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LORD RENTON LECTURE

WRITING A CONSTITUTION

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INTRODUCTION

1. Thank you for that kind introduction, and for the privilege of delivering this annual lecture. Its subject-matter has at least some connection with Lord Renton, who – in addition to his seminal work on statutory drafting – served on the delegation which helped prepare the European Convention on Human Rights and, as a member of the Royal Commission on the Constitution – the Kilbrandon Commission – was a vigorous opponent of devolution.

2. Lawyers tend to be tidy-minded people. So many of us are instinctively attracted by the idea that the United Kingdom should follow the example of nearly every other country in the world and produce a single document headed "Constitution". We also try to be methodical. So I shall first try to explain what is wrong with the constitutional arrangements we have, then explore whether change would be popular and feasible, before reviewing the benefits of writing a constitution, and which of the many ways of doing it – some more radical than others – we might select.

SO WHAT IS WRONG WITH THE CONSTITUTION?

3. Our existing constitution is not short of critics. They are not limited to those who contend for such major changes as a shift from monarchy to republic, the creation of a federal State or the break-up of the United Kingdom. Some have focussed on its ***distracting flummery***, the confusion of its dignified and efficient parts and the masking from public view of the realities of power. The journalist Gavin Esler wrote recently:

> "The genius of the British unwritten (more accurately, uncodified) constitution is deliberate obscurantism. Constitutional smoke, mirrors and glorious

verbiage are our patriotic hocus pocus, a con trick that suits those in power, who make up rules to suit themselves based on dubious 'precedents'."[1]

4. For others, mindful no doubt of the massive development in judicial review of administrative action since Lord Hailsham popularised the now outdated phrase "*elective dictatorship*" in the mid-1970s, the constitutional problem is ***an over-active judiciary***. The last Queen's Speech promised to *"restore the balance of power between the legislature and the courts"* – a remark to which the ironic oral response of the late and much-lamented Lord Judge, Lord Chief Justice turned parliamentarian extraordinaire, is well worth a read.[2] As Lord Judge reminded the House, if Parliament does not like what the courts have to say it can always correct them – as indeed it did only this year in the Northern Ireland Troubles (Legacy and Reconciliation) Act in relation to internment not authorised personally by the Secretary of State.[3]

5. Complaints of dysfunctionality, suggested Lord Judge, are better directed to ***the relationship between the executive and Parliament***. He did not have in mind the Brexit Parliament of 2017-2019, when government and MPs were frequently at loggerheads, but the current, more familiar scenario: the exercise of rigid control by the governing party over proceedings in the House of Commons, and the consequent abdication by the Commons of responsibility for legislative scrutiny on to a House of Lords which was described by Ian Dunt in his recent book as "*a bizarre half-feudal remnant of historical progress*" which is nonetheless "*one of the only aspects of our constitutional arrangements that actually works*".[4]

6. That control is a function partly of the government's influence over Commons business, and partly of the immense patronage that is available to Prime Ministers in order to keep their troops in line. There is not only the grant of ministerial office (the core payroll vote), but the offer of posts as parliamentary private secretary, Prime Minister's trade envoy, Prime Minister's special envoy, even Prime Minister's deputy special envoy.[5] Each may come with a heightened expectation of loyalty. Patronage

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1 Gavin Esler, 'Here's the key question about Britain in 2023: why do we put up with this rubbish?', The Guardian, 25 October 2023.

2 Hansard, HL Deb, 12 May 2022, col 129.

3 Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, ss 46 and 47, reversing the effect of *R v Adams* [2020] UKSC 19 and *In the Matter of an Application by Gerard Adams for Judicial Review* [2023] NIKB 53 (Colton J).

4 Ian Dunt, How Westminster Works … and Why it Doesn't, Weidenfeld & Nicholson, 2023, p. 315.

5 As of March 2023 there were 35 parliamentary Trade Envoys: Prime Minister's Trade Envoy programme appointments, gov.uk, 28 March 2023.

can also be exercised by the promise of a peerage or by use of the honours system: it was reported recently that no fewer than 96 MPs have been given knighthoods or damehoods since 2010, two thirds of them from the governing party.[6] Though the Select Committee system has opened up an alternative career route since its introduction in 1979, especially since chairs became elected in 2010, the main incentives for ambitious MPs are still to be loyal to their party rather than to engage in critical scrutiny or independent thought.

7. Of course, executive dominance of the House of Commons is hardly novel: indeed some of the constitutional reforms introduced since 1997 may have *reduced* it.[7] A compliant House of Commons may be tolerable when self-restraint is the order of the day: our constitution has, after all, always depended more on balances than on checks. But it is dangerous when it allows a government to abuse its popular mandate to bypass those balances, founded as many of them are on nothing more than tradition or convention. I take a few illustrative examples.

8. The excessive use of ***skeleton Bills and overbroad delegated powers*** has been a source of contention for over 100 years.[8] But conflict was sparked in November 2021 when two of our most technical House of Lords Committees, the Secondary Legislation Scrutiny Committee and the Delegated Powers and Regulatory Reform Committee, each chaired by a Conservative peer, published reports whose content is reflected in their alarming titles: "*Government by Diktat*" and "*Democracy Denied*". Any hope that the abuses identified in those reports were no more than a temporary expedient to get through the crises of Brexit and Covid must reckon with section 14 of the Retained EU Law Act 2023, which allows vast swathes of retained EU law, the functional equivalent of statute and the product of painstaking debate in the European Parliament and Council, to be revoked and replaced, until June 2026, "*by such alternative provision as the relevant national authority considers appropriate*", even if the replacement provision pursues a different set of objectives. A delegated power may have been justified, but the scope of this one is breathtaking.

9. A second example of liberties taken is a ***reckless attitude towards international obligations***, ill-befitting a country that has built its reputation since the Second World

[6] W. Hazell, "Knighthoods for MPs rise eightfold under Conservatives", The Telegraph, 25 November 2023.

[7] V. Bogdanor, The New British Constitution, Hart 2009, pp. 285-290.

[8] The "*new fashion of legislation by way of skeleton"* was deprecated in the House of Commons at the end of the 19th century: Augustine Birrell KC MP, Hansard 1 August 1899, col 1072.

War on its adherence to the rules-based international order. You will recall the admitted "*limited and specific*" breach of an agreement with the EU, on which the ink was scarcely dry, in the Internal Market Bill 2020, and the equivalent parts of the Northern Ireland Protocol Bill. It is of little comfort that these clauses appear to have been intended as negotiating devices, and that they were not in the end passed into law.

10. My third example is the ***assertion of government influence over independent regulators***, going beyond the legitimate interest in political accountability. The new Office for Environmental Protection was placed from its inception in the Environment Act 2021 under an obligation to have regard to guidance from the Secretary of State on its enforcement policy and functions.[9] This is striking indeed, considering that the OEP is the body whose task it is to take government to court for breaches of environmental law. Worse still is the requirement on the Electoral Commission – the umpire of the democratic game – to have regard to the "*strategic and policy priorities of Her Majesty's government relating to elections, referendums and other matters in respect of which the Commission have functions*".[10]

11. Then fourthly, there is the ***spread of ouster clauses*** – the most constitutionally significant of statutory devices because their whole purpose is to immunise the executive from review by the courts. The model pioneered in the Judicial Review and Courts Act 2022, in the obscure context of Cart judicial reviews, has survived judicial scrutiny:[11] there are further examples in the Illegal Migration Act 2023 and we will have to see whether, as suggested by Joshua Rozenberg,[12] this will be the Government's chosen method of achieving its objective of "*enabl[ing] [sic] parliament to confirm that with our new treaty, Rwanda is safe*".[13]

12. Even within government, the ***decline of Cabinet responsibility*** means that decisions of constitutional importance can be made by remarkably small numbers of people. As the UK Constitution Monitoring Group pointed out in its fifth report last month:

> "… the introduction or otherwise of substantial and questionable alterations to the UK constitution can turn on political fortunes, involving the ascent and

9 Environment Act 2021, section 25.
10 Elections Act 2022, section 16.
11 *R (LA (Albania)) v Upper Tribunal (Immigration and Asylum Chamber)* [2023] EWCA Civ 1337.
12 J. Rozenberg, Will Rishi's Law Work?, A Lawyer Writes, 16 November 2023.
13 Prime Minister's statement, 15 November 2023.

fall of prime ministers and the people they appoint to particular Cabinet posts." [14]

The Group cited Dominic Raab's controversial Bill of Rights Bill, a personal project that was dropped by his successor as Lord Chancellor, Alex Chalk. The decision to seek prorogation of Parliament in August 2019, echoing Charles II's treatment of his Exclusion Parliaments, was another example of a constitutionally controversial decision made by a very small number of people.

13. Last but not least in this quick tour of constitutional ailments, there is the widespread and corrosive perception that ***politicians are in it for themselves***. The expenses scandal of 2009 and Partygate in 2021 caused fury among a population that had recently suffered through, respectively, the financial crisis and Covid. Where parliamentary conduct is concerned, safeguards have in some respects improved. The expenses problem has been managed through the creation of the Independent Parliamentary Standards Authority. Following the Owen Paterson affair, a new Code of Conduct for MPs has strengthened the prohibition on giving paid parliamentary advice. On Partygate, the Privileges Committee of the House of Commons provided a textbook example of the political constitution in action. A Prime Minister who fell short of minimum ethical standards was disposed of more quickly and efficiently than would have been the case in many more law-bound constitutions. But there remain serious loopholes regarding party funding, and the registration and disclosure that should be associated with lobbying. The same is true of ministerial standards – a theme to which I will return. Even the Prime Minister, in his party conference speech last month, tapped into this mood when he said that "*there is an undeniable sense that politics just doesn't work the way it should*" and "*a feeling that Westminster is a broken system*".

14. The political crises we have lived through over the past five or more years are in part a consequence of ***the 2016 referendum*** in which the people voted for a constitutional change to which most Members of Parliament were opposed. I hope we will learn a lesson from the practice of many other countries, endorsed by our own Independent Commission on Referendums in 2018: that proposed constitutional changes should in future be put to the people only if they have the endorsement of Parliament.[15] But

[14] The Constitution in Review: Fifth Report form the UK Constitution Monitoring Group, October 2023, pp. 18-19.

[15] Report of the Independent Commission on Referendums, July 2018, 2.47.

while Brexit strained our constitutional arrangements – and would likely have done so even if they had been neatly codified – it did not destroy them. A decisive general election eventually broke the stalemate, and the central principles of our constitution, together with its chronic defects, survived to fight another day.

POPULAR SUPPORT FOR CHANGE

15. The problems that I have listed are common preoccupations of think tanks and frustrated parliamentarians. They are, accordingly, often dismissed as "Westminster bubble" issues. But the concerns expressed in SW1 seem to be widely shared within the general population, judging from a three-year research project examining public attitudes to democracy in the UK, based on a Citizens' Assembly and on surveys which questioned 4000 people in the summers of 2021 and 2022. UCL's Constitution Unit published its final report last Friday.[16] It showed the health of the UK's democracy to be a high-level preoccupation, not as prominent as the cost of living or the NHS but on a par with issues such as housing, crime and immigration. Some of its specific findings are highly pertinent.

16. Notwithstanding some disenchantment with Parliament, support for ***Parliament's role as a meaningful check on executive power*** was extremely strong. 79% of respondents in 2022 believed that Parliament should always need to consider and approve changes in the law, as against only 4% who took the contrary view. Smaller but still overwhelming majorities supported a requirement of parliamentary approval even for changes to the law on urgent or minor matters. It is almost as though those who campaign for stronger parliamentary checks on executive power, from the Hansard Society to the International Agreements Committee of the House of Lords, have their fingers on the popular pulse. There was support also for reforms that would loosen government's control over the Commons order paper: asked whether Government or Parliament should have the main responsibility for deciding what Parliament discusses and when it does so, survey respondents backed Parliament by 36% to 20%.

17. The surveys revealed a striking wish to ***tighten up the rules on ethics in government***. In 2022 78% believed that healthy democracy requires politicians always to act within

[16] A. Renwick, B. Lauderdale and M. Russell, The Future of Democracy in the UK, UCL Constitution Unit, November 2023.

the rules, as against only 6% who believed that "*getting things done*" sometimes requires the rules to be broken. There was massive support for the independent (as opposed to merely parliamentary) regulation of ministerial conduct.

18. What about the bigger and more eye-catching constitutional changes – to our voting system, to the composition of the Westminster Parliament and to the role of the judges? Here, public opinion is more cautious. A ***proportional voting system*** for elections to the House of Commons was favoured by less than half of respondents in 2022, with 52% expressing either neutrality, ignorance or preference for the existing first past the post system. As to the ***House of Lords***, there was decisive support for a reduction in numbers and for an independent appointments commission, but no overall preference for elected over appointed members.

19. And despite the trust in which judges are generally held, there was only muted enthusiasm for a ***judicial override***, by which Acts of Parliament can be declared unconstitutional by judges. 30% of respondents thought the courts should be able to declare new laws null and void on the basis that people's legal rights have been violated, as against 11% who thought the courts had no role. Both were outnumbered by the 39% who preferred the courts to declare incompatibility, followed by Parliament looking at the issue again: a modest vote of confidence in the balance struck by the Human Rights Act between rights protection and the sovereignty of Parliament.

20. Towards the end of the survey, respondents were asked how much better or worse democracy in the UK would work if the country had a ***written constitution***. No further details were given. 28% thought our democracy would work a lot or a bit better. 8% thought it would work a lot or a bit worse. Both figures were comfortably outranked by the 29% who thought it would work no better or worse, and the 34% who didn't know.

21. ***Other polls*** have revealed a higher degree of public support for a written constitution, no doubt reflecting how the question is put. 65% of respondents to a survey in 2018 agreed strongly or slightly with the proposition that Britain needs a written constitution providing clear legal rules within which government ministers and civil servants are forced to operate. Only 7% disagreed.[17] Four political parties put a written constitution in their 2019 election manifesto: the Liberal Democrats, Greens,

[17] YouGov/Unlock Democracy Survey (fieldwork: November 2018).

Brexit Party and Alliance Party, to which one might add the SNP and Plaid Cymru, which are committed to written constitutions for an independent Scotland and Wales.

FEASIBILITY OF A WRITTEN CONSTITUTION

22. There could be no obstacle of principle to the writing of a Constitution for the United Kingdom. It is not necessary to resort for inspiration to the US Constitution, with its mighty federal judges and tendency to institutional paralysis, or indeed to European models – interesting and relevant though some of them are. As Elliot Bulmer reminds us in his book Westminster and the World, this country is not only the Mother of Parliaments but the Midwife of Constitutions.[18] The Government of Ireland Act 1920 functioned as a written constitution for Northern Ireland for over 50 years. Our Westminster model of parliamentary democracy has been given constitutional form in nearly all states that were once British colonies, disproving the idea that its subtleties are too complex to be codified. We even have in this country state-of-the-art judicial expertise in interpreting such constitutions, through the Judicial Committee of the Privy Council.[19]

23. This is not to say that the retention of the Westminster model would inhibit us from different ways of doing things: on the contrary, it provides templates for this too. As Bulmer says:

> "If we propose adopting a system of proportional representation for the House of Commons, we can look to Ireland, Malta, Fiji and New Zealand. For federalism, we can look to Australia, Canada, India and Malaysia for various models and examples. For a reformed second chamber, we can look to direct popular election in Australia, indirect election in India, Pakistan and South Africa, and nomination in Canada, Jamaica and Barbados. For an elected Head of State, we can look to Ireland, India or Trinidad & Tobago. For limitations on Crown prerogative and the transference of parliamentary conventions into clear constitutional rules, we can look to the Commonwealth Caribbean states or South Pacific countries like the Solomon Islands. For transformative socio-economic provisions we can look to the relatively weak 'Directive Principles' of India, Ireland and Malta or the stronger socio-economic rights found in the Constitution of Fiji. There are many permutations and possibilities. Decisions that might otherwise have to be made in a vacuum can be made, without

[18] W. Elliot Bulmer, Westminster and the World, Bristol University Press 2020, p3.

[19] In 2022-23 the Privy Council delivered no fewer than 60 judgments (not of course limited to constitutional issues) as against 38 from the Supreme Court: The Supreme Court and Judicial Committee of the Privy Council, Annual Report and Accounts 2022-2023, p.4.

reinventing the wheel, by drawing upon a stock of established constitutional designs."[20]

24. Indeed we were on this island historical pioneers of the written constitution – starting with the Levellers and their remarkable Agreements of the People.[21] Oliver Cromwell's mid-17th century experiments – the Instrument of Government and the Humble Petition and Advice[22] - took effect, though they did not prove durable. The Bill of Rights 1689 was the foundation for parliamentary sovereignty rather than a balanced constitution, but the 1707 Act of Union had many constitutional features.[23] The 18th century vogue for constitutional documents may not have eventuated in a constitutional experiment to rival those of Catherine the Great or Napoleon – Britain's economic prosperity, military success and economic stability saw to that – but the influence of Blackstone and Thomas Paine is immense, and I could not speak on this subject in Bentham House without referring to Jeremy Bentham's vast, unfinished Constitutional Code, which he worked on between 1822 and his death in 1832 and which is addressed to "*all nations and all governments professing liberal opinions*" with the warning that its adoption by any of them would "*to a very large extent, involve the abolition of the existing institutions*".[24] In recent times we have seen the drafting of numerous constitutions, some more radical than others, including by the Institute for Public Policy Research in 1991,[25] and, in 2015, three "*illustrative blueprints*" put out to consultation by the House of Commons Political and Constitutional Reform Committee.[26] Contributions from United Kingdom scholars and practitioners has been influential on both the Commonwealth Charter of 2013 and the draft European Law Institute report on Fundamental Constitutional Principles.

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20 *Ibid.*, p90.

21 See R. Foxley, "The Levellers and the English Constitution in the English Civil War" in F. Foronda and J-P Genet, Des Chartes aux Constitutions, generally, P. Cane and H. Kumarasingham, eds., The Cambridge Constitutional History of the United Kingdom, Cambridge University Press, 2023.

22 The Instrument of Government (1653) and Humble Petition and Advice (1657) were preceded by the Heads of Proposals (1647) and Agreement of the People (1647-49).

23 B.C. Jones, "A (Brief) Case against Constitutional Supremacy" in R. Johnson and Y. Yi Zhu, eds., Sceptical Perspectives on the Changing Constitution of the United Kingdom, Hart 2023, p.21.

24 John Bowring, The Works of Jeremy Bentham, 1843. Vol. 9.

25 Institute for Public Policy Research (IPPR), The Constitution of the United Kingdom, 1991.

26 The House of Commons Political and Constitutional Reform Committee (HCPCRC), *A New Magna Carta?* (HC 2014-15, 463).

BENEFITS OF A WRITTEN CONSTITUTION

25. Modern proponents of a written constitution claim for it a variety of benefits. Let me list some of the main ones.

(1) Public understanding

26. First, there is ***public understanding.*** It is certainly true that some constitutions are the source of considerable national pride (the United States and Germany come to mind); an enviable state of affairs for any democrat. Particularly important is that people should be helped to understand how they can themselves participate in our constitutional arrangements, whether by voting in elections, petitioning Parliament or enjoying the right of access to the courts.

27. Her late Majesty was no doubt correct in the comment attributed to her that our constitution "*has always been puzzling, and always will be*".[27] But it should not be assumed that the lack of a written constitution has condemned our citizens to a disgraceful state of ignorance. IPSOS-MORI surveys conducted in 2015 revealed that only 65% of Australians and 60% of Belgians had even heard of their own constitutions,[28] and research indicates that where civic knowledge is concerned,

> "English pupils often sit in the middle of the pack along with German, Swiss and Danish pupils.[29]

That is not to downplay the importance of public understanding, but rather to urge realism about the role of a written constitution in promoting it.

(2) Clarity for constitutional actors

28. A second reason for a written constitution is to provide ***clarity for constitutional actors***.[30] In Parliament as in all public discourse, the air is thick with assertions that

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[27] Quoted by Sir Jeffrey Jowell KC KCMG in "Does the UK's unwritten constitution safeguard our democracy?", Rothschild/Foster Human Rights Lecture, 2 November 2022.

[28] Magna Carta Trust, International Poll (2015).

[29] B.C. Jones, In defence of the UK's unwritten constitution, IfG/Bennett Institute guest paper, 2023, p. 11 and fnn 45-48.

[30] Vernon Bogdanor and others have written of "*the clarity and accessibility that only a constitution could produce*": V. Bogdanor, T. Khaitan and S. Vogenauer, Should Britain Have a Written Constitution?, The Political Quarterly, Vol. 78, No. 4, 499-517 at 500.

this or that is "*unconstitutional*" or "*contrary to the rule of law*". But in the absence of any definitive statement of what these concepts mean, their meaning, and their validity, are hard to understand. Take the rule of law: its elements have been carefully defined by the Venice Commission of the Council of Europe and indeed in the EU's conditionality regulation, whose definition, approved by a rare sitting of the Court of Justice as a full court,[31] is the accepted yardstick for assessing whether Member States have strayed sufficiently from the rule of law to jeopardise their entitlement to EU funding. But here in the birthplace of the phrase, notwithstanding its inclusion in the Constitutional Reform Act 2005, even legally-qualified parliamentarians can only debate whether Sir John Laws was right to criticise Lord Bingham's generous eight-part formulation[32] as an over-broad "*suggested list of the virtues of a decent nation State*".[33] Without defining the terms of the debate, it is hard not to sympathise with the Harvard philosopher Judith Shklar, who described the rule of law as "*ruling-class chatter" and "just another of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians*".[34]

29. An authoritative reference point for constitutional principle would also be of value to the courts and to any other body that might have to opine on constitutional matters. In the ***Constitution Committee of the House of Lords***, of whose work I can of course speak only in an individual capacity, we try to assess and pronounce upon the constitutional implications of Bills. That task might be easier, and our opinions more authoritative, if were applying not simply our own past customs but an agreed code of constitutional standards – rather as the Joint Committee of Human Rights is able to measure Bills against the European Convention of Human Rights.

30. Jonathan Sumption proposed last year that the Privy Council should have:

> "a constitutional committee, chaired by a senior retired judge but otherwise consisting of elder statesmen, which could step in with authoritative constitutional advice independently of the government wherever it was needed".[35]

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[31] Joined Cases C-156/21 *Hungary v Parliament and Council* and C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:97, rejecting applications for the annulment of Regulation (EU, Euratom) 2020/2092.

[32] T. Bingham, The Rule of Law (Allen Lane, 2010), p.67.

[33] J. Laws, The Constitutional Balance (Hart, 2021), p.16.

[34] J. Shklar, "Political Theory and the Rule of Law" in A. Hutchinson and P. Monahan eds., The Rule of Law: Ideal or Ideology (Carswell, 1987), quoted in T. Bingham, *op. cit.*, p. 5.

[35] J. Sumption, 'Our system of conventions won out this time. But if Boris Johnson had been mad as well as bad, the whole edifice could have fallen', Sunday Times, 10 July 2022.

If such a body were to be accepted at all, it is hard to see how its advice could be authoritative without a written constitution – or at least, a democratically recognised version of the Code of Constitutional Standards that was helpfully prepared for the Constitution Committee, based on its own reports, on the initiative of Dawn Oliver and Robert Hazell.[36]

31. That said, the capacity of a written constitution to bring clarity should not be exaggerated. Since constitutions classically require more than the support of a simple majority of the legislature or of the electorate to be adopted, it is common for controversial and finely-balanced issues to be left unresolved. One will look in vain at other constitutions for detail on which decisions should be subject to a referendum, or the criterion by which a Prime Minister should be invited to form a government. Unwritten or uncodified conventions play an important part not just in our own constitutional arrangements but across the world.

(3) Public participation

32. A third reason for pursuing a written constitution is about the journey rather than the destination. The ***public participation*** inherent in the process of formulating and then revising a written constitution as a public good in itself: a means of creating not only public awareness of how we are governed, but of according meaningful agency to the citizen body in deciding the terms of the social contract. As Professor Jeff King of UCL has put it:

> "the best case for a written constitution is not that it will bring clarity or improve the protection of rights, but rather that the people should write the fundamental law that governs them."[37]

Bulmer, similarly, has seen such a constitution as "*an instrument for healing, reunification and trust-building*" and "*an important anchor for national identity*".[38]

33. Whatever the attractions of such an exercise in participation, it is not easy to think of an appropriate moment to conduct one. Few years in our recent history were calmer than 2007. But it was in that year that Vernon Bogdanor, a strong proponent of a

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[36] See most recently J.S. Caird, R. Hazell and D. Oliver, The Constitutional Standards of the House of Lords Select Committee on the Constitution, The Constitution Unit, 3rd edn., 2017.

[37] J. King, "The Democratic Case for a Written Constitution", (2019) 72 Current Legal Problems, pp 1–36.

[38] W Elliot Bulmer, Westminster and the World, p. 2.

written constitution, wrote that the time was not right because the reforms already made "*do not seem to amount to a final constitutional settlement*" and because "*the next stage of constitutional reform is likely to prove both more complex and also more fundamental.*"[39] Still more courage would be required to start now, as we face new uncertainties about the status of Scotland and Northern Ireland, together with the need to find a post-Brexit direction and repair the institutions that were damaged in the fight.

(4) Vehicle for reform

34. A fourth justification sometimes heard for a written constitution is that it can be a ***vehicle for reform*.** This is certainly possible, particularly when constitutions are written at a turning point in history. Indeed there are some potential changes so major – the reconstitution of the United Kingdom as a federal entity, the abolition of the monarchy – that it is hard to contemplate them being made by any other means. Few of those who have drafted specimen UK constitutions in recent years have resisted the temptation to incorporate some of their favoured reforms, whether to the monarchy, the House of Lords or the electoral system.

35. But once again, it is important not to overstate the case. As demonstrated over the past 25 years, even major constitutional changes – devolution, Lords reform, the creation of a Supreme Court, Brexit – can be effected by simple Act of Parliament, backed where appropriate by a referendum. Indeed some important constitutional changes – the establishment of an elected Backbench Business Committee as recommended by the Wright Committee of 2009, and even the short-lived experiment of English Votes for English Laws – required nothing more than a change to the standing orders of the House of Commons.

36. Furthermore, while a written constitution may during the process of its adoption be a vehicle for change, it is liable, once adopted, to have the reverse effect and turn into a roadblock. Whatever one's attitude to constitutional interpretation, there is truth in Justice Scalia's observation that:

> "The very objective of a basic law … is to place certain matters beyond risk of change, except through the extraordinary democratic majorities that

[39] V. Bogdanor, "Should Britain Have a Written Constitution?" The Political Quarterly vol. 78 no. 4, 499-517, p. 505.

> constitutional amendment requires. … The whole *purpose* of a constitution – old or new – is to impede change or, pejoratively put, 'obstruct modernity'."[40]

Though I acknowledge that some constitutions are more often changed than others: the lengthy and detailed Indian Constitution has been amended 103 times in 69 years, but the US Constitution only eight times in the past 100 years.

(5) Judicial constitution

37. A fifth and final justification is the replacement of parliamentary sovereignty as the mainspring of our constitution by a new principle – the sovereignty or supremacy of the constitutional text. For some, this is tantamount to a ***judicial constitution***, in which the constitutionality of Acts of Parliament – including their compatibility with the fundamental rights of the individual – would be determined by judges.

38. This would be the ultimate antidote to Professor John Griffiths' characterisation of the UK's constitution as "*no more and no less than what happens*".[41] But it is neither straightforward nor obviously necessary, as we shall come to later on.

INTERIM SUMMARY

39. To summarise thus far, our constitution is sick (though its condition is chronic rather than acute); a written constitution is a realistic proposition, for which there are many precedents within the Westminster family; the public seems at least mildly favourable to the idea; and there are a number of sound reasons for it, even though some of them are frequently over-stated.

40. What form could a written constitution take, and how should it be arrived at? In the time I have left, I am going to sketch out three options, which I shall describe as restatement, renewal and revolution. They are not mutually exclusive: you could think of them as the three courses on a menu, from which you can choose at will. For myself, to offer a spoiler, I am strongly tempted by the starter and the main course – but the pudding might be a bit much.

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[40] A. Scalia, "Modernity and the Constitution" in E. Smith, ed., Constitutional Justice under Old Constitutions, Kluwer, 1995 (original emphasis).

[41] J. Griffiths, The Political Constitution (1979) 42(1) MLR 1, 19.

OPTION 1: RESTATEMENT

41. By restatement, I mean an authoritative written account of our existing constitutional arrangements, neither changing their substance nor constituting a new source of authority to challenge those that already exist. The aim would not be to *entrench*, *amend* or even *codify* our existing constitutional laws, rules and conventions, but simply to describe them – noting in the explanatory text of the scholarly version when the existence or nature of a rule or convention is disputed.

42. The term is inspired by the American Law Institute's Restatements of the Law: distillations of case law that frequently came to my rescue as a young lawyer making his way at a law firm in Washington DC. American Restatements are not intended to be binding, and have never been legislated for. They have however lived up to the aspirations for them of Benjamin Cardozo who in 1923, the year in which the American Law Institute was founded, hoped that they would be:

> "something less than a code and more than a treatise … invested with unique authority, not to command but to persuade".[42]

Restatements are said to have been cited in over 150,000 reported cases in the United States.[43] Their inspiration is visible here in such classic works as Dicey, Morris and Collins on the Conflict of Laws, [44] and Lord Burrows' Restatement of the English Law of Contract.[45]

43. Restatement would be much simpler to implement than renewal or revolution. In any democracy worth the name, constitutional *change* must involve an energetic process of consultation, discussion, public participation and popular approval. But so long as the objective is merely to *capture* our constitutional arrangements rather than to *reform* them, the mechanics of restatement can be left to the experts, at least until the point where some public and symbolic recognition of their work is required. So an advisory board of the most senior retired judges, civil servants and Ministers from

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[42] Cardozo, Benjamin N., The Growth of the Law (Yale University Press, 1924), p. 9.

[43] Restatements of the Law, Wikipedia (no citation given).

[44] Lord Collins of Mapesbury, Dicey, Morris and Collins on the Conflict of Laws (Sweet & Maxwell, 16th edn. 2022).

[45] A. Burrows, A Restatement of the English Law of Contract (Oxford, 2nd edn. 2020); see also A. Burrows, A Restatement of the English Law of Unjust Enrichment (Oxford, 2013). Restatement was advanced by the former Lord Chief Justice Lord Thomas of Cwmgiedd, in his third Hamlyn Lecture on 1 November 2023, as a means for England to maintain its position as the world's premier provider of transnational commercial law.

across the Union could be assisted by a high-calibre secretariat, led by one or more academics skilled in constitutional law and assisted by parliamentary counsel and where necessary by specialist panels and expert evidence.

44. Restatement would not have to begin with a blank slate. A useful start would be the Cabinet Manual, based in part on a New Zealand model. This was published in 2011 as "*a guide to laws, conventions and rules on the operation of government*", and endorsed by the Cabinet as "*authoritative guide for Ministers and officials*". But the Cabinet Manual is a product of the executive and belongs to "*the Prime Minister and Cabinet of the day*".[46] It has practically no public recognition; even in government circles, according to the Cabinet Secretary, Simon Case, it "*comes up less in conversation than the other codes*", the Ministerial Code and the Civil Service Code.[47] It is badly out of date (though an update is promised). Furthermore, readable and useful though the Cabinet Manual is, it has little or nothing to say on primary constitutional issues such as citizenship, individual rights and responsibilities; the composition of the legislature; the independence of the judiciary and the electoral process; and the meaning of such foundational principles of our constitution as parliamentary sovereignty and the rule of law.

45. I suggest that the end product of a restatement process could take the form of two documents, which for maximum authority would be endorsed by both Houses or at least by the two relevant Constitution Committees – the Public Administration and Constitutional Affairs Committee (PACAC) in the Commons and the Constitution Committee in the Lords. These documents would be a short and accessible Summary of the Constitution, aimed at improving public understanding, and a much fuller Restatement of the Constitution, complete with explanatory notes, to offer clarity for constitutional actors. Restatement would be a flexible way of providing what I have characterised as the first two benefits of a written constitution: public understanding and clarity for constitutional actors.

OPTION 2: RENEWAL

46. The second option, renewal, would take the form of a programme of constitutional change responding to problems that have become evident in recent years. The central

[46] House of Lords Select Committee on the Constitution, Revision of the Cabinet Manual (HL Paper 34, July 2021), para 13.
[47] *Ibid.*, para 14.

principle of Parliamentary sovereignty, that Parliament may make and unmake any law, would not be up for question. But this would not preclude the use of soft retrenchment techniques, which could be modelled on British and New Zealand precedents, so as to give at least political emphasis to certain fundamentals.[48] By recording these changes in the Restatement as it is updated, the interests of public understanding and clarity for constitutional actors would continue to be served.

47. The menu choices for this main course are almost infinite. Mine revolve around three issues with the capacity to make a major difference to the functioning of our constitution: standards in public life, parliamentary reform, and improved structures for constitutional scrutiny. Though they do not have the high profile of some other proposals for constitutional reform, they would respond to the strong public concerns expressed to the UCL surveys, and should be debated not only within Westminster but among a wider public.

48. ***Standards in public life*** would be my first priority, on the principle that it is sensible to mend the holes in a bucket before you pour water into it. However brilliant an idea for devolution or electoral reform may be, it will fail if that improvement in trust is not achieved first. My priorities would be to restore trust in our governance by introducing a new offence of corruption in public office, by filling legislative gaps in the lobbying regime and in party funding rules, and by enacting the recommendations of the Committee on Standards in Public Life regarding the Commissioner of Public Appointments, the Independent Adviser on Ministerial Interests and the Advisory Committee on Business Appointments. Those posts, and their Codes, would be given statutory force so as to prevent or deter meddling, and the Independent Adviser would be allowed to initiate investigations without the consent of the Prime Minister. Some of these changes, as it happens, would be achieved by my private members' bill, the Public Service (Integrity and Ethics) Bill, which will receive its first reading next Thursday.

49. There is a perception of sleaze and favouritism in ***House of Lords appointments***: this contributes to what has been described as the low "*input legitimacy*" which detracts from the high "*output legitimacy*" of Lords work. This could be reduced by placing the

[48] For UK examples see A. Blick 'Entrenchment in the United Kingdom: a written constitution by default?', The Constitution Society, 2017.For purported entrenchment in a comparable system see New Zealand's Constitution Act 1986 and Electoral Reform Act 1993, which purport to entrench the term of Parliament, the determination of electoral boundaries and general electorates, the minimum voting age and the system for secret voting

House of Lords Appointments Commission on a statutory footing and by giving it power to block or at least recommend against appointments, including of political peers, on the grounds not only of propriety but of unsuitability.[49] Reforms to HOLAC would be coupled with the ending of hereditary elections and a plan to limit numbers – both initiatives for which the Lords themselves have expressed strong support.[50] This would improve perceptions of the House of Lords without transforming it into a wholly or mainly elected body: the contentious issue which has derailed previous schemes for reform.

50. These latter changes qualify as ***Parliamentary reform***, my next priority. But reform is just as important for the House of Commons if it is to reverse what Hannah White has called "*the vicious cycle of declining public trust into which it has fallen*".[51]

51. White suggests a number of remedies, including the simplification of arcane Commons procedures and much greater use of opportunities to work and vote online.[52] The Wright Committee's proposed reforms could be completed by the establishment of a House Business Committee to assume responsibility for the Commons agenda. The excessive use of skeleton bills and delegated powers could be addressed, as recommended by the Hansard Society, by a Concordat on Legislative Delegation, agreed between Parliament and Government to reset the boundary between primary and delegated legislation, and by a new Act of Parliament to ensure that Parliament, with the help of sifting committees, could calibrate the level of scrutiny to the content of a statutory instrument.[53]

52. There should be changes too to the process for the passage of primary legislation. There is currently far too much emphasis on the back end of the process, with Bills

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[49] Baroness Deech, the recently-appointed Chair of HOLAC, told PACAC at her pre-appointment hearing on 24 October 2023 that "*extending suitability as a criterion for all appointments*" was her first priority in the role.

[50] The Labour peer Lord Grocott has introduced a series of private member's bills which would end hereditary elections: see D. Beamish, "The Grocott Bill and the future of hereditary peers in the House of Lords, The Constitution Unit, 9 February 2022. Three attempts to amend his House of Lords (Hereditary Peers) (Abolition of By-Elections) Bill were decisively rejected in votes on Friday 7 September 2018. The plans in the Burns Report for capping the size of the House were initially adhered to, but it was reported in July 2023 that appointments by Boris Johnson when Prime Minister "*far exceeded*" the relevant benchmarks and "*were granted predominantly to members of his own party*": Fifth Report of the Lord Speaker's Committee on the size of the House, 23 July 2023.

[51] Hannah White, Held in Contempt: What's wrong with the House of Commons? (Manchester University Press, 2022), p. 192.

[52] See also D. Anderson, Let's build on the virtues of virtual procedures, The House, 18 May 2021.

[53] Hansard Society, Proposals for a New System for Delegated Legislation: A Working Paper, 6 February 2023.

being introduced before policy is fully developed and important amendments being introduced late. The Lords is being forced into a role as primary scrutineer, which it performs with distinction but which is uncomfortably close to the limit of what can be tolerated, given its unelected status and eccentric methods of composition.[54] More use of green and white papers, effective pre-legislative scrutiny by joint draft bill committees and reform of the often partisan Commons Bill committee system would allow for a more thoughtful process in which changes could be debated before trenches have been dug and testosterone levels raised.[55]

53. More controversial, as arguably outside the proper scope of legislation, would be changes to the practices of political parties. But the range of MPs could surely be improved by procedures in which parliamentary candidates were selected by all the voters whom they aspire to represent, not just local party members, as practised by the Conservative Party between 2009 and 2015. There is similarly a strong case for both big parties to revert to a system in which parliamentarians rather than party members select a new party leader, particularly when the party is in government.

54. ***Improving constitutional scrutiny***, my third priority, could be achieved by, and I quote:

> "supporting and reinforcing [the political constitution's] network of checks and balances; bringing greater clarity around the constitution; creating mechanisms for managing disagreement in its interpretation; and ensuring there are robust processes for constitutional change that encourage building political and public support".

Those words come from the final report of the Review of the UK Constitution by the Institute for Government and Bennett Institute for Public Policy, published this September.[56]

55. The centrepiece of the two Institutes' proposals is for a new Parliamentary Committee on the Constitution, an amalgamation of the existing Commons PACAC and Lords Constitution Committee, its work supported by an independent Office for the Constitution in a relationship similar to that between the Public Accounts Committee and the National Audit Office. That Committee would not only express its views on

[54] See D. Anderson, "The Lords and the Law", daqc.co.uk, 19 November 2022.

[55] See J. Sargeant and J. Pannell, The legislative process – how to empower Parliament, IfG/Bennett Institute, December 2022, p.6.

[56] J. Sargeant, J. Pannell, R. McKee, M. Hynes, S. Coulter, Review of the UK Constitution, Final Report, Institute for Government and Bennett Institute for Public Policy, 19 September 2023.

Bills with constitutional implications, and table amendments to them in the manner of the Joint Committee on Human Rights: it would have other powers including the power to establish a list of "*constitutional acts*" which, by convention, could be neither impliedly repealed nor amended by delegated powers, so-called Henry VIII clauses. All bills of a constitutional nature would be published in draft and subject to pre-legislative scrutiny by the new Committee. Deliberative exercises such as citizens' assemblies, citizens' juries and constitutional conventions would also be used to gain informed evidence of the public's views on constitutional questions.[57]

56. I declare a double interest, as a member both of the advisory board of the Institutes' Review and of the Constitution Committee of the House of Lords. But taken together with the other reforms I have suggested, to standards in public life and to the functioning of Parliament, the proposed changes to scrutiny mechanisms would inject a desirable degree of rigour into our political constitution. Each of these reforms is fully consistent with the wishes of the electorate as expressed to the Constitution Unit surveys. Transcribed into the Restatements that I have already suggested, they could give us a renewed and more visible constitution, capable of rapid adaptation to future developments.

OPTION 3: REVOLUTION

57. The third and final course on my menu of options I have called "Revolution". Certainly, it would be more ambitious than the other two. In its purest form it would mean the transformation of our constitutional arrangements, as described by the IPPR in 1991:

> "from a single fundamental principle, the supremacy of Parliament, which is founded in custom and usage as recognised by the courts, to a fundamental law which is prior to, independent of and the source of authority for the system of government".[58]

[57] A comparable idea, for a Joint Committee for Constitutional Standards, was floated by Andrew Blick and Peter Hennessy in The Bonfire of the Decencies (Haus, 2022), p. 136. See also the proposal of Jeffrey Jowell for "*a running commission, along the lines of the Joint Parliamentary Committee on Human Rights, or the House of Lords Constitution Committee*" to guide a process of constitutional reform with cross-party support: "Does the UK's unwritten constitution safeguard our democracy?", Rothschild/Foster Human Rights Lecture, 2 November 2022.

[58] IPPR*,* supra*,* Introduction p9.

This would be to realise Oliver Cromwell's vision of "*somewhat fundamental, somewhat like a Magna Carta, that should be standing and unalterable.*"[59] As urged by Lord Scarman in his in many respects visionary Hamlyn Lectures of 1974, it would give judges the power

> "to invalidate legislation that was unconstitutional and to restrain anyone – citizen, government, even Parliament itself – from acting unconstitutionally".[60]

58. We have been here before, of course: in the era of Chief Justice Coke;[61] but also in the 30 or so years that separated the *Factortame* case from our exit from the EU. Having had the good fortune to appear in *Factortame* and some of the subsequent cases in which judges disapplied provisions of statute incompatible with European Community or European Union law, I was always surprised by the ease with which it was done – the constitutional significance of the exercise being masked by judicial explanation that the command to disregard one Act of Parliament was nothing more than an exercise in applying the instruction given in another.[62] Though perhaps a price was paid for that in the end, in terms of democratic consent: a point astutely made by my clerk on the morning of the referendum result, when he said: "*You see Mr Anderson, you shouldn't have won Factortame*".

59. The cold reality is surely that such a revolution will not happen, for three reasons.

60. ***First***, there is currently no appetite in any quarter for the increased judicialisation of our constitutional system. The hint by some Law Lords in *Jackson v Attorney General*[63] that courts might refuse to give effect to an Act that was contrary to the rule of law fell on stony ground. Political pressure in recent years has been in the opposite direction, whether in the sense of pushback by the governing party against decisions such as *Evans, Privacy International* and the *Miller* cases,[64] or in the threats to even the limited role accorded to our courts under the Human Rights Act in relation to

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59 Oliver Cromwell, speech to the first Protectorate Parliament, 12 September 1654.

60 L. Scarman, English Law – the New Dimension, Stevens & Sons, 1974, p.77.

61 *Dr. Bonham's Case*, 1610.

62 *R v Transport Secretary ex p Factortame Ltd. (No. 2)* [1991] 1 AC 603, per Lord Bridge at 658G-659C. The matter-of-fact manner in which statutory provisions were occasionally disapplied thereafter is exemplified by the judgments of the High Court and Court of Appeal in *Philip Alexander Securities and Futures Ltd. v Bamberger and ors.* [1997] EuLR 63.

63 *Jackson v Attorney General* [2006] 1 AC 262.

64 *R (Evans) v Attorney General* [2015] UKSC 21; *R (Privacy International) v Investigatory Powers Tribunal & ors.* [2019] UKSC 22; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller) v Prime Minister* [2019] UKSC 41.

primary legislation. As Baroness Hale said at a recent conference of the judicial power to override statute: "*I don't know a member of the senior judiciary who would welcome it.*"[65]

61. ***Secondly***, in resisting the judicial override of primary legislation, we are in highly respectable company. Doctrines akin to parliamentary sovereignty apply to varying extents in some of our constitutionally rather successful northern European neighbours: notably Sweden, Finland and the Netherlands.[66] The control of constitutionality is largely conducted in Finland and Sweden by parliamentary committees, and in the Netherlands by its Council of State. The more restrained methods of rights protection used in the Nordic countries, the Netherlands, New Zealand and the UK does not prevent them from scoring very highly on the democracy and human rights criteria developed by Freedom House and The Economist.[67]

62. ***Thirdly***, and I suspect decisively, there is no sign of a "*constitutional moment*" sufficiently significant to precipitate the replacement of parliamentary sovereignty. As the historian Linda Colley has pointed out:

> "the introduction of a brand-new Constitution has usually been the result of some existential shock: a revolutionary war as in the American case, or a bitter civil war, or a foreign invasion, occupation or defeat."[68]

63. The past quarter century has seen a series of reforms, from Bank of England independence to devolution, House of Lords reform, the creation of the Supreme Court and Brexit, that would surely have required any written constitution to be amended multiple times. But there has been little appetite to change the fundamentals of what has been described as "*a dynamic constitution doing its best to adapt to political, legal, economic and cultural change*".[69]

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65 Institute for Government conference, Cambridge, September 2023.

66 D. Oliver, Parliamentary Sovereignty in Comparative Perspective, UKCLA blog, 2 April 2013. Finland and the Netherlands were inspirations for the recommendations of the IfG/Bennett Report, *supra*.

67 B.C. Jones, "A (Brief) Case against Constitutional Supremacy" in R. Johnson and Y. Yi Zhu, eds., Sceptical Perspectives on the Changing Constitution of the United Kingdom, Hart 2023, pp.30-31.

68 L. Colley, 'The Radical Constitutional Change Britain Needs', New York Times, 12 September 2022; see further L. Colley, The Gun, the Ship and the Pen: Warfare, Constitutions and the Making of the Modern World (Profile, 2021).

69 B.C. Jones, *op. cit.*, p. 13.

64. Potential constitutional moments have a tendency to arrive and then pass by with no more than a grinding of the gears, or not even that.[70] To Linda Colley's question, posed in the New York Times on 12th September last year:

> "might the queen's death and the accession of a less popular Charles III contribute to increased levels of turmoil and lead to unstoppable pressure for radical constitutional change, even a new British Constitution?"[71]

the answer, we can safely say, is a definitive "no".

CONCLUSION

65. Gladstone famously wrote in 1879 that the British constitution

> "presumes more boldly than any other, the good sense and the good faith of those who work it".

If, he added,

> "these personages meet together… as counsel in a court, each to procure the victory of his client, without respect to any other interest or right: then this boasted Constitution of ours is neither more nor less than a heap of absurdities."[72]

66. The past tumultuous years have demonstrated both the flexibility of our constitution, and its vulnerability in the hands of an administration which, in the words of Andrew Blick and Peter Hennessy:

> "displayed a tendency to evade, belittle or erode any mechanisms that might serve to limit it (such as Parliament, the courts, and other oversight bodies), particularly in its efforts to perpetrate constitutional violations …".[73]

67. Parliament needs to reverse that erosion: but as a body dedicated not to binary solutions but to workable compromise, it should be slow to hand over control to the

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70 Thus, the barrister Austen Morgan recently identified "*three principal reasons for considering a written constitution in the next few years*": Brexit, the proposed UK Bill of Rights (now withdrawn) and the decisive SNP victory in the 2019 general election: A. Morgan, Pretence: why the UK needs a written constitution, Black Spring 2023, p.58.

71 L. Colley, 'The Radical Constitutional Change Britain Needs', New York Times, 12 September 2022.

72 W.E. Gladstone, Gleanings of Past Years, John Murray, 1879, vol I p. 245.

73 A. Blick and P. Hennessy, The Bonfire of Decencies, Haus 2022, p. 120.

judges. The Constitution needs to be clearly written: but it is by restating and renewing our constitutional settlement, not revolutionising or judicialising it, that we can best equip it for the trials that lie ahead.