at Westminister [*sic*] either.’[[31]](#footnote-31)

We may find that it has also made fundamental reform as difficult here as it proved to be in South Africa, although under rather different circumstances.

# IV. The process of constitutional change in the UK

55. The real problem is that there is no recognized, distinctively constitutional process; that makes it impossible to say whether the process has changed, and, if so, how.

56. There have been some procedural strengths in relation to the reforms undertaken in the period 1997 to 2000: devolution; human rights; freedom of information: broad consultation with referenda on devolution in affected regions; prior publication of principles underlying the human rights proposals; and inclusion in a general election manifesto. There could have been wider public consultation on human rights and freedom of information, and it is true to say that (apart from devolution, where there were referendums in Scotland and Wales) beneficiaries could not be said to have felt that they ‘owned’ the legislation or the reform process. But everyone at least had an opportunity to put their points of view, and the Queen in Parliament then made its decision.

57. Other parts of the 1997 reform package were less well trailed and discussed, notably the Chancellor’s decision to make the Bank of England independent of the Treasury with special responsibility for controlling inflation.

58. The weaknesses of the process have generally been most evident in those changes which were triggered by knee-jerk reactions, particularly after 2000. Examples include the bodged attempt by Mr Blair as Prime Minister in 2003 to get rid of the Lord Chancellorship, an attempt which failed, but led to far more wide-ranging changes in executive-parliamentary-judicial relationships and to the structure and recruitment of the judiciary, though without appropriate reflection or consultation, in the Constitutional Reform Act 2005. The results may be beneficial (though it is too early to say), but the process was a mess. A similar lack of a properly reflective and consultative process can be seen in the panic over politicians’ reputations after the parliamentary expenses affair, leading to the mess of the Parliamentary Standards Act 2009, which then had to be significantly revised in the Constitutional Reform and Governance Act 2010.

59. The Constitutional Reform and Governance Act 2010 is in itself another example of messy reform. As originally introduced to Parliament, the Bill contained a rag-bag of reform measures without any coherent, unifying principle. To make matters worse, much of it was lost in the wash-up before Parliament was dissolved for the 2010 general election. Now we have more bits and pieces of reform before Parliament, like the Protection of Freedoms Bill, the European Union Bill, and, undergoing pre-legislative scrutiny, the draft Detention of Terrorist Suspects (Temporary Extension) Bills (if they are indeed constitutional: see question 1).

60. Other important aspects of the constitution which have been changed fundamentally but in a piecemeal way over the last 40 years, and often without people realising the significance of what was happening, are the structure, responsibilities and powers of local government, and the relationship between local and central government, including but not limited to local government financing.

# V. How can the constitutional reform process be improved? What ‘good practice’ principles should be adhered to?

61. First, it would be desirable to identify the core rules and encapsulate them in a single document, which we might even call ‘The Constitution of the UK’. It need not be in a statute, although that would help, and it need not be entrenched, although that too would help to some extent (though it would create as many problems as it would resolve). It could take the form of a Report of this Committee which the leaders of all political parties publicly endorsed, and could be descriptive of current practice, probably at quite a high level of generality, rather than prescriptive or aspirational. It would be important both symbolically and practically as a shared understanding of the central principles and institutions of the state. In particular, it would enable us to say whether a proposal affected the constitution in such a way as to require a special process of scrutiny and approval.

62. Secondly, when such a proposal is advanced it would be useful to require it to be:

* published in the form of a Green Paper, and made the subject of a White Paper before any legislation is introduced to Parliament. For if an idea cannot be effectively defended in a green paper, and its more detailed working out justified in a white paper, the idea is probably not worth pursuing;
* open to public consultation for at least six months (and preferably more), using a variety of modes of communication. Multiple ways of consulting the public should be used. For example, in post-apartheid South Africa there was a Constitutional Convention which consulted through comics, papers, internet, touring public meetings. There might also be a body of constitutional experts and political practitioners who could discuss proposals and seek a consensus; and
* referred to a special parliamentary committee (perhaps a joint committee) for pre-legislative scrutiny in the form of a draft Bill.

63. Thirdly, there should be a clear understanding that new or amending constitutional legislation should take the form of an Act of Parliament. It is entirely inappropriate for constitutional change to take place by way of subordinate legislation.

64. Some further points may be briefly noted.

### 1. Who should initiate constitutional reform?

65. It should not be left to government to initiate reform. Governments tend to be too close to the business of government to see the wider picture. Governments get into government by exploiting the existing constitution effectively, and tend to have a vested interest in resisting change. In addition, constitutional reform initiated by a government is likely to be seen as, or to become, a matter of party-political controversy, reducing the chance of achieving consensus.

66. People outside government may be less conservative and more principled. I see no reason why it should not be open to anyone in a democracy to propose constitutional reform. This Committee might be thought to have a particularly important role in proposing constitutional reform. So far as legislation is needed to achieve a particular reform, Parliament will have the last say. If it can be done without legislation, for example by convention, the relevant actors will have the final say. In any case, it makes sense for there to be wide and long consultation before anything is done.

67. Nevertheless, government must (and inevitably will) make a substantial contribution to the debate about the proposals. Parliament can provide fora for discussing proposals, for example through the inquiries and deliberations of this Committee. Parliament will decide, so far as legislation is needed. Government will have a share in decision-making so far as it can be achieved by convention.

### 2. Should cross-party consensus be required?

68. Seeking consensus is important, because it sets the tone for the debate. Achieving consensus, on the other hand, will often (perhaps usually) be impossible, so should not be seen as essential to the legitimacy of the reform proposal. Constitutions grow through tension and conflict over ideas at least as much as through consensus. Consensus should therefore not be an absolute requirement. However, if there is total lack of consensus between parties it might suggest that the proposal is too partisan to be acceptable.

69. If proposals include a requirement for adoption of constitutional laws by a special majority it would give the Constitution special status as a set of supra-legislative norms. It would therefore make it particularly important to secure agreement on the need for reform between at least the main parties.

70. It is pertinent to note Rodney Brazier's observation in 1991: ‘Major constitutional change in Britain in this century has, so far as possible, usually been preceded by agreement between the Government and the Opposition - or at least by an attempt to reach such agreement.’[[32]](#footnote-32) At present, the agreement between Conservative and Labour to adopt a generally conservative approach to constitutional reform, which Brazier noted in 1991[[33]](#footnote-33),[[34]](#footnote-34) seems to have largely broken down. Some level of agreement is needed, at least on the basics, because to be effective the Constitution will need to be accepted as a basis for decision-making and action by all actors in the political field. Negotiated agreement is inevitably necessary. To use the South African example, the adoption of an entrenched and justiciable Bill of Rights was not universally supported by leaders of the black community, but a judgment both pragmatic and principled (in terms of the strains of commitment test and Scanlon's and Barry's ‘reasonable rejection’ principle) was made that ‘if an entrenched bill of rights would make majority rule more palatable to minorities, it may well have to be accepted by the majority’[[35]](#footnote-35).[[36]](#footnote-36)

### 3. What specific role should a) the House of Lords and b) this Committee play in the consideration of constitutional reform proposals?

71. In relation to this Committee, see paragraph 74, below.

72. In relation to the House of Lords as a whole, as the chamber devoted mainly to deliberation as to policy and scrutiny of legislation it has a proper role in safeguarding the constitution by ensuring, so far as possible, that constitutional changes are not introduced for partisan reasons and that arguments advanced are generally applicable and not motivated by party advantage. For this reason, there should be very few, if any, circumstances in which constitutional change should be effected by way of the procedure laid down in the Parliament Acts 1911 and 1949. (Indeed, one reason for concern about the 1949 Act is that it was itself a significant constitutional amendment passed without the consent of the Lords.)

# VI. Would it be possible or desirable to design an enforceable ‘rulebook’ for the consideration of constitutional reform?

73. It would be possible to produce a rulebook, or book of principles, encapsulating such matters as the procedure to be followed for different kinds of constitutional change and ways to recognize constitutional change, building perhaps on the kinds of considerations set out in section I.A above. It might also provide ways to distinguish between particularly significant constitutional changes requiring extensive consultation and scrutiny and less significant ones for which a lower level of scrutiny and consultation might be appropriate. If it were kept up to date, the rulebook might in time come to be, in effect, a codified constitution for the United Kingdom.

74. So far as the procedures set out in the rulebook involved special intra-parliamentary scrutiny, it is unlikely that they would be judicially enforceable, as courts will not normally examine the inner workings of Parliament. It might, however, be monitored by a committee such as this one, or by a body modelled on the Independent Parliamentary Standards Commission. If the work were done by a committee, it would be able to advise each House as to whether a proposal or Bill is constitutional and, if it is, what procedure would be appropriate. The committee might also be allowed to place a blocking order on legislation of constitutional import which is not proceeding in accordance with the ‘rulebook’. Ultimately each House would have to police its own procedures, as the two Houses already do in deciding whether a Bill is public, private or hybrid.

75. In relation to special requirements operating outside Parliament, such as public consultation or a referendum, there is no reason why the courts could not enforce the rules if they are given statutory force. Even in respect of intra-parliamentary procedure, judges might have to decide whether a constitutional Bill has become a valid Act if a formal requirement, such as a Speaker’s certificate, is missing. This sort of review would be analogous to that carried out in relation to Acts passed using the procedure laid down in the Parliament Acts 1911 and 1949.

Professor David Feldman, QC, FBA

31st March 2011

1. [2002] EWHC 195 (Admin), [2003] QB 151 at [62]-[63]. [↑](#footnote-ref-1)
2. *R v Lord Chancellor, ex parte Witham* [1998] QB 575, DC. [↑](#footnote-ref-2)
3. *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, HL; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, HL. [↑](#footnote-ref-3)
4. *A. v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221, HL. [↑](#footnote-ref-4)
5. *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [[1997] 1 WLR 275, CA. [↑](#footnote-ref-5)
6. *Thoburn*, above, at [66]-[67]. [↑](#footnote-ref-6)
7. *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396, HL; *M.S.S. v Belgium and Greece*, App. No. 30696/09, judgment of 21 January 2011, Eur. Ct. H.R. [G.C.]. [↑](#footnote-ref-7)
8. Acts of the Westminster Parliament all or part of which remain in force are: Isle of Man Constitution Amendment Act 1919; Isle of Man Constitution Act 1961; Isle of Man Constitution Act 1969; Isle of Man Constitution Act 1971; Isle of Man Constitution (Elections to Council) Act 1971; Isle of Man Constitution (Amendment) Act 1975. Acts of the Tynwald currently in force are: Constitution (Amendment) Act 1978; Constitution (Legislative Council) (Amendment) Act 1980; Constitution (Amendment) Act 1981; Constitution (Executive Council) (Amendment) (No. 2) Act 1986; Constitution Act 1990. [↑](#footnote-ref-8)
9. Acts of the Westminster Parliament currently wholly or partly in force are: Northern Ireland Constitution Act 1973; and Northern Ireland Constitution (Amendment) Act 1973. [↑](#footnote-ref-9)
10. See *United Mizrahi Bank Ltd.* *v Migdal Cooperative Village and others* [1995] Isr LR 1, SC of Israel sitting as the Court of Appeal. [↑](#footnote-ref-10)
11. In a footnote, the Committee added: Similar definitions appear in O. Hood Phillips, *Constitutional and Administrative Law,* 6th ed. (Sweet & Maxwell, 1978), p. 5; Anthony King, *Does the United Kingdom still have a constitution?* (Sweet & Maxwell, 2001), p. 1. In offering his own definition, Professor King adds: ‘That definition is far from perfect… but it will do for our purposes’. We adopt a similar approach.’ House of Lords Constitution Committee, First Report of 2001-02, *Reviewing the Constitution: Terms of Reference and Method of Working*, HL Paper 11, 19th July 2001, para. 20 and note 11. [↑](#footnote-ref-11)
12. For Kelsen's definition of a revolution, see Hans Kelsen, *The Pure Theory of Law* (Berkeley and Los Angeles: University of California Press, 1967, 1970), p. 200. He was more concerned with the source of legal validity of norms than in changes in the fundamental values or arrangements which legitimise those norms. [↑](#footnote-ref-12)
13. [↑](#footnote-ref-13)
14. Brian Barry, *Justice as Impartiality* (Oxford: Clarendon Press, 1995), pp. 67-72, 80-86, 99-111, discussing and drawing out some constitutional implications of the formulation of a criterion for moral wrongness by T. M. Scanlon, ‘Contractualism and Utilitarianism’, in Amartya Sen and Bernard Williams (eds.), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press), pp. 103-128 at p. 110: ‘An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement.’ [↑](#footnote-ref-14)
15. [↑](#footnote-ref-15)
16. Peter Morton, ‘Conventions of the British Constitution’ (1991-92) 15(2) *Holdsworth Law Review* 114-180. [↑](#footnote-ref-16)
17. Rodney Barker, *Political Legitimacy and the State* (Oxford: Clarendon Press, 1990) makes the point that it is worthwhile to distinguish between political legitimacy and other forms of legitimacy, not least because a study of political legitimacy helps to answer some fundamental questions in political theory and political science about the nature of the sense of obligation to obey state commands. As explained below, I have some reservations about the usefulness of Barker's approach outside political science. In particular, I have distinguished in the past between political and constitutional legitimacy: ‘The Left, Judicial Review and Theories of the Constitution’, in William Watts Miller (ed.), *Socialism and the Law*, 49 *Archiv für Rechts- und Sozialphilosophie* (Stuttgart: Franz Steiner Verlag, 1992) 71-84, especially at p. 74. For the purpose of discussing the legitimacy of constitutional change, other factors may be relevant. [↑](#footnote-ref-17)
18. Barker, *Political Legitimacy* at pp. 4-6, 112-124. [↑](#footnote-ref-18)
19. Ibid., pp. 6-18, 195-196. [↑](#footnote-ref-19)
20. [↑](#footnote-ref-20)
21. [↑](#footnote-ref-21)
22. [1969] 2 AC 147, HL. [↑](#footnote-ref-22)
23. John Rawls, *A Theory of Justice* (New York: Oxford University Press, 1972), § 29. [↑](#footnote-ref-23)
24. [↑](#footnote-ref-24)
25. See Paul W. Kahn, *Legitimacy and History* (New Haven and London: Yale University Press, 1992), esp. at pp. 73-77 discussing Thomas Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* (1868). [↑](#footnote-ref-25)
26. [↑](#footnote-ref-26)
27. Sydney Kentridge, ‘Bill of Rights - the South African Experience’ (1996) 112 *LQR* 237-261 at 261: ‘The present constitution is infused with a generosity of spirit which is in part no doubt derived from the characters of the remarkable political leaders who negotiated it.’ [↑](#footnote-ref-27)
28. Kentridge, *op. cit.* at p. 242. [↑](#footnote-ref-28)
29. [↑](#footnote-ref-29)
30. See Nico Steytler, ‘Constitution-Making: In Search of a Democratic South Africa’, in Mervyn Bennun and Malyn D. D. Newitt (eds.), *Negotiating Justice: A New Constitution for South Africa* (Exeter: University of Exeter Press, 1995), pp. 62-80, and Newitt and Bennun, ‘Conclusion’, ibid., pp. 177-195. [↑](#footnote-ref-30)
31. Barry, *Justice as Impartiality*, 106. [↑](#footnote-ref-31)
32. Rodney Brazier, *Constitutional Reform: Reshaping the British Political System* (Oxford: Clarendon Press, 1991), p. 2. [↑](#footnote-ref-32)
33. [↑](#footnote-ref-33)
34. Ibid., p. 13. [↑](#footnote-ref-34)
35. [↑](#footnote-ref-35)
36. Sydney Kentridge, ‘Civil Rights in South Africa: the Prospect for the Future’ 47 *Maryland Law Rev.* 271 (1987), quoted in Kentridge, *op. cit.*, n. 15 above, at p. 241. [↑](#footnote-ref-36)