CHAPTER 14

# The changing constitution

Philip Norton

> "The British Constitution has always been puzzling and always will be"
>
> Queen Elizabeth II, quoted in Hennessy (1996: 33)

## Learning objectives

- To identify the sources and key components of the British constitution.
- To analyse the nature of the debate about the British constitution.
- To consider the major changes and modifications made to the constitution in recent years.
- To detail the arguments for and against some of the major changes that have taken place or are proposed to the constitution, including electoral reform.
- To address the problems faced by political parties as a consequence of constitutional change.

## Introduction

In the quarter-century following the Second World War, the constitution rarely figured in political debate. It was seen as the preserve more of lawyers than of politicians. In the last three decades of the century, it became a subject of political controversy. Demands for reform of the constitution grew. Many of those demands were met by the Labour Government elected in May 1997, with major changes being made to the constitutional framework of the country. Less expectedly, more constitutional change took place under the Coalition Government formed following the General Election of 2010 and the Conservative Government returned in 2015. Despite their scale and extent, the reforms that have been implemented derive from no particular intellectually coherent approach to constitutional change. For some politicians, the changes have gone too far, for others they have not got far enough, some critics arguing for a new constitutional settlement for the United Kingdom. The changes that have taken place have created problems for the three main political parties.

# The constitution

What, then, is a constitution? What is it for? What is distinctive about the British constitution? Where does it come from? What are the essential constituents of the 'traditional' constitution? Once we have established the basics of the nation's constitutional arrangements, we can address the challenges it has faced in recent years and the changes made to it. In so doing, it is possible to identify the problems posed to the political parties by such changes and the nature of the debate taking place about further constitutional change.

## Definition and sources

What is a constitution? A constitution can be defined as the aggregation of laws, customs and conventions that determines the composition and powers of organs of the state (such as government, Parliament and the courts) and regulates the relationship of the various state organs to one another and to the private citizen.

What are constitutions for? Constitutions vary in terms of their purpose. A constitution may be constructed in such a way as to embody and protect fundamental principles (such as individual liberty), principles that should be beyond the reach of the transient wish of the people. This is referred to as *negative constitutionalism* (see Ivison 1999). This tends to be reflected in presidential systems of government (see Bradley, Ziegler and Baranger 2007); the United States is a notable example. A constitution may be constructed in order to ensure that the wishes of the people are paramount. This is referred to as *positive constitutionalism*. Here, there are few, if any, restraints on the people's elected representatives. This tends to be reflected in parliamentary systems of government (Bradley, Ziegler and Baranger 2007). The UK falls primarily in this category.

What form do constitutions take? Most, but not all, are drawn up in a single, codified document. Some are short, others remarkably long. Some embody provisions that exhort citizens to act in a certain way ('It shall be the duty of every citizen. . . .'); others confine themselves to stipulating the formal structures and powers of state bodies. Processes of interpretation and amendment vary. Most, but not all, have entrenched provisions – i.e. they can only be amended by an extraordinary process beyond that normally employed for amending the law.

The British constitution differs from most in that it is not drawn up in a single codified document. As such, it is often described as an 'unwritten' constitution. However, much of the constitution does exist in 'written' form. Many Acts of Parliament – such as the Parliament Act 1911, which determined the relationship between the two Houses of Parliament, and the Constitutional Reform Act 2005, which created a Supreme Court – are clearly measures of constitutional law. Those Acts constitute formal, written – and binding – documents. To describe the constitution as unwritten is thus misleading. Rather, what Britain has is an uncodified constitution.

Even in countries with a formal, written document, 'the constitution' constitutes more than the simple words of the document. Those words have to be interpreted. Practices develop, and laws are passed, that help to give meaning to those words. To understand the contemporary constitution of the United States, for example, one has to look beyond the document to interpretations of that document by the courts in the USA, principally the US Supreme Court, and to various acts of Congress and to practices developed over more than 200 years. The constitutions of most countries thus have what may be termed a 'primary source' (the written document) and 'secondary sources' (judicial interpretation, legislative acts, established practice). The UK lacks the equivalent primary source. Instead, the constitution derives from sources that elsewhere would constitute secondary sources of the constitution. Those sources are four in number (see Figure 14.1). They are:

1 *statute law*, comprising Acts of Parliament and subordinate legislation made under the authority of the parent Act;

2 *common law*, comprising legal principles developed and applied by the courts and encompassing the prerogative powers of the crown and the law and practice of Parliament;

3 *conventions*, constituting rules of behaviour that are considered binding by and upon those who operate the constitution but that are not enforced by the courts or by the presiding officers in the Houses of Parliament; and

4 *works of authority*, comprising various written works – often but not always accorded authority by reason of their age – that provide guidance and interpretation on uncertain aspects of the constitution. Such works have persuasive authority only.

Statute law is the pre-eminent of the four sources and occupies such a position because of the doctrine of parliamentary sovereignty (see Gordon 2015). Under this judicially self-imposed concept, the courts recognise only the authority of Parliament (formally the Queen-in-Parliament) to make law, with no body other than Parliament itself having the authority to set aside that law. The courts cannot strike down a law as being contrary to the provisions of the constitution. Statute law, then, is supreme and can be used to override common law.



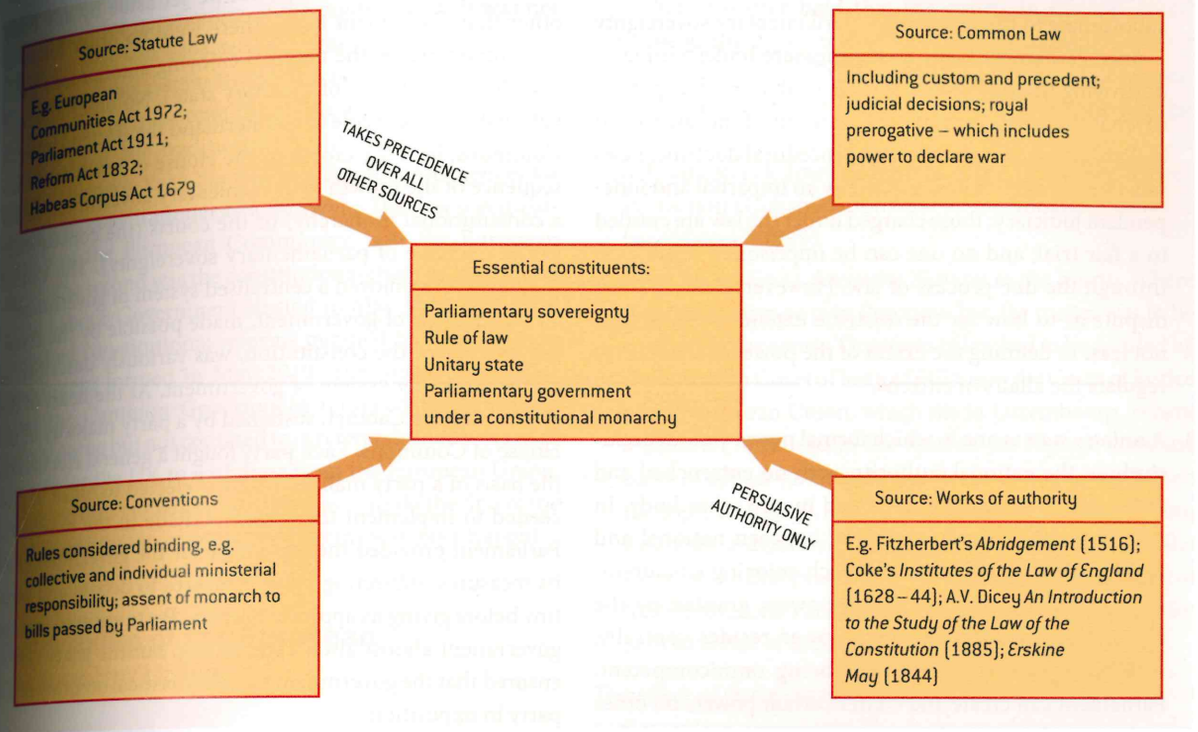


**Figure 14.1** The traditional constitution: sources and constituents

*Source:* P. Norton (1986) 'The constitution in flux', *Social Studies Review*, vol. 2, no. 1. Reproduced with permission from the California Council for Social Studies

## Amendment

No extraordinary features are laid down in Parliament for the passage or amendment of measures of constitutional law. Although bills of constitutional significance usually have their committee stage on the floor of the House of Commons, rather than in a public bill committee (see Chapter 15), there is no formal requirement for this to happen. All bills have to go through the same stages in both Houses of Parliament and are subject to simple majority voting. As such, the traditional constitution is, formally, a flexible constitution.

However, as we shall see, there are two developments that have challenged this flexibility: membership of the European Community/Union and the incorporation of the European Convention on Human Rights into British law. They have constrained Parliament, but the constraints are essentially self-imposed. That is, they have been created by Parliament itself. The devolution of powers to elected assemblies in different parts of the United Kingdom may also be argued to limit, in effect, the capacity of Parliament to pass any legislation it wishes.

# The traditional constitution: essential constituents

The constitution, formed on the basis of the Glorious Revolution of 1688 and 1689 and developed in the following three centuries, has four principal features. Although, as we shall see, these features have been challenged by changes in recent years, each nonetheless remains formally in place:

1 *Parliamentary sovereignty* has been described as the cornerstone of the British constitution. As we have seen, it stipulates that the outputs of Parliament are binding and cannot be set aside by any body other than Parliament itself. The doctrine was confirmed by the Glorious Revolution, when the common lawyers combined with Parliament against the King. Since the Settlement of 1689 established that the King was bound by the law of Parliament, it followed that his courts were also so bound.

2 *The rule of law* was identified by nineteenth-century constitutional lawyer A.V. Dicey as one of the twin pillars of the constitution and is generally accepted as one of the

essential features of a free society. However, it is logically subordinate to the first pillar – parliamentary sovereignty – since Parliament could pass a measure undermining or destroying the rule of law. It is also a matter of dispute as to what the term encompasses. In terms of the law passed by Parliament, it is essentially a procedural doctrine. Laws must be interpreted and applied by an impartial and independent judiciary; those charged under the law are entitled to a fair trial; and no one can be imprisoned other than through the due process of law. However, there is some dispute as to how far the doctrine extends beyond this, not least in defining the extent of the power of the state to regulate the affairs of citizens.

3 *A unitary state* is one in which formal power resides exclusively in the national authority, with no entrenched and autonomous powers being vested in any other body. In federal systems, power is shared between national and regional or state governments, each enjoying an autonomous existence and exercising powers granted by the constitution. In the UK state power resides centrally, with the Queen-in-Parliament being omnicompetent. Parliament can create and confer certain powers on other bodies – such as assemblies and even parliaments in different parts of the UK – but those bodies remain subordinate to Parliament and can be restricted, even abolished, by it.

4 *A parliamentary government under a constitutional monarchy* refers to the form of government established by, and developed since, the Glorious Revolution. That revolution established the supremacy of Parliament over the King. The greater acceptance of democratic principles in the nineteenth and twentieth centuries resulted in the enlargement of the franchise and a pre-eminent role in the triumvirate of Queen-in-Parliament (monarch, Commons, Lords) for the elected chamber, the House of Commons. 'Parliament' thus means predominantly – although not exclusively – the House of Commons, while 'parliamentary government' refers not to government by Parliament but to government through Parliament. Ministers are legally answerable to the crown but politically answerable to Parliament, that political relationship being governed by the conventions of collective and individual ministerial responsibility. A government is returned in a general election and between elections depends on the confidence of a majority of Members of Parliament both for the passage of its measures and for its continuance in office.

Three of these four features (parliamentary sovereignty, unitary state, parliamentary government) facilitated the emergence of strong, or potentially strong, government. A government secure in its majority in the House of Commons was usually able to enact measures that were then binding on society and which could not be set aside by any body other than Parliament itself. There were no other forms of government below the national enjoying autonomous powers (the consequence of a unitary state). No other actors at national level were able to countermand the elected House of Commons, be it the crown or the House of Lords (the consequence of the growth of parliamentary government under a constitutional monarchy) or the courts (the consequence of the doctrine of parliamentary sovereignty). The United Kingdom thus enjoyed a centralised system of government.

That system of government, made possible by the essential features of the constitution, was variously described as the Westminster system of government. At the heart of the system was the Cabinet, sustained by a party majority in the House of Commons. Each party fought a general election on the basis of a party manifesto and, if elected to office, it proceeded to implement the promises made in the manifesto. Parliament provided the legitimacy for the government and its measures, subjecting those measures to debate and scrutiny before giving its approval to them. *Party* ensured that the government almost always got its way, but the *party system* ensured that the government faced the critical scrutiny of the party in opposition.

This constitution can, as we have seen, be traced back to the Glorious Revolution, but it emerged more fully in the nineteenth century with the widening of the franchise. It emerged in the form we have just described – the Westminster system – essentially in the period from 1867, with the passage of the second Reform Act (necessitating the growth of organised parties), and 1911, when the Parliament Act (restricting by statute the powers of the House of Lords) was passed. From 1911 onwards, power in the UK resided in the party that held a majority of seats in the House of Commons. In so far as the party in government expressed the will of the people and it achieved the measures it wanted, the UK acquired, in effect, a limited form of positive constitutionalism.

# Challenges to the traditional constitution

The traditional constitution was in place from 1911 to 1972. Although it was variously criticised in the years between the two world wars, especially in the depression of the 1930s, it went largely unchallenged in the years immediately after the Second World War. The nation's political institutions continued to function during the war, and the country emerged victorious from the bitter struggle. In the 1950s the nation enjoyed relative economic prosperity. There appeared little reason to question the nation's constitutional arrangements. That changed once the country began to experience economic



recession and more marked political conflict. The constitution came in for questioning. If the political system was not delivering what was expected of it, was there not then a case for changing the system itself? The issue of constitutional reform began to creep onto the political agenda.

Since 1970, the traditional constitution has faced four major challenges. Each has had significant consequences for the nation's constitutional arrangements. The first was membership of the European Community, now the European Union. The second was the constitutional changes introduced by the Labour Government elected in May 1997. The third comprised constitutional reforms pursued by the Coalition Government formed in May 2010. The fourth took place under the Cameron Government returned in May 2015, encompassing but not confined to, a referendum that resulted in a vote for the UK to withdraw from the European Union. The nation thus embarked on a process to undo the first of the four, but one that in constitutional terms was itself fraught.

## Membership of the European Community/Union

Membership of the European Communities, later the European Union, created a unique situation for the United Kingdom and posed two challenges to the constitution: one was legal and the other political. Coming to terms with both was never fully achieved in the years of membership.

### A juridical dimension

The United Kingdom became a member of the European Community (EC) on 1 January 1973. The Treaty of Accession was signed in 1972 and the legal basis in domestic law for membership provided by the European Communities Act 1972. The motivation for joining the Community was essentially economic and political. However, membership had major constitutional consequences, primarily because it:

- *Gave the force of law not only to existing law but also to all future European law:* As soon as regulations were agreed, they had binding applicability in the UK. The assent of Parliament was not required. That assent had, in effect, been given in advance under the provisions of the 1972 Act. Parliament had some discretion as to the form in which European directives were to be implemented, but the discretion referred only to the form and not to the principle.
- *Gave European law precedence over UK law:* In the event of a conflict between European law and UK law, the former took precedence. The full effect of this was only realised with some important court cases in the 1990s (Fitzpatrick 1999). In the *Factortame* case of 1990–1, the European Court of Justice held that the courts in the UK could suspend the provisions of an Act of Parliament, where it appeared to breach EC law, until a final determination was made. In the case of *Ex Parte EOC*, in 1994, the highest domestic court, then the appellate committee of the House of Lords, struck down provisions of the 1978 Employment Protection (Consolidation) Act as incompatible with EC law (Maxwell 1999).
- *Gave the power to determine disputes to the courts:* Where there was a dispute over European law, the matter was to be resolved by the courts. Questions of law had to be decided by the European Court of Justice (ECJ), now the Court of Justice of the European Union, which sits in Luxembourg. Where a question of European law reaches the highest domestic court of appeal (until 2009 the House of Lords, since then the Supreme Court), it had to be referred to the Luxembourg Court for a definitive ruling. Lower courts could ask the Court of the European Union for a ruling on the meaning of treaty provisions. All courts in the UK were required to take judicial notice of decisions of the European Court.

The effect of these changes was to challenge the doctrine of parliamentary sovereignty. The decisions of Parliament could, in certain circumstances (where they conflict with European law), be set aside by a body or bodies other than Parliament itself – namely, the courts. In sectors that fell within the competence of the European Union, it could be argued that the UK acquired something akin to a written constitution – that is, the treaties of the European Union.

However, the doctrine of parliamentary sovereignty remained formally in place (see Gordon 2015). Parliament retained the capacity to change the law in order to take the UK out of the European Union. Prior to the ratification of the Lisbon Treaty, the only way it could do so was by repealing the European Communities Act. This would have put the UK in breach of international law, since there was no procedure under the treaties creating the EU for a member state to withdraw from membership. However, under the doctrine of parliamentary sovereignty, the Act of repeal would be recognised by the UK courts. The Lisbon Treaty inserted Article 50 of the Treaty on European Union, enabling a member state to leave the Union. Following a UK-wide referendum in June 2016, in which a majority voted to leave the EU, the Government began the process of withdrawal. Parliament enacted the EU (Notification of Withdrawal) Act 2017, enabling the Government to give notice under Article 50 of the UK's intention to withdraw, and the Government prepared to introduce a Bill to repeal the 1972 Act. However, after nearly half-a-century of membership, with a large body of law deriving from membership, the process of withdrawal itself created major constitutional problems.

### A political dimension

As a consequence of membership, the constitution acquired a new juridical dimension, one that challenged the doctrine of parliamentary sovereignty. At the same time, it also acquired a new political dimension, one that challenged the decision-making capacity of British government. Under the terms of membership, policy-making power in various sectors of public policy passed to the institutions of the European Community. Subsequent treaties served both to extend the range of sectors falling within the competence of the EC and to strengthen the decision-making capacity of the European institutions.

The Single European Act, which came into force in 1987, produced a major shift in the power relationship between the institutions of the Community and the institutions of the member states, strengthening EC institutions, especially through the extension of qualified majority voting (QMV) in the Council of Ministers. The Act also brought about a shift in the power relationships within the institutions of the Community, strengthening the European Parliament through the extension of the cooperation procedure, a procedure that provides a greater role for the Parliament in Community law making. Further shifts in both levels of power relationship were embodied in subsequent treaties. The Treaty on European Union (the Maastricht Treaty) established a European Union with three pillars, extended the sectors of public policy falling within the competence of the European Community. It also established a new co-decision procedure for making law in certain areas, a procedure that strengthened again the position of the European Parliament. It now became a partner, with the Council of Ministers, in law making. A further strengthening of the position of the EC, now the European Union, took place with the implementation in 1999 of the Amsterdam Treaty, in 2003 of the Nice Treaty and in December 2009 with the consolidation of the EU's powers in the Lisbon Treaty. These treaties variously extended the competences of the EU, reformed the Union's institutional structures and – in the case of the Lisbon Treaty – drew together the pillars into one entity. The European Union has thus been characterised by the absence of any steady state in constitutional terms: there has been almost continual pressure for further change, with attendant consequences for the member states.

As a result of membership of the European Union, the British government was thus constrained in what it could do. Government and Parliament could block new treaty provisions (primary legislation) – which require unanimous approval of the member states – but were constrained in seeking to block or change legislation introduced under the existing treaties (secondary legislation). Where proposals for secondary legislation were laid before the Council of the European Union (formerly the Council of Ministers), the UK minister could be outvoted by the ministers of the other member states. A decision could thus be taken that was then enforced within the UK, even if it did not have the support of the British government and Parliament. If the government took an action that appeared to be incompatible with EU law, it could be challenged in the courts and then required to bring itself into line with EU law.

The nature of this process, with decisions being taken by European bodies – usually aggregated in the term 'Brussels' – formed part of the debate in the referendum campaign in 2016, opponents of EU membership arguing that the UK should 'take back control'. However, the very nature of the process, with EU directives being implemented in a variety of guises, created problems in determining what law did derive from the EU and in devising a mechanism to determine what law should be retained, modified or repealed. It also created a challenge for Parliament in seeking to ensure that the UK Government did not use the process of withdrawal to create new policy through 'gold plating' measures (that is, adding new provisions) to modify or repeal EU law.

## Constitutional reform under the Blair Government

### Background to reform

The 1970s and 1980s witnessed growing demands for reform of the existing constitution. The system of government no longer appeared to perform as well as it had in the past. The country experienced severe economic problems (inflation, rising unemployment); industrial disputes; civil unrest in Northern Ireland; and some social unrest at home (riots in cities such as Bristol and Liverpool). The political process also came under pressure. Turnout declined in general elections. The proportion of electors voting for either of the two major parties fell. Two general elections took place in one year (1974), with no decisive outcome. A Labour government elected with less than 40 per cent of the vote in October 1974 was able to implement a series of radical measures.

Critics of the constitution argued the case for change. Some politicians and lawyers made the case for an entrenched Bill of Rights – putting rights beyond the reach of simple majorities in the two Houses of Parliament. The case for a Bill of Rights was put by Lord Hailsham in a 1976 lecture, subsequently published in pamphlet form under the title *Elective Dictatorship*. Some politicians wanted a new electoral system, one that produced a closer relationship between the proportion of votes won nationally and the proportion of seats won in the House of Commons. The case for a new electoral system was made in an influential set of essays, edited by Professor S.E. Finer in 1975. Finer argued that a system of proportional representation would put an end to partisanship and help get rid of the policy discontinuity that results when one party replaces another in government.



There were also calls for power to be devolved to elected assemblies in different parts of the United Kingdom and for the use of referendums. Both changes, it was argued, would push decision making down from a centralised government to the people. The Labour Government elected in 1974 sought, unsuccessfully, to pass measures providing for elected assemblies in Scotland and Wales. The Government did make provision for the first UK-wide referendum, held in 1975 on the issue of Britain's continued membership of the European Community.

The demands for change were fairly disparate and in most cases tied to no obvious intellectually coherent approach to constitutional change. However, as the 1980s progressed, various coherent approaches developed (Norton 1982, 1993). These are listed in Box 14.1. Each approach had its advocates, although two of them, the high Tory and Marxist approaches, were overshadowed by the other approaches. The corporatist, or group, approach was more to the fore in the 1970s, when a Labour government brought representatives of trade unions and business into discussions on economic policy. It retained some advocates in the 1980s. The socialist approach, pursued by politicians such as former Labour Cabinet minister Tony Benn, had a notable influence in the Labour Party in the early 1980s, the Labour manifesto in the 1983 General Election adopting an essentially socialist stance. The New Right approach found some notable supporters in the Conservative Party, notably Cabinet minister Sir Keith Joseph; it also had some influence on the Prime Minister, Margaret Thatcher.

However, the two most prominent approaches were the liberal and the traditionalist. The liberal approach was pursued by the Liberal Party and by its successor party, the Liberal Democrats. It also attracted support from a much wider political spectrum, including some Labour supporters and even some ex-Marxists. In 1988 a constitutional reform movement, Charter 88, was formed (the year of formation was deliberate, being the tercentenary year of the Glorious Revolution) to bring together all those who supported a new constitutional settlement.

The liberal approach made much of the running in political debate. However, the traditional approach was the more influential of the two by virtue of the fact that it was the approach adopted by the Conservative Government. Although Prime Minister Margaret Thatcher supported reducing the public sector, she nonetheless maintained a basic traditionalist approach to the constitution. Her successor, John Major, was a particularly vocal advocate of the traditional approach (Norton 2017a). Although the period of Conservative government from 1979 to 1997 saw some important constitutional changes – such as a constriction of the role of local government and the negotiation of new European treaties (the Single European Act and the Maastricht Treaty) – there was no principled embrace of radical constitutional change. The stance of government was to support the existing constitutional framework.

As the 1990s progressed, the debate about constitutional change largely polarised around these two approaches. The collapse of communism, the move from Labour to New Labour in Britain and the demise of Margaret Thatcher as leader of the Conservative Party served to diminish the impact of several of the other approaches. As the liberal approach gained ground, so supporters of the traditional approach began to put their heads above the parapet in support of their position.

Supporters of the liberal approach argued that a new constitution was needed in order to push power down to the individual. Power was too heavily concentrated in public bodies and in special interests. Decentralising power would limit the over-mighty state and also be more efficient, ensuring that power was exercised at a more appropriate level, one more closely related to those affected by the decisions being taken. Supporters of the traditional approach countered this by arguing that the traditional constitution had attributes that, in combination, made the existing arrangements preferable to anything else on offer. The attributes were those of coherence, accountability, responsiveness, flexibility and effectiveness. The system of government, it was argued, was coherent: the different parts of the system were integrated, one party being elected to office to implement a programme of public policy placed before electors. The system was accountable: electors knew who to hold to account – the party in government – if they disapproved of public policy; if they disapproved, they could sweep the party from office. The system was responsive: knowing that it could be swept out at the next election, a government paid attention to the wishes of electors. Ministers could not ignore the wishes of voters and assume they could stay in office next time around as a result of post-election bargaining (a feature of some systems of government). The system was flexible: it could respond quickly in times of crisis, with measures being passed quickly with all-party agreement. The system was also effective: government could govern and could usually be assured of parliamentary approval of measures promised in the party's election manifesto. Government could deliver on what in effect was a contract with the electors: in return for their support, it implemented its promised package of measures.

The clash between the two approaches thus reflected different views of what the constitution was for. The liberal approach, in essence, embraced negative constitutionalism. The constitution was for constraining government. The

traditional approach embraced a qualified form of positive constitutionalism. The Westminster system enabled the will of the people to be paramount, albeit tempered by parliamentary deliberation. The qualification is a crucial one, at the heart of the Westminster system.

## Reform under a Labour government

In the 1970s, Labour politicians tended to adopt an essentially traditionalist stance. There was an attempt to devolve powers to elected assemblies in Scotland and Wales and the use of a national referendum, but these were not seen as part of some coherent scheme of constitutional reform. The referendum in particular was seen as an exercise in political expediency. In the early 1980s the influence of left-wing activists pushed the party towards a more socialist approach to the constitution. Under the leadership of Neil Kinnock, the party was weaned off this approach. It began to look more in the direction of the liberal approach. The longer the party was in opposition, the more major constitutional reform began to look attractive to the party. It was already committed to devolution. In its socialist phase, it had adopted a policy of abolishing the House of Lords. It moved away from that to committing itself to removing hereditary peers from the House and introducing an elected element. Having previously opposed electoral reform, some leading Labour MPs began to see merit in introducing proportional representation for parliamentary elections. John Smith, leader from 1992 to 1994, committed a future Labour government to a referendum on the issue of electoral reform. The party also began to move cautiously towards embodying rights in statutory form: in 1992 it favoured a charter of rights. It also committed itself to strengthening local government.

The move towards a liberal approach was apparent in the Labour manifesto in the 1992 and 1997 general elections. In both elections, the Conservatives embraced the traditional approach and the Liberal Democrats the liberal approach. The constitution was one subject on which it was generally acknowledged that there was a clear difference in policy between the parties.

**BOX 14.1**

# Approaches to constitutional change

**High Tory**
This approach contends that the constitution has evolved organically and that change, artificial change, is neither necessary nor desirable. In its pure form, it is opposed not only to major reforms – such as electoral reform, a Bill of Rights and an elected second chamber – but also to modifications to existing arrangements, such as the introduction of departmental select committees in the House of Commons. Its stance on any proposed reform is thus predictable: it is against it. The approach has been embraced over the years by some Conservative MPs.

**Socialist**
This approach favours reform, but a particular type of reform. It seeks strong government, but a party-dominated strong government, with adherence to the principle of intra-party democracy and the concept of the mandate. It wants to shift power from the existing 'top-down' form of control (government to people) to a 'bottom-up' form (people to government), with the party acting as the channel for the exercise of that control. It favours sweeping away the monarchy and the House of Lords and the use of more elective processes, both for public offices and within the Labour Party. It is wary of, or opposed to, reforms that might prevent the return of a socialist government and the implementation of a socialist programme. It is thus sceptical of or opposed to electoral reform (potential for Coalition Government), an entrenched Bill of Rights (constraining government autonomy, giving power to judges) and membership of the European Union (constraining influence, sometimes viewed as a capitalists' club). For government to carry through socialist policies, it has to be free of constitutional constraints that favour or are dominated by its opponents. This approach was pursued most notably at the end of the twentieth century and beginning of the twenty-first by former Labour Cabinet minister, Tony Benn. It is also an approach embraced by Jeremy Corbyn, who was elected leader of the Labour Party in 2015.

**Marxist**
This approach sees the restructuring of the political system as largely irrelevant, certainly in the long run, serving merely to delay the collapse of capitalist society. Government, any government, is forced to act in the interests of finance capital. Changes to the constitutional arrangements may serve to protect those interests in the short term but will not stave off collapse in the long term. Whatever the structures, government will be constrained by external elites, and those elites will themselves be forced to follow rather than determine events. The clash between the imperatives of capitalism and decreasing profit rates in the meso-economy determines what capitalists do. Constitutional reform, in consequence, is not advocated but rather taken as demonstrating tensions within the international capitalist economy. This approach has essentially been a 'pure' one, with some Marxists pursuing variations of it and some taking a more direct interest in constitutional change.

**Corporatist**
The corporatist, or group, approach seeks the greater incorporation of groups into the process of policy making in order to achieve a more consensual approach to public policy. The interdependence of government and interest groups – especially sectional interest groups – is such that it should be recognised and accommodated. A more integrated process can facilitate a more stable economic system. Supporters of this approach have looked to other countries, such as Germany, as examples of what can be achieved. This approach thus favours the representation of labour and business on executive and advisory bodies and, in its pure form, the creation of a functionalist second chamber. It was an approach that was pursued in a mild form from 1972 to 1974 by Conservative Prime Minister Edward Heath (1970–4) and by the Labour Government of 1974 to 1979.

**New Right**
This approach is motivated by the economic philosophy of the free market. State intervention in economic affairs is viewed as illegitimate and dangerous, distorting the natural forces of the market and denying the consumer the freedom to choose. The state should therefore withdraw from economic activity. This viewpoint entails a contraction of the public sector, with state-owned industries being returned to the private sector. If institutions need reforming in order to facilitate the free market, then so be it: under this approach, no institution is deemed sacrosanct. Frank Vibert, the former deputy director of the free-market think tank, the Institute of Economic Affairs, has advocated a 'free market written constitution' (Vibert and Haseler 1991). It is an approach associated with several politicians on the right wing of the Conservative Party, such as John Redwood.

**Liberal**
Like the New Right approach, this is a radical approach to constitutional change. It derives from traditional liberal theory and emphasises the centrality of the individual, limited government, the neutrality of the state in resolving conflict and consensual decision making. It views the individual as increasingly isolated in decision making, being elbowed aside by powerful interests and divorced from a governmental process that is centralised and distorted by partisan preferences. Against an increasingly over-mighty state, the individual has no means of protection. Hence, it is argued, the need for radical constitutional change. The liberal approach favours a new, written constitution, embodying the various reforms advocated by Charter 88 (now part of a wider reform movement, Unlock Democracy), including a Bill of Rights, a system of proportional representation for elections, an elected second chamber and a reformed House of Commons. In its pure form, it supports federalism rather than devolution. Such a new constitutional settlement, it is argued, will serve to shift power from government to the individual. The only reform about which it is ambivalent is the use of referendums, some adherents to this approach seeing the referendum as a device for oppression by the majority. It is an approach pursued by Liberal Democrats and by some Labour politicians.

**Traditional**
This is a very British approach and derives from a perception of the 'traditional' system as fundamentally sound, offering a balanced system of government. It draws on Tory theory in its emphasis on the need for strong government and on Whig theory in stressing the importance of Parliament as the agent for setting the limits within which government may act. These emphases coalesce in the Westminster model of government, a model that is part descriptive (what is) and part prescriptive (what should be). Government, in this model, must be able to formulate a coherent programme of public policy – the initiative rests with government – with Parliament, as the deliberative body of the nation, subjecting the actions and the programme of government to rigorous scrutiny and providing the limits within which government may govern. This approach recognises the importance of the House of Commons as the elected chamber and the fact that the citizen has neither the time nor the inclination to engage in continuous political debate. There is thus a certain

deference, but a contingent deference, to the deliberative wisdom of Parliament. The fact that the Westminster model is prescriptive means that traditionalists – unlike high Tories – will entertain change if it is designed to move present arrangements towards the realisation of that model. They also recognise with Edmund Burke that 'a state without the means of some change is without the means of its conservation' (1969: 106) and are therefore prepared to consider change in order to maintain and strengthen the existing constitutional framework. Over the years, therefore, traditionalists have supported a range of incremental reforms, such as the introduction and strengthening of departmental select committees and public bill committees in the House of Commons and reducing the size of the House of Lords. However, they have opposed radical reforms – such as electoral reform – which threaten the existing framework. There has sometimes been a wariness about membership of the European Union insofar as it has posed a threat to Parliament's capacity for giving assent to law. It is an approach pursued by many mainstream Conservative politicians and by some Labour MPs.

Looking in greater detail at the Labour Party's proposals in the 1997 manifesto, the party advocated:

- devolving power to Scotland and Wales;
- removing hereditary peers from the House of Lords;
- incorporating the European Convention on Human Rights into British law;
- appointing an independent commission to recommend a proportional alternative to the existing electoral system;
- holding a referendum on the voting system;
- introducing a system of proportional representation for the election of UK members of the European Parliament;
- legislating for an elected mayor and strategic authority for London;
- legislating to give people in the English regions power to decide by referendum, on a region by region basis, whether they wanted elected regional government;
- introducing a Freedom of Information Bill;
- holding a referendum if the government recommended joining a single European currency; and
- setting up a parliamentary committee to recommend proposals to modernise the House of Commons.

Following its election to office in 1997, the New Labour Government moved to implement its manifesto promises. In the first session (that is, the first year) of the new parliament, it achieved passage of legislation providing for referendums in Scotland and Wales. In these referendums, electors in Scotland voted by a large majority for an elected parliament with legislative and some tax-varying powers. Voters in Wales voted narrowly for an elected assembly to determine spending in the Principality of Wales (see Table 14.1). The Government then introduced measures to provide for an elected parliament in Scotland and an elected assembly in Wales. Elections to the new bodies were held on 6 May 1999, and Scotland and Wales acquired new forms of government. The government also introduced legislation providing for a new 108-member assembly in Northern Ireland with a power-sharing executive. A North/South Ministerial Council and a Council of the Isles were also brought into being. These unique constitutional arrangements were approved by electors in Northern Ireland in a referendum in May 1998.

**Table 14.1** Referendum results in Scotland and Wales, 1997

| **Scotland** | | |
|---|---|---|
| | **A Scottish Parliament** | **Tax-varying powers** |
| Agree | 1,775,045 (74.3%) | 1,512,889 (63.5%) |
| Disagree | 614,400 (25.7%) | 870,263 (36.5%) |
| *Turnout*: 60.4% | | |
| **Wales** | | |
| | **A Welsh Assembly** | |
| Yes | 559,419 (50.3%) | |
| No | 552,698 (49.7%) | |
| *Turnout*: 50% | | |

In the first session the Government also achieved passage of the Human Rights Act, providing for the incorporation of most provisions of the European Convention on Human Rights into British law, thus further reinforcing the new juridical dimension of the British constitution. It also achieved passage of a bill providing for a referendum in London on whether or not the city should have an elected mayor and authority. The referendum in London, in May 1998, produced a large majority in favour of the proposal: 1,230,715 (72 per cent) voted 'yes' and 478,413 (28 per cent) voted 'no'. The turnout, though, was low: only 34.1 per cent of eligible electors bothered to vote. The House of Commons appointed a Select Committee on Modernisation. Within a year of its creation, it had issued seven reports, including one proposing various changes to the way legislation was considered in Parliament. The Government also introduced a bill providing



for a closed member regional list system for the election of British Members of the European Parliament (MEPs). This was complemented by the use of the additional member system (AMS) for elections to the Scottish Parliament and the Welsh Assembly and by the use of the single transferable vote (STV) for the Northern Ireland Assembly (see Ministry of Justice 2008).

At the end of 1997 the Government appointed a Commission on the Voting System to make a recommendation on a proportional alternative to the existing first-past-the-post system for electing the House of Commons. The commission, chaired by Liberal Democrat peer Lord Jenkins, was asked to report within a year and did so. It considered a range of options but recommended the introduction of an electoral system known as the alternative vote plus ('AV Plus'). Under this system, constituency MPs would be elected by the alternative vote but with top-up MPs, constituting between 15 and 20 per cent of the total number of members, being elected on an area-wide basis (such as a county) to ensure some element of proportionality.

In the second session of Parliament, the Government achieved passage of the House of Lords Act. Taking effect in November 1999, the Act removed most hereditary peers – more than 500 – from membership of the House of Lords. At the same time as introducing the House of Lords Bill, the Government established a Royal Commission on the Reform of the House of Lords, under a former Conservative minister, Lord Wakeham, to make recommendations for a reformed second chamber once the hereditary peers had gone. The commission was asked to report within a year and did so. It recommended that a proportion of the membership of the second chamber be elected by popular vote.

The Government also achieved passage of three other measures of constitutional note during the parliament. The Greater London Authority Act brought into being an elected mayor and a strategic authority for the metropolis. The additional member electoral system was employed for election of Assembly members and the supplementary vote (SV) for election of the mayor. (The successful candidate in the first election for mayor was Ken Livingstone.) The Freedom of Information Act opened up documents held by public authorities, with certain exceptions, to public scrutiny. The Political Parties, Elections and Referendums Act created an Electoral Commission, stipulated new rules governing donations to political parties and introduced provisions to cover the holding of referendums. Given that referendums had been promised on various issues, the measure was designed to ensure some consistency in the rules governing their conduct.

After a reforming first Parliament, constitutional change appeared to take a back seat to other measures introduced by the Blair Government. However, a further major change was enacted at the end of the second Parliament, one not envisaged in the party's manifesto. The Constitutional Reform Act 2005 provided that the Lord Chancellor (a Cabinet minister at the head of the judiciary) need not be a lawyer or a peer. It also transferred the judicial powers of the Lord Chancellor (a political appointee) to the Lord Chief Justice (a senior judge) and created a Supreme Court. Instead of the highest court of appeal being law lords sitting in an appellate committee of the House of Lords, it was now to be an independent body sitting separately from a legislative chamber. The court came into being in October 2009, housed in the old Middlesex Guildhall in Parliament Square. The change was described by the new President of the Court, Lord Phillips of Worth Matravers, as 'essentially one of form, not of substance' (*Financial Times*, 10 September 2009). It involved principally a transfer of personnel, the law lords moving from the House of Lords to the new court.

Further change came about as a result of political settlement in Northern Ireland in 2007 – Democratic Unionist leader Ian Paisley agreeing to go into a power-sharing government in the province with Sinn Féin member Martin McGuinness – and with Gordon Brown becoming Prime Minister in succession to Tony Blair. Whereas Blair had emphasised wider constitutional change, largely external to Parliament – though having notable consequences for Parliament – Brown focused on changes designed to strengthen Parliament in calling government to account and in enhancing its links with the public (Norton 2008). He introduced a *Governance of Britain* agenda, with Parliament at the heart of it. There were various initiatives, but the principal legislative manifestation was the enactment in 2010 of the Constitutional Reform and Governance Act, designed to transfer the prerogative power of treaty approval from the crown (in effect, the government) to Parliament, the House of Commons being given the capacity to veto a treaty. It also put the civil service on a statutory basis. The government also pressed for further reform of the House of Lords.

There was also one other major constitutional change, but one created by practice rather than by statute. In 2002 and 2003, Tony Blair was persuaded to seek the approval of the House of Commons for British military action in Iraq. He won the votes, but the action set a precedent, and in 2007 the House of Commons resolved 'that it is inconceivable that any Government would in practice depart from this precedent' (House of Commons Debates, *Hansard*, 15 May 2007, col. 492). The constitutional implications of this change are profound, limiting the prerogative power to undertake war (Norton 2015a: 177–9).

In a little over a decade, the Labour Government thus saw through major changes to the nation's constitution. These changes variously modified, reinforced or challenged the established tenets of the traditional constitution. Each tenet was affected in some way by the changes shown in Table 14.2.

Parliamentary sovereignty, already challenged by British membership of the European Union, was further challenged by the incorporation of most provisions of the European Convention on Human Rights (ECHR). This gave the courts an added role, in effect as protectors of the provisions of the convention. If a provision of UK law was found by the courts to conflict with the provisions of the ECHR, a senior court could issue a declaration of incompatibility. It was then up to Parliament to act on the basis of the court's judgement. Further treaties transferred more policy competences to the EU.

The rule of law was strengthened by the incorporation of the ECHR. The effect of incorporation could be seen as providing a little more balance between the twin pillars of the constitution identified by Dicey (parliamentary sovereignty and the rule of law). The courts could now protect the rule of law against Parliament in a way that was not previously possible. The transfer of powers from the Lord Chancellor to the Lord Chief Justice, and the creation of a supreme court, was also designed to demonstrate judicial independence.

The unitary state was challenged by the creation of elected assemblies in Scotland, Wales and Northern Ireland. In Scotland the new Parliament was given power to legislate on any matter not reserved to the UK Parliament. It was also given power to vary the standard rate of taxation by 3p in the pound. The UK Parliament was expected not to legislate on matters that fell within the competence of the Scottish Parliament. The powers previously exercised by the Welsh Office were devolved to a National Assembly for Wales. The capacity to trigger the transfer of more powers was made by the Government of Wales Act 2006. Legislative and administrative powers were also provided for a new Northern Ireland Assembly: elections to the assembly were held in 2007. The devolution of such powers raised questions as to the extent to which Parliament should intervene in matters that were exclusive to a part of the UK other than England. As such, devolution may be seen to limit, in effect, the flexibility of the traditional constitution. Devolution also serves to reinforce the juridical dimension to the constitution, giving the courts a role akin to constitutional courts in determining the legal competence of the new assemblies.

**Table 14.2** Changes to the established tenets of the traditional constitution

| Tenets | Affected by |
|---|---|
| Parliamentary sovereignty | Incorporation of ECHR |
| | Ratification of Amsterdam, Nice and Lisbon Treaties |
| Rule of law | Incorporation of ECHR |
| | Creation of a supreme court |
| Unitary state | Creation of Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly |
| Parliamentary government under a constitutional monarchy | Use of referendums |
| | New voting systems in different parts of the UK |
| | Removal of hereditary peers from the House of Lords |
| | Freedom of Information Act |
| | Modernisation of the House of Commons |
| | Transfer of prerogative powers |

The creation of these devolved bodies also challenged some of the basic tenets of a parliamentary government under a constitutional monarchy. Decision-making power was being hived off to bodies other than the British Cabinet. Some decision-making competences had passed to the institutions of the European Union, others to elected bodies in different parts of the United Kingdom. There was also an enhancement of the powers of the courts at the expense of the government and Parliament. The coherence inherent in central parliamentary government was being challenged. Parliamentary government was also challenged by the use of referendums. Referendums provide for electors, rather than Parliament, to determine the outcome of particular issues. Opponents of a new electoral system also argued that, if the proposals for electoral reform were implemented, the capacity of the political system to produce accountable government would be undermined. The removal of most hereditary peers proved controversial – not least, and not surprisingly, in the House of Lords – although the full consequences for parliamentary government were not apparent: in the event, it proved to be a more independent House, willing to challenge the House of Commons. Reforms proposed to strengthen the House of Commons had some, albeit limited, effect.

By the time that Labour lost power in the General Election of 2010, the UK constitution was very different to that which existed when it entered office thirteen years previously. The extent of change in just over a decade was unprecedented in modern British history.

## Reform under the Coalition Government

Had a Conservative government been elected in the 2010 General Election, there would not likely have been major constitutional change. The Conservative election manifesto had some proposals for constitutional change, but the party was wedded primarily to the traditional approach. However, the failure of the party to win an overall majority and the decision of the party leader, David Cameron, to seek negotiations with the Liberal Democrats to form a coalition changed fundamentally the scope for change. The two parties held, as we have seen, notably opposing views on constitutional reform. The negotiations almost foundered on the issue of electoral reform (Norton 2011a: 156–7; Laws 2016: 10–16). However, agreement was eventually reached (see Wilson 2010; Norton 2011b) with a Coalition Agreement published that embodied a disparate programme of constitutional and political reform (HM Government 2010: 26–8). The key features of the agreement were:

- five-year fixed-term Parliaments;
- a referendum bill on electoral reform (the AV system) and the creation of fewer and equal-sized constituencies;
- power to recall MPs;
- a committee to bring forward proposals for a wholly or mainly elected second chamber on the basis of proportional representation;
- reform of the House of Commons based on the report of the Select Committee on the Reform of the House of Commons (the Wright Committee);
- a commission to consider the 'West Lothian question'; and
- petitions that achieved 100,000 signatures to be eligible for debate in the House of Commons.

The first session of the new Parliament saw the passage of the Fixed-term Parliaments Act, stipulating that the next general election was to take place on 7 May 2015 and on the first Thursday in May every five years thereafter. This removed the Prime Minister's discretion to request an election within the five-year maximum life span of a Parliament, unless approved by Parliament. Under the Act, an early election could only be triggered if the House of Commons passed a motion of no confidence in the government (and no new government could be formed within 14 days) or if the House voted, by a two-thirds majority of all MPs, for an early election. It constituted a significant change in the nation's constitutional arrangements and was unusual in that, in respect of a vote of no confidence in the government, it was translating a convention into statute.

The session also saw the enactment of the Parliamentary Voting System and Constituencies Act. This provided for a referendum on the introduction of the Alternative Vote in elections to the House of Commons and a reduction in the size of the House of Commons from 650 to 600. The reduction in the number of MPs was to take effect from the 2015 General Election, with the 600 constituencies essentially equal in size, with no deviation from the average by more or less than 5 per cent.

**Table 14.3** Result of the referendum on the voting system, 2011

Question: At present, the UK uses the 'first past the post' system to elect MPs to the House of Commons. Should the 'alternative vote' system be used instead?

| | | |
|---|---|---|
| Yes | 6,152,607 | 32.1% |
| No | 13,013,123 | 67.9% |
| Turnout: | 42.4% | |

As a consequence of the Act, a referendum on AV was held on 5 May 2011. After a bitter campaign, the No vote triumphed decisively, more than two-thirds of those who voted opposing the introduction of AV (Table 14.3). The referendum was distinctive for being a binding referendum: Parliament had prescribed that the result, whatever it was, would take effect. It was not seeking the advice of the electorate but instead handing it over to electors. Had there been a majority voting Yes, even if only by a majority of one, the Alternative Vote would have been introduced for elections to the House of Commons.

The Government also published a draft House of Lords Bill, providing for a 300-member second chamber, with 80 or 100 per cent of its members elected by the single transferable vote (STV) and each serving single, non-renewable 15-year terms. The draft bill was sent to a Joint Committee of the two Houses for examination and, following its report in April 2012, the Government introduced a House of Lords Reform Bill to replace the existing House of Lords with a largely elected chamber, elected under a regional list system.

The Government also achieved passage of a European Union Act providing for referendums to be held on any treaty changes that entailed a transfer of power or competence from the UK to the European Union. This was a measure very much favoured by the Conservatives. A UK Bill of Rights Commission was also established to investigate the creation of a UK Bill of Rights that incorporated or built on the UK's obligations under the ECHR and protected and extended liberties. This again was a Conservative initiative, many Conservative MPs being wary of the Human Rights Act and wanting to replace it with a distinctly British Bill of Rights. The extent to which this would or could supplant, as opposed to supplement, the European Convention was not clear. The commission was to report by the end of 2012. Another product of Conservative preferences was the appointment at the start of 2012 of a commission to examine the 'West Lothian question' – the situation where MPs from Scotland could vote on English laws, as on education, but MPs from England could not vote on the equivalent Scottish law.

Reform also took place in the House of Commons. From the start of the new Parliament, the chair of each select committee was elected by a vote of all MPs. The other members of each committee were elected by a vote of the MPs in their parliamentary party. The effect of the change was to transfer power from the party whips to backbenchers. A backbench

business committee was elected, enabling a committee of the House to decide business on 35 days of the year, moving power from the government's business managers to backbench MPs. The government also introduced an e-petition site: any petition attracting 100,000 votes or more was sent to the backbench business committee to consider if the topic should be allocated for debate in the House.

In the negotiations leading to the creation of the Coalition, the perception was that the Liberal Democrats had got the better of the deal on constitutional issues and the Conservatives the better of the deal on economic issues. However, the loss of the AV referendum made the balance in favour of the Liberal Democrats less obvious. The abandonment of the House of Lords Reform Bill in August 2012 – the result of sustained opposition to the bill from Conservative backbenchers – further strained relations between the coalition partners. In retaliation for the loss of the bill, the leader of the Liberal Democrats, Deputy Prime Minister Nick Clegg, instructed his party members in each House to vote against the orders to implement the recommendations of the Boundary Commission. As a result, the motions to implement the boundary changes in the Parliament were defeated.

Complicating the ever-changing constitutional framework was the future of Scotland within the United Kingdom. In 2011 the Scottish Nationalist Party achieved an absolute majority of seats in the Scottish Parliament and pressed for a referendum on the issue of independence. However, the British government, supported by the Labour opposition, made clear that the power to call a referendum resided with the UK government, constitutional issues being reserved to Westminster under the Scotland Act. However, agreement was reached that there should be a referendum in 2014 on a single question on Scotland remaining within the UK. The referendum campaign proved highly contentious. When just before the referendum took place an opinion poll suggested that there may be a majority for independence, all three main party leaders (David Cameron, Ed Miliband and Nick Clegg) went to Scotland and promised more powers for Scotland if electors voted to stay in the UK. The referendum produced 54 per cent voting to remain within the UK and 46 per cent voting for independence.

The Parliament ended with significant constitutional change having been implemented, though was equally notable for what was not implemented. The Government had achieved passage of the Fixed-term Parliaments Act and had triggered only the second UK-wide referendum in UK history, as well as agreeing to a referendum in Scotland. However, the main constitutional flagship measure of the Parliament – the House of Lords Reform Bill – and the introduction of a new electoral system, both major goals of the Liberal Democrats, failed to be implemented. Constituency boundary changes, strongly supported by the Conservatives, also failed to be carried through. The Parliament was thus as notable for what the Government sought to achieve in constitutional terms as much as for what it did achieve. The Government also had a claim to be constitutionally significant in its own right, being the first coalition government to be formed in the UK as the consequence of the electoral arithmetic of a general election.

## Reforms under the Cameron Conservative Government

There were two major constitutional developments under the premiership of David Cameron following the return of the Conservatives with an overall majority in the 2015 General Election. Both derived from commitments made during the previous Parliament, one in relation to devolution and the other in relation to the UK's membership of the European Union.

### Devolution

In order to fulfil commitments made at the time of the Scottish independence referendum in 2014, the Government established a commission, the Smith Commission, and in the light of its recommendations achieved passage of the Scotland Act 2016. The Act recognised the permanence of the Scottish Parliament. It also extended the range of subjects that fell within the legislative competence of the parliament, provided the right of Scotland to receive half of the Value Added Tax (VAT) raised in Scotland, and the ability to set income tax rates and bands on non-savings and non-dividend income. The Wales Act 2017 extended the powers devolved to Wales, though the range was not as great as in the case of Scotland. The Act also recognised the permanence of the National Assembly for Wales.

At the same time, the Government sought to give effect to a commitment made by David Cameron the morning after the Scottish referendum, namely to introduce English Votes for English Laws (EVEL). There was evidence of a growing resentment in England at what was seen as preferential treatment for Scotland, both financially (as a result of the Barnett Formula) and politically. MPs from Scottish seats were able to vote on issues, such as health policy, affecting only England, whereas MPs from English seats could not vote on health policy affecting Scotland. In the 2010–5 Parliament, the Conservatives had accepted the case for legislation that affected only England to be voted on by MPs representing English seats (or English and Welsh seats in the case of legislation that applied to England and Wales). Under the Coalition Government, the Liberal Democrats had not supported the policy, but once the Conservatives were returned to office in 2015, the Government set about giving effect to it. It did so through changing the Standing Orders of the House of Commons. The changes meant that a measure (or particular provisions) affecting only England, and certified as such by the Speaker, would still be voted on by the whole House, but that there would be a separate stage at which MPs from English seats could decide to block it. MPs representing English seats could not get a measure passed over the opposition of a majority of MPs, but they could veto it. In effect, therefore, it was not a case of English Votes *for* English Laws, but a case of an English Veto over English Laws. Under the changes made by the Standing Orders, not least since they may apply to particular provisions of a Bill, the process is a highly complex one.

### Withdrawal from the European Union

In the previous Parliament, David Cameron had accepted the case for a referendum on the UK's membership of the European Union, following pressure from Conservative backbenchers (see Norton 2015b: 482–5). The Conservative manifesto in 2015 included a commitment to hold an in/out referendum on the UK's membership of the EU and to implement the outcome, whatever the result. The Government introduced and achieved passage of the European Referendum Bill in 2015, providing for a UK-wide referendum on the UK's membership. Electors were offered a choice of 'Leave' or 'Remain'. After a bitterly fought contest, 52 per cent of those who voted cast their ballots for 'Leave' and 48 per cent for 'Remain' (Table 14.4).

The result was twofold. First, David Cameron resigned and was replaced by Home Secretary Theresa May. Second, the Government under Theresa May began the process of giving effect to its commitment to implement the result. The Prime Minister also sought an early General Election, gaining the required two-thirds majority (under the Fixed-term Parliaments Act 2011) for such an election, the election taking place in June 2017. The PM justified it on the grounds that she needed a strong mandate to negotiate with the EU.

The move to withdraw from the EU was constitutionally fraught. It constituted unknown territory. No nation had withdrawn from the EU under the terms of Article 50 of the Treaty on European Union. The Government believed it could trigger notification of withdrawal under prerogative powers. This was challenged in the courts and the Supreme Court held, in the *Miller* case, that Parliament had to approve such notification. The Government then achieved passage of a short Bill, the European Union (Notification of Withdrawal) Bill, to enable it to notify the EU of the UK's intention to withdraw. It then began the process of negotiating the terms of the UK's withdrawal and, subsequent to that, negotiating the future relationship with the EU. There was also a recognition that the 1972 European Communities Act would need to be repealed, but that provision would need to be made for keeping in place existing law derived from EU membership until the Government could decide which parts should be retained, modified or removed. The task of scrutinising and approving the legislation and orders to give effect to these decisions would be a major task for Parliament (House of Lords Constitution Committee 2017), one likely to occupy it for some years.

Preparing to leave the EU was a task that absorbed much of the resources and energy of Government, as well as the time of Parliament, and largely overshadowed other issues on the political agenda. The Conservative Government under David Cameron and then Theresa May became as much occupied with constitutional issues as had the Labour Government of Tony Blair.

The collective effect of these changes has been to modify the Westminster constitution, though arguably not destroy it. Formally, each of the elements of the constitution remains in place:

1 The doctrine of parliamentary sovereignty may have been challenged by membership of the EU and the incorporation of the ECHR into UK law. However, as we have seen, Parliament retained the capacity to repeal the European Communities Act 1972. In terms of incorporation of the ECHR, the Human Rights Act 1998 incorporates recognition of the doctrine of parliamentary sovereignty. As the Lord Chancellor, Lord Irving of Lairg, declared: 'In this way, the Act unequivocally preserves Parliament's ability to pass Bills that are or may be in conflict with the convention' (House of Lords, *Hansard*, written answer, 30 July 2002). The courts may issue declarations of incompatibility, but it is then up to Parliament to act on them. Parliament retains the formal power not to take any action (even if the reality is that it will act, or normally act, on them).

2 Devolution may challenge the concept of a unitary state, but ultimate power still resides with the centre. Devolved powers – indeed, devolved institutions – may be abolished by Parliament. The Westminster Parliament can still legislate for the whole of the UK, even in areas formally devolved. Indeed, it variously does legislate in devolved

**Table 14.4** EU Referendum result, June 2016

Question: Should the United Kingdom remain a member of the European Union or leave the European Union?

| | | | |
|---|---|---|---|
| Remain | 16,141,241 (48.11%) | | |
| Leave | 17,410,742 (51.89%) | | |
| Invalid or blank votes | 25,359 (0.08%) | | |
| Total votes | 33,577,342 | Turnout | 72.21% |

areas, albeit at the invitation of the devolved institution – the Scottish Parliament, for example, may invite the UK Parliament to extend the provisions of a bill affecting England and Wales to Scotland.

3 Parliament decides whether referendums are to be held and, if so, on what basis. Referendums are normally advisory – Parliament is not bound by them – but Parliament can prescribe that they are binding, as was the case with the 2011 referendum on the electoral system. If they are advisory, it is then for Parliament to decide whether to act on the outcome. In practice, it would be somewhat perverse to ignore how the people have voted, though there were calls in the light of the 2016 EU referendum for Parliament do exactly that.

4 The creation of a Supreme Court has entailed moving law lords out of the House of Lords and into a new building, across the road in Parliament Square. The physical separation may over time affect the culture of the relationship between the court and the executive, but the change confers no new powers to strike down Acts of Parliament.

5 The Fixed-term Parliaments Act limits the powers of the Prime Minister in calling a general election, but does not affect the principle that the government rests on the confidence of the House of Commons for its continuance in office. A government may be turned out of office by MPs passing a vote of no confidence and a Prime Minister may, as Theresa May did in 2017, seek a vote of the House of Commons, by a two-thirds majority, to trigger an early general election.

6 A new electoral system, especially if one of proportional representation, has the potential to undermine the accountability inherent in the present system, but in the event no new system has been introduced, the referendum in 2011 resulting in a large majority opposing a modification to the existing system. Though new electoral systems have been employed for other bodies (including the election of newly created police commissioners in 2012, chosen by the Supplementary Vote), the first-past-the-post system remains in place for the election of members of the House of Commons.

Although the practical effect of some of the changes may be to challenge and, in the long run, undermine the provisions of the Westminster constitution, the basic provisions remain formally in place. The fact that they have been modified or are under challenge means that we may be moving away from the traditional constitution: however, as yet, no new constitution has been put in its place. The traditional approach to the constitution has lost out since 1997, but none of the other approaches can claim to have triumphed.

# Parties and the constitution

In the wake of the General Election of 1997, the stance of the parties on constitutional issues was clear. The Labour Party had been returned to power with a mandate to enact various measures of constitutional reform. The party's election manifesto was frequently quoted during debate on those measures, not least during debate on its House of Lords Bill. The Conservative Party remained committed to the traditional approach to the constitution. It had proposed no major constitutional reform in its election manifesto and was able to take a principled stand in opposition to various measures introduced by the Labour Government. The Liberal Democrats were wedded to the liberal approach and could claim some intellectual purity in advocating that approach. Though some critics claimed that there was not much to choose between the parties, in the sphere of constitutional reform there was a marked division, one that was especially marked between the Conservatives and Liberal Democrats.

However, the actions taken by the parties in government have created difficulties for them in delineating a clear approach to constitutional change. Though they have been responsible, as we have seen, for substantial changes to the British constitution, their actions bear little correlation to any of the approaches to constitutional change outlined in Box 14.1.

## The Labour Party

For the Labour Party in office, there were two problems. One was practical: that was, trying to implement all that it had promised in its election manifesto. A three-figure parliamentary majority in the period from 1997 to 2005 was not sufficient to stave off problems. The narrowness of the vote in the referendum in Wales in 1997 appeared to deter ministers from moving quickly to legislate for referendums in the English regions. When, in the first regional referendum, in the North-east in 2004, there was a decisive 78 per cent 'no' vote, the policy was effectively put on hold. The proposal for a referendum on a new electoral system encountered opposition. The report of the Commission on the Voting System in 1998 attracted a vigorous response from both Labour and Conservative opponents of change. One report suggested that at least 100 Labour MPs, including some members of the Cabinet, were opposed to electoral reform, and this appeared to influence the government. No referendum was held during the parliament and none was promised in the party's 2001 and 2005 election manifestos. The House of Lords Bill encountered stiff opposition in the House of Lords and the government was unable (and in this case largely unwilling) to mobilise a Commons majority to carry through further change. The Freedom of Information Bill ran into opposition from within the ranks of the government itself, various senior ministers – including Home Secretary Jack Straw – not favouring a radical measure. When the bill was published in 1999, it was attacked by supporters of open government on the grounds that it did not go far enough.

There was also a practical problem in that not all those reforms that were implemented had the desired effect. Far from undermining support for nationalist parties, devolution in Scotland provided the basis for the SNP to emerge as the dominant party. It emerged as the largest single party in the 2007 elections, forming a minority government. Some of the judgments of the senior courts, interpreting the Human Rights Act, were heavily criticised by ministers (Norton 2007a). As we have noted, the House of Lords proved more assertive following implementation of the House of Lords Act (Russell and Sciara 2007), with the Government suffering a string of defeats.

The constitution thus did not change in quite the way that the party had intended. This practical problem also exacerbated the second problem. The party was unable to articulate an intellectually coherent approach to constitutional change. It had moved away from both the socialist approach and the traditional approach and some way towards the liberal approach. However, it only partially embraced the liberal agenda. It was wary of a new system for elections to the House of Commons and appeared to have dropped the idea by the time of the 2001 election. The Government hesitated to pursue regional assemblies in England. It set up a Royal Commission to consider reform of the House of Lords but – until a vote by MPs in 2007 favouring a largely or wholly elected House – it was reluctant to embrace demands for an elected second chamber. Some ministers opposed any change that might challenge the primacy of the House of Commons, in which the Government had a parliamentary majority. In respect of both devolution and the incorporation of the European Convention on Human Rights, the Government ensured that the doctrine of parliamentary sovereignty remained in place.

Although the Labour Government was able to say what it was against, it was not able to articulate what it was for, at least not in terms of the future shape of the British constitution. What was its approach to the constitution? What did it think the constitution was for? What sort of constitution did it wish to see in place in five or ten years? When these questions were put to ministers, they normally avoided answering them. As Prime Minister, Tony Blair avoided making speeches on the subject (Theakston 2005: 33). However, in a debate on the constitution in the House of Lords in December 2002, the Lord Chancellor, Lord Irvine, did concede that the Government did not have an overarching approach, arguing instead that the Government proceeded 'by way of pragmatism based on principle'. The three principles he identified were:

- To remain a parliamentary democracy, with the Westminster parliament supreme and within that the Commons the dominant chamber.
- To increase public engagement with democracy, 'developing a maturer democracy with different centres of power, where individuals enjoy greater rights and where the government is carried out close to the people'.
- 'To devise a solution to each problem on its own terms'.

(House of Lords, *Hansard*, 18 December 2002, vol. 642, col. 692)

The problem with these 'principles' is that they are not obviously compatible with one another: the first two are in conflict as to where power should reside – should it be in Westminster or in other centres of power? – and the third is a let-out clause, enabling policy to be made up as one goes along.

The government thus lay open to the accusation that it had no clear philosophical approach, nothing that would render its approach predictable or provide it with a reference point in the event of things going wrong. Opponents were thus able to claim that it has been marching down the path – or rather down several paths – of constitutional reform without having a comprehensive map and without any very clear idea of where it was heading. Tony Blair took one path and Gordon Brown another, but with neither articulating a clear destination.

The situation that pertained in Government continued in Opposition after 2010, the party not articulating or embracing a particular approach to constitutional reform. Jeremy Corbyn, elected leader in 2015, embraced the socialist approach to constitutional change, though this found only partial expression in the party's 2017 election manifesto, the party committing itself to an elected second chamber, but otherwise advocating a constitutional convention to examine the future direction of the British Constitution.

## The Conservative Party

The Conservative Party encountered a problem, first in opposition and then, more substantively, in government. In opposition it was able to adopt a consistent and coherent position. It supported the traditional approach to the constitution. It was therefore opposed to any changes that threatened the essential elements of the Westminster system of government. It was especially vehement in its opposition to proposals for electoral reform, mounting a notable campaign against the recommendations of the Commission on the Voting System in 1998. It opposed devolution, fearing that it would threaten the unity of the United Kingdom. It opposed the House of

Lords Bill, not least on the grounds that the Government had not said what the second stage of reform would be.

However, it was clear that as and when it was returned to government, the constitution would be very different to that which it had been defending when last in government. How was a future Conservative government to respond to the constitutional changes made under the Labour Government? Should a future Conservative government go for the reactionary, conservative or radical option (Norton 2005)? That is, should it seek to overturn the various reforms made by the Labour Government, in effect reverting to the status quo ante (the reactionary option)? Should it seek to conserve the constitution as it stood at the time the Conservatives regained power (the conservative option)? Or should it attempt to come up with a new approach to constitutional change (the radical option)? Party leader William Hague made a speech on the constitution in 1998, effectively ruling out the reactionary option, but neither he, nor any of his successors as party leader, addressed what stance the party would take if returned to office.

The failure to articulate a clear approach was in any event overtaken by events in 2010. The failure to achieve an absolute majority of seats in the general election produced negotiations with the Liberal Democrats in order to form a coalition. The obvious problem was that, as we have noted, the parties took diametrically opposed views on the constitution. The result was a compromise. That compromise bore no relationship to any approach to constitutional change. The nature of the agreement drawn up by the negotiators (HM Government 2010) reflected the fact that those engaged in the negotiations had no strong grasp of the constitution. The agreement stated 'We will put a binding motion before the House of Commons stating that the next general election will be held on the first Thursday of May 2015'. This reflected the rushed nature of the negotiations. No binding motion was ever brought forward because there was no one to be bound by such a binding motion. (The royal prerogative cannot be constrained simply by a motion of the House of Commons.) The changes proposed were sufficient to achieve political agreement, but they bore no relationship to the preferred position of either party.

The result was that a Conservative-dominated Coalition Government embarked on significant constitutional change that lacked coherence and bore little relationship to the stance of the party on constitutional change. There was major disquiet in Conservative ranks in Parliament over approving the referendum on the electoral system, over the passage of the Fixed-term Parliaments Bill and over House of Lords reform. Managing the parliamentary party was the immediate concern of the Conservative leadership (Norton 2015b). Part of that management entailed David Cameron committing a future Conservative Government to an in/out referendum on membership of the EU. The upsurge of SNP support in Scotland also generated demands to which the Prime Minister adopted a reactive stance. The Government, on the initiative of the Chancellor, George Osborne, also engaged on a programme of devolving powers to particular parts of England. However, the pursuit of devolution to Scotland and Wales was essentially detached from the policy being pursued in England, a point noted by the House of Lords Constitution Committee in a report on *The Union and Devolution* (2016). Rather like Labour's approach after 1997, constitutional reforms were significant, but essentially disparate and discrete. There was no intellectually coherent approach to constitutional change (see Norton 2015b: 475–6). Cameron's successor, Theresa May, had no time to reflect on such an approach, focusing instead on handling Britain's withdrawal from the EU.

### The Liberal Democrats

The Liberal Democrats, as we have seen, could claim to be in the strongest position on issues of constitutional change. They embraced the liberal approach to constitutional change. When Labour was in office, they were able to evaluate the Government's reform proposals against the liberal agenda. Given that the Government fell short of pursuing a wholly liberal agenda, they were able to push for those measures that the Government had not embraced. Their stance was thus principled and consistent.

However, they faced a major problem in 2010. They were invited to participate in negotiations leading to a coalition. The party was keen to be in government – the last time Liberals had been part of a peacetime government was in 1922 – and would look irresponsible at a time of economic crisis if they refused. They therefore engaged in discussions that necessarily entailed compromising on their intellectual purity. The main goal of the party was a new electoral system based on proportional representation. The compromise, as we have seen, was a referendum on AV, which essentially pleased neither party: the Conservatives wanted no change, and so disliked holding a referendum, and the Liberal Democrats wanted more than AV. The referendum on AV was seen as half-a-loaf from the Liberal Democrat perspective, essentially as a stepping stone to later, more radical change. In the event, the No vote in the 2011 referendum killed off hopes of achieving electoral reform in the foreseeable future. The other prize was seen as an elected House of Lords, but that failed to materialise, the Government abandoning its House of Lords Reform Bill rather than face protracted debate and sustained opposition from Conservative MPs.

The party thus found itself in government, but the price for being part of the policy-making process was to abandon its highly principled position on constitutional change. It was not clear what the future route could be to reclaiming and achieving the liberal approach to constitutional change. The party was reduced to eight MPs in the 2015 General Election and only increased the number to twelve in the 2017 General Election, its stance on a second referendum on EU membership not having a significant electoral impact.



## The continuing debate

The constitution remains an issue of debate. It does so at two levels. One is at the wider level of the very nature of the constitution itself. What shape should the British constitution take? How plausible are the various approaches to constitutional change? The Conservatives, as we have seen, favour the traditional approach, but have had to compromise in order to form a government. Successive leaders have in any event not thought reflectively about the future of the British constitution. The last to do so was John Major (Norton 2017a). The Liberal Democrats favour the liberal approach, but they had to compromise in order to be in government. The Labour Party wants to move away from the Westminster model but have not articulated the type of constitution they wish to achieve for the United Kingdom. The reforms under Tony Blair moved in the direction of the liberal approach. The party leader after 2015, Jeremy Corbyn, was more attached to the Socialist approach.

The other level is specific to various measures of constitutional change. Some changes have been made to the constitution. Other changes are advocated, not least – although not exclusively – by advocates of the liberal approach. Supporters of change want, among other things, to see the introduction of a system of proportional representation for parliamentary elections. Opponents, as they did during the 2011 referendum, continue to advance the case for the first-past-the-post method of election (see Box 14.2). Following the 2010 General Election, a Coalition Government was formed, the result of post-election bargaining and a government for which no voter had an opportunity to vote. Opponents of a new electoral system argue that this is exceptional under the existing electoral system, but would likely become the norm under a PR system of election. The use of referendums, and the promise of their use on particular issues, has spurred calls for their more regular use. Opponents are wary of any further use. Some are opposed to referendums on principle (see Box 14.3), others, especially following the 2016 referendum on EU membership, are wary of referendums decided by simple majority vote. The role of the second chamber also generates considerable debate. Should there be a second chamber of Parliament? Most of those who are engaged in constitutional debate support the case for a second chamber but do not agree on the form it should take. Should it be wholly or partly elected? Or should it be an appointed House (see Norton 2017b and Chapter 18)? The reforms pursued by successive governments since 1997 have not put an end to debate about the future of the British constitution. If anything, they have given it new impetus, leaving the issue of the constitution very much on the political agenda.

The relationship between the debate about the constitution and about particular measures of constitutional reform throws up a vital question. Should specific reforms derive from a clear view of what the constitution, as a constitution, should look like in five or ten years? Or should the shape of the constitution be determined by specific changes made on the basis of their individual merits? In practice, the approach has been bottom-up, that is, the future shape of the British Constitution being determined by disparate changes made by different governments. It is not top-down, that is, determined on the basis of the type of constitution deemed most appropriate to the UK, with reforms carried out to achieve that end. Hence the divide between practice and the different approaches to constitutional change.

BOX 14.2

### Electoral reform (proportional representation)

**The case for**

- Every vote would count, producing seats in proportion to votes.
- It would get rid of the phenomenon of the 'wasted vote'.
- It would be fairer to third parties, ensuring that they got seats in proportion to their percentage of the poll.
- On existing voting patterns, it would usually result in no one party having an overall majority – thus encouraging a coalition and moderate policies.
- A coalition enjoying majority support is more likely to ensure continuity of policy than changes in government under the existing first-past-the-post system.

- A coalition enjoying majority support enjoys a greater popular legitimacy than a single-party government elected by a minority of voters.
- Coalitions resulting from election by proportional representation can prove stable and effective.

**The case against**

- Very few systems are exactly proportional. Little case to change to a relatively more proportional system than the existing system unless other advantages are clear.
- A system of proportional representation would give an unfair advantage to small parties, which would be likely to hold the balance of power.
- The government is most likely to be chosen as a result of bargaining by parties after a general election, as happened in 2010, and not as a deliberate choice of the electors.
- It would be difficult to ensure accountability to electors in the event of a multi-party coalition being formed.
- Coalitions cobbled together after an election – and for which not one elector has definitively voted – lack the legitimacy of clear electoral approval.
- There is no link between electoral systems and economic performance.
- Coalitions resulting from election under a system of proportional representation can lead to uncertainty and a change of coalition partners.
- Bargaining between parties can produce instability, but coalitions can also prove difficult for the electorate to get rid of.
- There is popular support for the consequences of the existing electoral system – notably a single party being returned to govern the country.
- 'Proportional representation' is a generic term for a large number of electoral systems: there is no agreement on what precise system should replace the existing one.

BOX 14.3

## Referendums

**The case for**

- A referendum is an educational tool – it informs citizens about the issue.
- Holding a referendum encourages people to be more involved in political activity.
- A referendum helps to resolve major issues – it gives a chance for the voters to decide.
- The final outcome of a referendum is more likely to enjoy public support than if the decision is taken solely by Parliament – it is difficult to challenge a decision if all voters have a chance to take part.
- The use of referendums increases support for the political system – voters know they are being consulted on the big issues. Even if they don't take part, they know they have an opportunity to do so.

**The case against**

- Referendums are blunt weapons that usually allow only a simple answer to a very general question. They do not permit explanations of why voters want something done nor do they usually allow alternatives to be considered.
- Referendums undermine the position of Parliament as the deliberative body of the nation.
- There is no obvious limit on when referendums should be held – if one is conceded on the issue of Europe, why not also have referendums on immigration and capital punishment? With no obvious limit, there is the potential for 'government by referendum'.
- Referendums can be used as majoritarian weapons – being used by the majority to restrict minorities.
- There is the difficulty of ensuring a balanced debate – one side may (indeed, is likely to) have more money and resources.
- There is the difficulty of formulating, and agreeing, a clear and objective question.
- Some referendums may generate high turnouts, but research shows that turnout tends to be lower than that in elections for parliamentary and other public elections. In the UK, for example, there have been turnouts of less than 50 per cent in the referendums on having a London mayor (1998) and on the Alternative Vote (2011).
- Referendums are expensive to hold and are often expensive ways of not deciding issues. If government does not like the result it may call another referendum (as has happened in both Denmark and Ireland over ratification of European treaties) or the losing side, if not able to hold another, may demand one, as with the SNP after the 2014 Scottish independence referendum and some supporters of the UK remaining in the EU following the 2016 EU referendum.

Referendums or referenda? There is also some dispute as to whether the plural of referendum is referendums or referenda. As a gerund, referendum has no plural in Latin. It is therefore considered appropriate to use the term referendums.



BOX 14.4

## BRITAIN IN CONTEXT

# A distinctive constitution

The United Kingdom is distinctive for having an uncodified constitution. The laws, rules and customs determining how it is to be governed are not drawn up in a single document. This is a distinction it shares with only two other nations: Israel and New Zealand. Other states have drawn up codified documents as a consequence of being newly formed or having to start afresh, having broken away from a colonising power or having been defeated in battle. Britain has not suffered a distinctive constitutional break since the seventeenth century. An attempt to impose a codified, or 'written', constitution during the period of the Protectorate was abandoned with the restoration of the monarchy in 1660. When James II fled the country in 1688, he was deemed to have abdicated, and those responsible for inviting his daughter and son-in-law, Mary and William of Orange, to assume the throne were keen to stress continuity in the nation's constitutional arrangements. The nation's constitutional foundations thus pre-date the creation, starting with the USA in the eighteenth century, of formal codified constitutions.

There are other distinctive features of the nation's constitutional arrangements. Many countries have entrenched constitutions: that is, they are amendable only through some extraordinary process, such as a two-thirds majority in the legislature and/or approval by the people in a referendum. In the UK laws that change the nature of the constitution – such as the Human Rights Act 1998 – go through the same process as those that determine that it is an offence to leave the scene of an accident.

In terms of the basic structure of government, the UK is also distinctive, but not unique, in having a particular form of parliamentary government. Some systems are presidential, where the head of government and the legislature are elected separately and where neither depends on the other for continuation in office. In a parliamentary system the head of government and other ministers derive their positions through election to the legislature – they are not elected separately – and they depend for their continuation in office on the confidence of the legislature. There are two basic types of parliamentary government: the Westminster parliamentary system and the continental. The Westminster model stresses single-party government, elected normally through a first-past-the-post electoral system, with two major parties competing for the all-or-nothing spoils of electoral victory. The continental parliamentary system places stress on consensus politics, with Coalition Government derived from elections under electoral systems of proportional representation. The Westminster model has been exported to many Commonwealth countries, though a number have departed from it; New Zealand, for example, has adopted a system of proportional representation. There are also various hybrid presidential–parliamentary systems, where the president is directly elected but a government, under a Prime Minister, is formed through elections to the legislature. France has a hybrid system; hybrid systems have been adopted by a number of democracies in central and eastern Europe.

# Chapter summary

The British constitution remains distinctive for not being codified in a single document. It is drawn from several sources and retains the main components that it has developed over three centuries. Although little debated in the years between 1945 and 1970, it has been the subject of dispute – and of change – in the years since. Proponents of reform have argued that existing constitutional arrangements have not proved adequate to meet the political and economic challenges faced by the United Kingdom. They have pressed for reform, and various approaches to change have developed. Debate has polarised around two approaches: the liberal, favouring a new constitutional settlement for the United Kingdom, and the traditional, favouring retention of the principal components of the existing constitution.

The constitution has undergone significant change as a result of British membership of the EC/EU and of reforms undertaken by successive governments after 1997. The constitution had difficulty acclimatising to membership of the EC/EU. The referendum vote in 2016 to withdraw from the EU, after more than 40 years of membership, then generated major constitutional challenges of its own. The juridical dimension of the constitution has been strengthened as a result of the incorporation of the European Convention on Human Rights into British law. It has also been strengthened by the devolving of powers to elected bodies in different parts of the UK, the courts acting in effect as constitutional courts for the devolved bodies; and by the creation of a supreme court. Devolution has seen some powers pass to elected bodies in Scotland, Wales and Northern Ireland. The consequence of these changes has been to change the contours of the 'traditional', or Westminster, model of government, although not destroying the model altogether.

The constitution remains a subject of political controversy, posing problems for each of the main political parties. Governments since 1997 have pursued change but have done so on a pragmatic basis, embracing no particular approach to change. The British constitution has changed significantly in recent years and continues to be the subject of demands for further change, but its future shape remains unclear.

# Discussion points

- How does the constitution of the United Kingdom differ from that of other countries? What does it have in common with them?
- Which approach to constitutional change do you find most persuasive, and why?
- How convincing are the principal arguments against holding referendums?
- Is electoral reform desirable?
- What are the main obstacles to achieving major constitutional change in the United Kingdom?

# Further reading

For an overview of constitutional change in the twentieth century, see the contributions to Jowell, Oliver and O'Cinneide (2015), Norton (2011c) and Bogdanor (2003). Works addressing constitutional change under the Labour Government are King (2007) and Bogdanor (2009a). King tends to take a more critical view; the constitution, in his view, is 'a mess'. Bogdanor sees the old system being replaced by a new one. On the constitution under the Coalition Government, see Bogdanor (2011). Johnson (2004) and Marquand (2004) offer critical reflective analyses. On Conservative and Labour approaches to the constitution, see Norton (2005, 2007b, 2008, 2012).

Articles covering aspects of constitutional change can also be found in scholarly journals, not least *Public Law* and *Parliamentary Affairs*, as well as in student magazines such as *Politics Review*. Useful reports on constitutional developments are also published by the House of Lords Constitution Committee (see 2016, 2017) and, on the UK's withdrawal from the EU, the House of Lords European Union Committee (see 2016a, 2016b).

There are various useful publications that address specific issues. Most of these are identified in subsequent chapters (the crown in Chapter 15, the House of Commons in Chapters 16 and 17, the House of Lords in Chapter 18 and the judiciary in Chapter 22). Chapter 22 also addresses issues arising from membership of the European Union, the incorporation of the European Convention on Human Rights, devolution and the Constitutional Reform Act. On the doctrine of parliamentary sovereignty, see Gordon (2015). On electoral reform, see Blais (2008) and Ministry of Justice (2008). On referendums, see Butler and Ranney (1994), Qvortrup (2005), Bogdanor (2009b) and House of Lords Constitution Committee (2010), especially Chapter 2.



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House of Lords Constitution Committee (2017) *The 'Great Repeal Bill' and Delegated Powers*, 9th Report, Session 2016–17, HL Paper 123.

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# Useful websites

## Organisations with an interest in constitutional change

Constitution Unit: www.ucl.ac.uk/constitution-unit
Electoral Reform Society: www.electoral-reform.org.uk
Campaign for Freedom of Information: www.cfoi.org.uk
Unlock Democracy: www.unlockdemocracy.org

## Reports

Independent Commission on the Voting System (the Jenkins Commission): http://webarchive.nationalarchives.gov.uk/20140131031506/http:/www.archive.official-documents.co.uk/document/cm40/4090/contents.htm
Ministry of Justice, *The Governance of Britain*, Cm 7170: www.gov.uk/government/publications/the-governance-of-britain
Ministry of Justice, *Review of Voting Systems: The Experience of New Voting Systems in the United Kingdom since 1997*, Cm 7304: www.gov.uk/government/publications/the-governance-of-britain-review-of-voting-systems
Royal Commission on the Reform of the House of Lords (the Wakeham Commission), *A House for the Future*: www.archive.official-documents.co.uk/document/cm45/4534/4534.htm

## Government departments with responsibility for constitutional issues

Cabinet Office: www.gov.uk/government/organisations/cabinet-office/about
Home Office: www.gov.uk/government/organisations/home-office
Ministry of Justice: www.gov.uk/government/organisations/ministry-of-justice

## Parliamentary bodies

House of Lords Constitution Committee: www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/
House of Commons Public Administration and Constitutional Affairs Committee: www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-and-constitutional-affairs-committee/

## Other official bodies

The Electoral Commission: www.electoralcommission.org.uk

## European bodies

European Convention on Human Rights: www.echr.coe.int/Pages/home.aspx?p=home