

**ENTRENCHMENT IN THE UNITED
KINGDOM:**

A written constitution by default?

By Dr. Andrew Blick

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Executive Summary

For a number of decades, the United Kingdom (UK) has been passing through a phase of profound systemic transformation, accelerating in particular since 1997. One of the outcomes of this period of reform has been that more components of our system than previously have become subject to protections, making modification more than a standard procedure. However, the position is now more complicated still since some of the stability that might have developed is in question, given the prospect of departure from the European Union (EU).

All legal systems have hierarchies. If an adjudicating body, often a court, finds during the course of a proceeding that two rules are in conflict with each-other, it must have a means of discerning which of them should take precedence over the other.

The UK, as is well known, has no ‘written’ constitution. In this sense, a law cannot be deemed void because it conflicts with an un-amendable part of the written constitution, or because the amendment procedure required by the written constitution was not adhered to. Nor is it possible, when two different legislative bodies within the domestic system have issued contradictory legislation, to assess which should prevail on a basis of the spheres of operation allotted to different tiers of governance by the written constitution. Furthermore, the UK tends towards a dualist rather than monist model in its reception of international agreements. A treaty cannot directly change UK domestic law; and if implementation of the agreement requires such alteration, then it must be achieved through a specific internal legal instrument, such as an Act of Parliament.

In the absence of these means of determining precedence, the UK leans more heavily on other methods of determining priorities. One is to treat Acts of Parliament as the highest form of law. This practice is connected to the doctrine sometimes labelled ‘parliamentary sovereignty’. Viewed from this perspective, entrenchment is lacking in the UK. It is difficult to provide firm expression to a principle that some rules – especially those of a systemic nature – are more important than others and that, by extension, changes to those rules should ideally command a wider consensus than others.

A similar point might be made about a principle which appears to have gained in force in the UK in the wake of the EU referendum of June 2016, and which presents a practical challenge even to the idea of parliamentary sovereignty. Some now appear to hold that a referendum result can provide an irresistible imperative to follow a certain course of action, to which any opposition is undemocratic.

A chief value of entrenchment is that it separates areas of legitimate party political contestation that can appropriately be susceptible to simple majority decision-making, from the realm of more fundamental constitutional principles.

The traditional alternative to legal safeguards in the UK has been to rely on protections that do not take a hard legal form. While entrenchment of constitutional principle has an exceptionally informal flavour in the UK, there are some firmer legal means by which it can be sought. They include self-entrenchment, an outcome the texts of the Treaty and Acts of Union of 1706-7 seemingly seek to achieve. Precedent for the use of supermajorities can be found, for instance in section 2 of the *Fixed-term Parliaments Act 2011*.

The *European Union Act 2011* creates a whole class of parliamentary action – in relation to the pooling of powers at EU level – which is subject to approval by referendum. Stipulations surrounding the possible departure of Northern Ireland from the UK, involving a referendum, are also provided for in statute. The *Scotland Act 2016* and the *Wales Act 2017* contain a series of stipulations seeking to entrench devolved institutions with regard to the UK Parliament.

The courts in the UK can play a part in the entrenchment of certain features of the constitution. This practice can take place when they carry out judicial review, assessing the legality of ministerial actions under primary legislation or the Royal Prerogative. Courts also of necessity play an adjudicatory role in another form of entrenchment, whereby in limited areas the doctrine of implied repeal does not apply. One such instance of this mechanism involves the *Human Rights Act 1998*. Another statute entrenched through immunity to implied repeal is the *European Communities Act 1972*, though it is due to be repealed.

According to the ‘common law constitutionalism’ school, the courts are the source of parliamentary authority, and are therefore able to place limits upon it, or perhaps reject it altogether.

Whatever legal order takes the place of incorporated European law may well need to include various forms of entrenchment.

There are a variety of options for achieving entrenchment of constitutional provisions or principles in the UK. Were a deliberate and concerted approach taken towards constitutional entrenchment the outcome might begin to resemble a written constitution.

Introduction

For a number of decades, the United Kingdom (UK) has been passing through a phase of profound systemic transformation. It has accelerated in particular since 1997.¹ This process has involved participation in (and now possibly disengagement from) European integration, the introduction and development of devolution, alterations in the composition and practices of Parliament, new protections for human rights, and an amplified and changed role for the judiciary. These dramatic shifts have been possible partly because of the relative ease with which a determined government can bring about constitutional change in the UK. Yet, perversely, one of the outcomes of this period of reform has been that more components of our system than previously have become subject to protections, making modification more than a standard activity.

This overall process of transformation led to the UK taking on more of the features of the written constitution it is famous for not possessing.² European law, though its future applicability to the UK is now in doubt, has since accession to the European Economic Community in 1973 provided a body of core rules that – though they are provided for in the UK via an Act of Parliament³ – have taken precedence over domestic primary and secondary legislation, in a fashion similar to the contents of many written constitutions. The *Human Rights Act 1998* resembles a constitutional charter of rights; while the devolution polities share some of the qualities of states as set out in the texts providing for federal systems. Moreover, the protections against casual alteration that have appeared can be likened to the special amendment procedures found in written constitutions. Constitutional entrenchment, however, should not be regarded exclusively as part of a reform programme. Some who have promoted it have regarded it as a means of inhibiting further change – for instance, through creating, under the *European Union Act 2011*, a ‘referendum lock’ (that may now never be used) on further pooling of sovereignty at European level.⁴ Entrenchment is also seen as a means of reassuring certain groups – especially those in the devolved territories – that their representative institutions are guaranteed a lasting existence and that their status with respect to UK level institutions is protected.

The entrenchment concept has lately manifested itself with increasing frequency. However, the position is now more complicated still since some of the stability that might have developed is in question, given the prospect of departure from the European Union (EU). Yet entrenchment could well acquire a new significance in debates about possible constitutional arrangements that will apply after exit from the EU. Taking into account the salience of constitutional entrenchment, this paper considers its value, the different possible means of bringing it about, and the particular approaches taken in the UK. It then considers current developments, especially in the wake of the EU referendum of June 2016, and weighs the merits of different options for the future.

Hierarchies and values

All legal systems have hierarchies. If an adjudicating body, often a court, finds during the course of a proceeding that two rules are in conflict with each-other, it must have a means of discerning

1 Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009).

2 Andrew Blick, *Beyond Magna Carta: a constitution for the United Kingdom* (Hart, Oxford, 2015).

3 The *European Communities Act 1972*.

4 Part 1 of the Act.

which of them should take precedence over the other. One solution that may be applicable is to deem the more recent provision to have overridden the older. In the UK, for instance, an Act of Parliament may be held to have amended or repealed an earlier Act of Parliament. An Act may have this effect because it states expressly that it does so. Or it may simply be that when read against an earlier Act, if the two are not compatible, then the earlier gives way. The application of this rule is straightforward, and does not primarily rest on a consideration of the status of the institution issuing the rule, the procedure it followed in producing it, or its substantive content. That is to say, when making this kind of decision, a court does not ask whether Parliament has the constitutional authority to pass a particular measure, whether its contents amount to a violation of a constitutional rule, or whether some kind of special constitutional amendment procedure would have been necessary to make it valid. The court simply prioritises the most recent Act of Parliament over the older.⁵

Another means of allotting precedence to one legal rule over another is by considering the authority under which both were issued. If, for instance, under a federal system, there is a conflict between a law introduced at state level and another law passed at federal level, it will be necessary to consider whether the particular policy area concerned comes within the remit of the state or the federal legislature.⁶ Having reached a decision on this matter, it will be possible to declare one of the laws invalid, and recognise the other, regardless of which of the two was introduced first. A practice with some similarity now takes place in the UK, where a court may consider whether a devolved legislature is acting within the scope of the powers provided to it.⁷

A further means of resolving an apparent clash between legal rules involves considering the *procedure* by which they were introduced. For instance, there may exist a legal requirement that a certain outcome can only be achieved subject to special requirements being met, such as a legislative supermajority or approval through a referendum. If a particular measure is found to fall within the scope of such a procedural stipulation, but did not meet it, then it will be denied the status of law. It is also possible to scrutinise the *form* that legislation takes. Some laws may be designed in such a way that they can be amended or repealed by subsequent legislation only if it states expressly – perhaps using prescribed wording – its intention to bring about such change.⁸

Certain legal rules, such as fundamental human rights, may be deemed under some constitutional arrangements to be impossible to violate under any process. This protection may be achieved by a written constitution that declares some of its contents to be permanent. More controversially, some theorists believe it is possible for the courts to discern certain common law principles – for instance, the prohibition of torture – that are so fundamental as to be beyond the reach of legislators. This school of thought is known as ‘common law constitutionalism’.⁹

Another means still of distinguishing laws is to do so in accordance with their origin as either in an international agreement or as the product of a domestic legislature. The constitutional arrangements of countries that tend towards the so-called ‘monist’ (as opposed to ‘dualist’) model entail

5 But see the discussion at: < <https://ukconstitutionallaw.org/tag/implicit-repeal/> >

6 For a Federal Constitutional Court, see Article 93 of the Basic Law for the Federal Republic of Germany < <https://www.btg-bestellservice.de/pdf/80201000.pdf> >

7 See for instance, s.29 of the *Scotland Act 1998*. However, since the basis of the authority for the devolved legislatures lies in Acts of Parliament, see the discussion of parliamentary supremacy or ‘sovereignty’ below.

8 For procedure and form, or manner and form, see: Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge, Cambridge University Press, 2010), chapter 7.

9 Eg: Thomas Poole, ‘Back to the future? Unearthing the theory of common law constitutionalism’, *Oxford Journal of Legal Studies* (2003): 435-454.

the incorporation of treaties directly into the internal legal hierarchy, which can take precedence over other laws within the domestic legal system.¹⁰

Hierarchies in the UK

It is apparent that there are a variety of means of determining how to resolve a clash between different laws, and thereby of entrenching some legal provisions. But what is the position in the UK? The UK, as is well known, has no ‘written’ constitution.¹¹ In this sense, a law cannot be deemed void because it conflicts with an un-amendable part of the written constitution, or because the amendment procedure required by the written constitution was not adhered to. Nor is it possible, when two different legislative bodies within the domestic system have issued contradictory legislation, to assess which should prevail on a basis of the spheres of operation allotted to different tiers of governance by the written constitution. Furthermore, the UK tends towards a dualist rather than monist model in its reception of international agreements.¹² A treaty cannot directly change UK domestic law; and if implementation of the agreement requires such alteration, then it must be achieved through a specific internal legal instrument, such as an Act of Parliament. While a court can take international agreements and customary international law into account as part of its deliberations, it cannot treat them as superseding statute law.

In the absence of these means of establishing precedence, the UK leans more heavily on other methods of determining priorities. One is to treat Acts of Parliament as the highest form of law. This practice is connected to the doctrine sometimes labelled ‘parliamentary sovereignty’.¹³ According to this theory, Parliament is legally unlimited in its legislative power. In many orthodox interpretations of parliamentary supremacy, for instance, Parliament could, if it chose, legislate in contravention of international law. It could – if it used express terms – directly contravene European law even while the UK remains a Member State; and the European Convention on Human Rights. Parliament, it is held, could also legislate as it saw fit in policy areas that have been devolved to Wales, Scotland and Northern Ireland, in contravention of the wishes of the legislatures operating in those territories.¹⁴ Parliament could, furthermore, in this school of thought, abolish the devolved institutions altogether.¹⁵ Parliament can also, through an Act, create delegated powers enabling ministers to amend or repeal Acts of Parliament themselves, without need to resort to the full parliamentary procedures required to pass an Act, though potentially subject to judicial review.¹⁶ Potentially, an Act can seek even to preclude judicial review of powers its

10 See eg: Article 94 of *The Constitution of the Kingdom of the Netherlands 2008* < <https://www.ivir.nl/syscontent/pdfs/144.pdf> >

11 Though parts of the fundamental system are expressed in writing, there is no one text or group of texts clearly demarcated as the constitution, with a special legal position.

12 Arabella Lang, *Parliament's role in ratifying treaties* (House of Commons, London, 2017), p.6.

13 For the classic account, see: A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis, Liberty Fund, 1982). For the most important contemporary exposition, see: Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Oxford University Press, Oxford, 2001) and Goldsworthy, *Parliamentary Sovereignty*.

14 For an assertion of the persistence of the legislative competence of the UK Parliament in devolved spheres of operation, see: s.93 (5) of the *Government of Wales Act 2006*.

15 But see: *Scotland Act 2016*, s. 1 and *Wales Act 2017*, s 1.

16 They are labelled ‘Henry VIII clauses’, a reference to the *Proclamation by the Crown Act 1539* (also known as the *Statute of Proclamations*). For a critical view see: Lord Judge, ‘Ceding Power to the Executive, the resurrection of Henry VIII’, 12 April 2016 King’s College London < <https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf> >.

creates, through what are known as ‘ouster clauses’.¹⁷

While there is a principle that other laws give way to an Act of Parliament, what happens when two Acts of Parliament clash with each other? The standard approach here has been for the more recent to override the earlier. In the words of A. V. Dicey, if the *Dentists Act 1878* had happened ‘unfortunately [to] contravene the terms of the Act of Union, the Act of Union would be *pro tanto* repealed, but no judge would dream of maintaining that the Dentists Act 1878, was thereby rendered invalid or unconstitutional.’¹⁸ Viewed from this perspective, entrenchment is lacking in the UK. The legal system exists in a permanent present. Acts passed today expunge those of yesterday; and those passed tomorrow may have the same effect again. The view advanced by Dicey means that even if an Act does not expressly amend or repeal an earlier Act, it can take precedence over it even if it only conflicts with it by implication (though exceptions to this doctrine of ‘implied repeal’ are discussed below).

For some, parliamentary supremacy is democratically necessary. According to such accounts, it means that the UK legislature, as repository of the popular will, is free from improper restraint by the courts.¹⁹ Yet the concept of parliamentary sovereignty predates the full democratic era in the UK. The democratic justification, whether or not it is sustainable, is a post-rationalisation. Furthermore, in another sense, parliamentary sovereignty is ethically neutral, or even empty. No rule or principle can have a special value attached to it, because all are equally susceptible to being overturned by an Act of Parliament that itself may be supplanted in the same way. Consequently, the democratic case for parliamentary sovereignty has further problems. Under this doctrine it is difficult to provide firm expression to a principle that some rules – especially those of a systemic nature – are more important than others and that, by extension, changes to those rules should ideally command a wider consensus than others. A group can win power in the House of Commons with the support of less than forty per cent of those who voted (which itself is likely to be less than 70 per cent of those registered to vote, which in turn is not all of those who are in theory entitled to vote).²⁰ This victorious party or coalition can then use its position not only to implement a programme of regular policy, but also to alter the rules of the political game in which it is itself a player. Indeed, some observers hold that governments in the UK have tended in recent decades to approach the constitution as though it is simply another field of public policy that they can subject to ongoing interventions and initiatives.²¹ There is a danger that a government might seek to deploy its dominant position within the UK legislature to alter the rules in pursuit of partisan gain.²² The recent controversy over changes to the electoral system, involving both individual electoral registration and boundary changes, illustrates this point well (though it should not be

17 Douglas Edlin, ‘A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States’, *American Journal of Comparative Law* 57.1 (2009): 67-102.

18 A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, Indianapolis, 1982), p.78.

19 For a democratic assertion of the value of parliamentary supremacy, see: Adam Tomkins, *Our Republican Constitution* (Hart, Oxford, 2005).

20 House of Commons Political and Constitutional Reform Committee, *Voter engagement in the UK*, Fourth Report of Session 2014-15 (Stationery Office, London 2014), HC 232, pp.4-6 < <https://www.publications.parliament.uk/pa/cm201415/cmselect/empolcon/232/232.pdf> >.

21 Sir John Baker, ‘Our unwritten constitution’, Maccabaeen lecture in jurisprudence, British Academy, 29 November 2009 < <http://www.britac.ac.uk/audio/our-unwritten-constitution> >

22 Andrew Blick, David Howarth and Nat le Roux, *Distinguishing constitutional legislation: a modest proposal* (The Constitution Society, London, 2014) < https://consoc.org.uk/wp-content/uploads/2014/08/COSJ2237_Constitutional_Legislation_WEB.pdf >

concluded that a written constitution would necessarily prevent all such abuse).²³

Furthermore, a contemporary democracy is a sophisticated mode of government. While elections and the concept of decision-making on a basis of majority votes are important to it, they are not the whole. For democracy to be meaningful, certain principles – such as the rule of law and human rights – must be protected. The possession of a majority in the dominant legislative chamber should not be a means of arbitrarily denying individuals and groups due process of law or individual rights. Though those seeking to pursue such oppressive policies might claim to express the essence of democracy, they would in fact be undermining democracy through compromising the principle of equal citizenship. Furthermore, populist majoritarianism could, if taken to an extreme, be deployed even to destroy the processes, such as multi-party elections, which provided the initial basis for the authority of those pursuing such ends. A similar point might be made about a principle which appears to have gained in force in the UK in the wake of the EU referendum of June 2016, and that presents a practical challenge even to the idea of parliamentary sovereignty. Some now appear to hold that a referendum result can provide an irresistible imperative to follow a certain course of action, to which any opposition is undemocratic. Yet as with the idea of parliamentary supremacy, a democratic concept – decision-taking through simple majority voting – could potentially prove detrimental to democracy, if deployed crudely for particular purposes.²⁴

The concept of winner-takes-all, then, is problematic. This difficulty explains the need for entrenchment. It can separate areas of legitimate party political contestation that can appropriately be susceptible to simple majority decision-making, from the realm of more fundamental constitutional principles. Defining which is which is of course not always a straightforward matter. But this task is nonetheless vital. As discussed, some forms of entrenchment that are deployed in many other countries have not been available in the UK. The traditional alternative to legal safeguards in the UK has been to rely on protections that do not take a hard legal form. One supposed protection has been the sound judgement and good intentions of legislators. Historically, Parliament perceived itself as an upholder of liberty against the executive. We should avoid confusing liberty as conceived in pre-democratic times with its meaning today; and should be equally wary of exaggerating how effective Parliament was at protecting it. More important still for the present debate, the historic success of Parliament at making the executive accountable to it has had a perverse consequence. The constitutional position that developed, especially from the eighteenth century onwards, was that governments were formed out of relatively cohesive groups (normally) with a majority in the House of Commons (albeit subject to increasing rebelliousness lately). In this sense, there is an alignment between the interests of the Parliament and the executive, in that the same group is preeminent within both institutions. The idea of Parliament as disposed to protect certain democratic norms in the face of threats from the executive is, in this light, questionable.²⁵

Certainly, resistance to proposals judged constitutionally inappropriate can come from the Commons, including through backbench rebellions on the government side. The House of Lords

23 Lewis Baston, *Electoral Collision Course? The boundaries and the Register after May 2015* (The Constitution Society, London, 2014) < <http://consoc.org.uk/publications/election-collision-course-the-boundaries-and-the-register/> >

24 Andrew Blick, *Taking Back Control? The EU referendum, Parliament and the 'May Doctrine'* (Federal Trust, London, 2016) < <http://fedtrust.co.uk/our-work-on-europe/taking-back-control/> >

25 Lord Scarman. 'Why Britain needs a written constitution', *Commonwealth Law Bulletin* 19.1 (1993): 317-323.

also, in some accounts, performs a role of constitutional guardianship.²⁶ Parliamentary committees, such as the Joint Committee on Human Rights and the House of Lords Select Committee on the Constitution, operate in this area. The government is likely to modify proposals taking these forces into account even before it introduces them; and it can successfully be pressurised into altering bills that have attracted criticism and met with resistance within Parliament. But to regard Parliament as above all else a defender of core constitutional principles is to risk misrepresenting and simplifying its actual role. Moreover, there are instances of legislation with problematic constitutional connotations, in particular counter-terrorism bills, that – far from being resisted within Parliament – pass through it at an accelerated rate, on the grounds of claims from the executive that a given emergency necessitates an expedited process.²⁷ Lately, faced with a supposed popular mandate, Parliament has also proved largely willing to afford substantial discretion to the UK executive in its response to the EU referendum, despite the immense constitutional implications involved. Furthermore, the Parliament Acts of 1911 and 1949 (discussed below), that entrench the length of a Parliament, were otherwise intended to make constitutional change easier to bring about, through creating the potential for the Commons to override the Lords.

A further check on the potential for abuse of the legislative authority of Parliament that is sometimes identified involves the idea of practical and political limitations. Governments and legislators may prefer not to introduce a provision because it will not be possible to implement, or may attract attacks from the media, or public unpopularity. A problem with these safeguards is that that they are arbitrary. There is no automatic correlation between the extent to which a particular legislative proposal might be practical, and whether or not it might violate a core constitutional principle. Furthermore, while the media and public opinion can at times be a barrier to abuse, they cannot be relied upon. They might be sharply divided over a matter, or largely indifferent, or uncomprehending – or might even be an important source of initiative or support for a democratic abuse. An important influence on plans to amend or repeal the *Human Rights Act 1998* and change the way in which the European Convention on Human Rights has effect in the UK has been a belief (or hope) that human rights have become contaminated in the public perception.²⁸ Populist drives for the undermining of constitutional principles can in turn exert pressure upon Parliament, further challenging its potential to act as an upholder of standards.

A further means by which, tradition has it, constitutional principles are upheld, connected to some of the ideas discussed above, is through conventions. They exist in all constitutions, whether written or unwritten, and will surely always do so. But in the UK, conventions are arguably of exceptional importance. They are principles and rules of conduct that are not legally enacted. Their force is derived from their being recognised as being binding by the different players involved in the political process, including, most importantly, those to whom they apply. Public scrutiny can

26 Dawn Oliver, *Constitutional Guardians: The House of Lords* (The Constitution Society, London, 2015) < https://consoc.org.uk/wp-content/uploads/2015/12/COSJ3942_Constitutional_guardians_WEB.pdf > ; Lucy Atkinson, *Talking to the Guardians: the constitutional role of the House of Lords* (The Constitution Society, London, 2016), < <http://consoc.org.uk/publications/talking-to-the-guardians-constitutional-role-house-lords/> > .

27 For the definitive account of counter terrorist legislation in the UK, see: Clive Walker, *Terrorism and the Law* (Oxford University Press, Oxford, 2011).

28 It should be noted that in the case of the Human Rights Act and the Convention, it may be that the practicality constraint has proved effective in limiting the potential for action in this area – a workable policy to limit their impact has so far been elusive. Stephen Dimelow and Alison L. Young, ‘*Common Sense*’ or *Confusion? The Human Rights Act and the Conservative Party* (The Constitution Society, London, 2015) < http://www.consoc.org.uk/wp-content/uploads/2015/04/COSJ3217_Common_Sense_or_Confusion_WEB.pdf > .

also be useful in applying external pressure, and perhaps creating a sense that failure to adhere to conventions will lead to undesirable consequences.²⁹

There is no doubt that conventions can be effective at ensuring the upholding of constitutional norms. For instance, the monarch still in theory possesses the legal right to make personal decisions in a range of areas falling within the remit of a legal source known as the Royal Prerogative. They include the appointment and dismissal of the Prime Minister and ministers, and the granting or withholding of Royal Assent to bills that have passed through their other parliamentary stages.³⁰ But convention has long since determined that these authorities are, in practice, disposed of in accordance with democratic principles, rather than the individual disposition of the ruler.³¹ Conventions can also be regarded as ensuring that legislation bringing about constitutional change is enacted subject to special processes. For instance, a convention exists that bills of ‘first class’ constitutional significance be considered in the Commons by a Committee of the Whole House (though just how effective this form of scrutiny is, and whether the convention has been applied consistently, are different matters).³² In the period since referendums came into use for major purposes in the 1970s, there has arguably developed a convention that certain types of constitutional decision-making require approval by referendum.³³ Yet it might also be held that, as well as being a protective device, referendums are a potentially a vehicle for achieving radical changes such as independence for a component of the UK or UK exit from the EU.³⁴

Conventions can bring with them problems. It is not always clear how they come into being, whether they exist at all, what, precisely, is the nature of particular conventions, or how they apply in given circumstances. Because they are broadly self-imposed, there is not necessarily a satisfactory means of impartial arbitration if a dispute arises involving a convention. Therefore, if individuals or institutions that some believe are bound by a particular convention do not recognise it, and take the view they can behave as though it does not exist without serious repercussions, then the supposed convention will have no force. In such circumstances, there is a danger that those in positions of authority will be able to abuse their power, and conventions will have failed as a protector of constitutional values.

There are instances when conventions have seemingly broken down or have been abruptly and unilaterally violated. For instance, early in the twentieth century, there was a lack of consensus over what was the appropriate way in which the House of Lords could utilise its legal right to veto legislation including finance bills. A severe political dispute developed, eventually leading to the *Parliament Act 1911*. Lately another disagreement has appeared involving differing interpretations of how the Lords should deploy its powers in relation to statutory instruments.³⁵ Further

29 Andrew Blick, ‘The Cabinet Manual and the codification of conventions’, *Parliamentary Affairs* 67.1 (2014), pp.191-208.

30 The standard practice now is for batches of bills, rather than individual bills, to receive Royal Assent.

31 Andrew Blick, ‘Emergency powers and the withering of the Royal Prerogative’ *The International Journal of Human Rights* 18.2 (2014): 195-210.

32 Robert Hazell, *Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills 1997-2005* (Constitution Unit, London, 2006).

33 See: House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom*, HL 99 (Stationery Office: London, 2010), p. 27.

34 Lucy Atkinson and Andrew Blick, *Referendums and the Constitution* (The Constitution Society, London, 2017) < <http://consoc.org.uk/publications/referendums-and-the-constitution/> >

35 Sir Malcolm Jack and Richard Reid, *Financial Privilege: The Undoubted and Sole Right of the Commons?* (The Constitution Society, London, 2016) < <https://consoc.org.uk/wp-content/uploads/2016/06/Web-copy-Financial-Privilege.pdf> >

contemporary incidents that might be regarded as entailing a violation of convention include the decision of the coalition government to seek to legislate for changes in the system of party funding without achieving cross-party consensus for its proposals; and the introduction of directly elected devolved mayors in England without first holding referendums in the areas concerned. In recent decades a trend has developed for the publication of official documents containing within them accounts of conventions. On one level, this practice could be seen as helpfully clarifying what the position is, and perhaps increasing the chances that conventions will be acknowledged and upheld. However, the legitimacy of the production processes of the texts is open to question. While conventions surely require some kind of collective ownership, these documents are often the product of one institution acting alone – frequently, the UK executive. Furthermore, as much as a source of clarity and strength, the appearance of official descriptions of conventions could in fact be evidence of a prior loss of faith in their effectiveness as tools of constitutional management.³⁶

Legal entrenchment in the UK

The principle that an Act of Parliament is superseded by a later Act is a prominent feature of the UK legal system. So too is a reliance on practical limitation, self-restraint and convention. Yet while entrenchment of constitutional principle has an exceptionally informal flavour in the UK, there are some firmer legal means by which it can be achieved. The first example of such a provision involves one of the bases on which the UK as a state is founded: the Treaty and Acts of Union between Scotland and England of 1706-7 (and to some extent its successor, the Act of Union 1800, merging Great Britain and Ireland). First, the text appears to seek to be self-entrenching, repeatedly describing itself as permanent through the use of terms such as ‘forever after’ (see eg: article I). Furthermore, and perhaps more importantly, since the union provided for the existence of a new Parliament of Great Britain, (article III), how can a Parliament interfere with an instrument in which its own authority is founded? However, Parliament has since successfully altered some of the perhaps less central terms of the union through regular legislative procedures. Whether a more substantial amendment or repeal is possible through this means has remained a subject of debate, which the judiciary has been careful to leave open.³⁷ This issue received surprisingly little attention in the period prior to the Scottish independence referendum of September 2014. Yet it would have been reasonable to ask whether, in the event of Scotland voting ‘yes’, Parliament would strictly have had the legal authority to put this decision into effect. Perhaps an aggrieved party might have brought litigation to probe this area of uncertainty. It is notable that it is generally accepted that a referendum is required for a break-up of the union (although seemingly in the potentially departing territory only, not the whole UK), perhaps a tacit acknowledgment that full repeal of the Treaty and Acts of Union requires, for practical even if not legal reasons, something more than a normal Act of Parliament. Ultimately, however, it seems doubtful that a court would stand in the way of full repeal.

The Acts of Union are often grouped together with other historic instruments that are generally regarded as core components of the English and/or UK constitution. Among their number are *Magna Carta* (first agreed in 1215, then revoked and reissued in altered form); the *Petition of Right (1628)*; the *Bill of Rights (1689)*; and the *Act of Settlement (1701)*. These texts are regarded

³⁶ Andrew Blick, *The Codes of the Constitution* (Hart, Oxford, 2016).

³⁷ See eg: N. MacCormick, ‘Does the United Kingdom have a Constitution? Reflections on *MacCormick v. Lord Advocate* (1978) 29 1 *Northern Ireland Law Quarterly*; T B Smith, ‘The Union of 1707 as Fundamental Law’ (1957) 99 *Public Law*.

within the UK and internationally as crucial statements of principles pertaining to the rule of law and personal freedom (though their historic meaning is often misrepresented in the process). However, while the values with which we now associate them are in a sense eternal, their status as actual legal documents is not as persistent. Since the late nineteenth century, for instance, Parliament has repealed almost the entirety of *Magna Carta*; and important portions of the Act of Settlement were expunged within a few years of its coming into force. Many of the contents of these texts seem anachronistic today, and the justiciability of some of them may be questionable. Therefore, while there would certainly now be a reluctance to modify what remains of these venerable and culturally embedded documents without pressing reason, we should not regard them as legally entrenched in a contemporary sense.³⁸

A more recent statute, the *Parliament Act 1911*, as amended by the *Parliament Act 1949*, provided for an inverted form of entrenchment. It made it easier for Parliament to legislate in most possible ways through creating a mechanism (used on seven occasions to date) for the House of Commons ultimately to have the last word in a dispute with the House of Lords, circumventing the second chamber and presenting a bill for Royal Assent notwithstanding its resistance (section 2).³⁹ This system utilises certification by the Speaker of the House of Commons (section 3). But certain bills are exempt from the Parliament Act bypass procedure, most notably those that have the effect of extending the life of a Parliament beyond five years (section 2 [1]). In this sense, the maximum duration of a Parliament is entrenched, since it is subject to the same protection of a potential Lords veto that once applied to all legislation. Indeed, the absolute requirement for agreement from both Houses is, when compared to the possibility of a bypass of the Lords that is theoretically available in most cases, a form of supermajority. However, it is not clear how well entrenched is the actual section 2 (1) provision protecting the maximum length of a Parliament. The Commons could attempt to force through an amendment to this stipulation using the Parliament Acts themselves – and then might be able unilaterally to postpone a General Election. The potential barriers to such an abuse (aside from political limitation, self-restraint or convention) would be the courts, that might refuse to recognise measures produced in this way as law⁴⁰; or perhaps even the monarch, who might object to Royal Assent being provided.

The Parliament Acts contain, as discussed, a supermajority provision of a type. Further precedent for supermajorities can be found elsewhere, including in section 2 of the *Fixed-term Parliaments Act 2011*. This section provides for early general elections following support from two-thirds or more of MPs. Though not relating to the power to issue legislation, it does establish a procedure that might eventually be deployed for purposes of law-making.⁴¹ (Perhaps the ease with which the government was able to attain the requisite level of Commons support for an early election in April 2017 should be noted if this model is to be adapted.) Section 96 of the *Enterprise and Regulatory Reform Act 2013*, moreover, provides in effect for the establishment by Royal Charter of a body (intended in turn to perform the task of recognising one or more press regulators) the alteration or abolition of which can, in the terms under which the body is set up, be made subject to parliamentary approval through a supermajority. In other words, ministers are able, supported

38 Blick, *Beyond Magna Carta*, esp. Part 1.

39 Section 1 of the 1911 Act also extinguished the power of the House of Lords to alter money bills.

40 See: House of Lords Select Committee on the Constitution, *Constitutional implications of the challenge to the Hunting Act 2004* (Stationery Office, London, 2006), Appendix 3, The reasons given by the Law Lords, Professor Anthony Bradley, 30-32, paras 16-20.

41 Andrew Blick, 'Constitutional Implications of the Fixed-Term Parliaments Act 2011', *Parliamentary affairs* 69.1 (2016): 19-35.

by the 2013 Act, to use the Royal Prerogative to entrench an entity as they create it. The stipulations contained in these 2011 and 2013 Acts suggested that the idea of heightened requirements for certain forms of action, and entrenchment of a kind, was gaining currency.

Another variant on the supermajority concept comes with the English Votes for English Laws (EVEL) system introduced through changes to the Commons Standing Orders in 2015.⁴² Under this mechanism, legislative provisions that the Speaker deems to be English (or English and Welsh) only must be agreed not only by a majority of the whole of the Commons, but by a majority of MPs elected from English (or English and Welsh) constituencies. A significant feature of this particular assertion of the principle that a simple majority of UK MPs is not enough is that it relates specifically to the legislative process. The UK Parliament has also applied the supermajority concept at devolved level. Section 11 of the *Scotland Act 2016* and section 9 of the *Wales Act 2017* require that certain varieties of electoral legislation must be subject to approval by two-thirds respectively of the Scottish Parliament and the National Assembly for Wales.

A further provision with an aspect of entrenchment to it comes in the form of the *European Union Act 2011*. The Act creates a whole class of parliamentary action – in relation to the pooling of powers at EU level – that is subject to approval by referendum (part I). However, it seems that Parliament could amend or repeal this Act using normal legislative processes, ending this requirement for a plebiscite, without first holding a referendum. Indeed it may be that, following exit from the EU, the 2011 Act is repealed using secondary legislation issued under the proposed Great Repeal Act. Moreover, another feature of the Act is that it states, in section 18, that European law had force in the UK system only by virtue of parliamentary statute. In other words, it asserted the supremacy or ‘sovereignty’ of Parliament, a doctrine that has proved to be an important barrier to the realisation of constitutional entrenchment in the UK. In a sense, it sought to entrench a restriction on entrenchment.

Stipulations surrounding the possible departure of Northern Ireland from the UK, involving a referendum, are also provided for in statute, the *Northern Ireland Act 1998* (section 1 and schedule 1). While Parliament could repeal this Act, to do so unilaterally would seem to entail violation of a treaty, the *Belfast* (or ‘Good Friday’) *Agreement*, some of which was realised through the 1998 Act. In this respect, this particular provision, or at least the content to which it refers, is entrenched under international law. Moreover, there would possibly be immense political costs both domestically and on the world stage for a government perceived as having violated the peace process.

Another experiment with entrenchment involves devolution. Partly providing for commitments made by the leaders of the pro-union parties in the lead up to the Scottish Independence Referendum of 2014, the *Scotland Act 2016* contains a series of stipulations regarding the UK Parliament. Section 1 inserts into the *Scotland Act 1998*, under the heading ‘Permanence of the Scottish Parliament and Scottish Government’, the statement:

(1) *The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom’s constitutional arrangements.*

(2) *The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament*

⁴² Daniel Glover and Michael Kenny, *Finding the good in EVEL: an evaluation of ‘English Votes for English Laws’ in the House of Commons* (Centre on Constitutional Change, Edinburgh, 2016) < https://www.ucl.ac.uk/constitution-unit/news/EVEL_Report_A4_FINAL.pdf >

and the Scottish Government.

(3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.

Section 2 of the 2016 Act encapsulates a previously non-legislative rule known as the ‘Sewel Convention’. It states that ‘it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’ Sections 1 and 2 of the *Wales Act 2017* make similar provisions for Wales.

If one accepts that the ‘sovereignty’ of Parliament remains intact following the enactment of these measures, then the principles they encapsulate would be no more entrenched, in pure legal terms, than they were before this legislation was passed. Furthermore, in the *Miller* case in January 2017, the Supreme Court expressed the view that the ‘Sewel’ rule remained a convention, despite statutory recognition. The judgement found in paragraph 148 that:

by such provisions, the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement. That follows from the nature of the content, and is acknowledged by the words (“it is recognised” and “will not normally”), of the relevant subsection. We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts.⁴³

Ultimately, the reasons that Parliament might feel unable to violate the commitments set out in these Acts, even if it wanted to, would be the traditional ones: political reality, self discipline and convention. But in the case of the Sewel rule, even given a desire by Parliament to adhere to it, differing interpretations of it might be possible in particular circumstances. What, precisely, are ‘devolved matters’, and what is ‘normally’? If the courts do not have a role, it seems the UK Parliament, though a party to this convention, would be the final legal arbiter as to how it applied in a particular instance, thus qualifying its status as a basis for entrenchment.

Implied repeal, express repeal, and judicial review

The courts in the UK can play a part in the entrenchment of certain features of the constitution. This practice can take place when they carry out judicial review, assessing the legality of ministerial actions under primary legislation or the Royal Prerogative. In doing so they may apply principles that could be regarded as constitutional – such as the need for adherence to proper procedure, or (under the *Human Rights Act 1998*) to adhere to the European Convention on Human Rights (ECHR). Judicial review may lead to such outcomes as the quashing of decisions, actions or secondary legislation. The tendency for inclusion of conventions in published official codes may serve to make their justiciability more likely (though seemingly not in the *Miller* case), making it easier for the courts to take what might be regarded as constitutional conventions into account when reviewing executive action.⁴⁴ However, the idea that a court might void an Act of Parliament

⁴³ [2017] UKSC 5. Judgement at: < <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf> >

⁴⁴ Richard Rawlings (2000) ‘Concordats of the Constitution’, *The Law Quarterly Review*, 116, 257–286.

on the grounds that it conflicted with a fundamental constitutional principle – discussed below – is less plausible.

Courts also of necessity play an adjudicatory role in another form of entrenchment, whereby in limited areas the doctrine of implied repeal, discussed above, does not apply. Statutory provisions become entrenched in as far as they can only be amended or repealed by a later Act if it expressly states that it is the intention of Parliament to attain this outcome. One such instance of this mechanism involves the *Human Rights Act 1998*.⁴⁵ The Act requires courts to read acts (and secondary legislation) – whether passed before or after the 1998 Act – as far as possible as to render them compatible with the ECHR (section 3 [1]). The judiciary can in the process potentially wield a high degree of discretion in the interpretation it applies. If despite its best efforts the court is unable to make the Act fit with the Convention, then it makes a declaration of incompatibility (section 4). The offending Act remains in force, but so does the 1998 Act, which is consequently immune to implied repeal and in this sense entrenched (nor does the Act repeal earlier Acts, meaning they are entrenched against it). Through the Act, the Convention itself becomes, by extension, entrenched.⁴⁶ The 1998 Act is therefore the closest equivalent to a Bill of Rights – as understood internationally – that the UK possesses. Following a declaration of incompatibility, it is left to ministers and Parliament to resolve the discrepancy (section 10), though a convention is arguably emerging that they should in such circumstances accept the judgement of the courts and respond in the spirit of it.

Another statute entrenched through immunity to implied repeal is the *European Communities Act 1972*. It has a firmer status than the Human Rights Act in that the courts can, under the 1972 Act, disapply Acts – including those passed after it – in as far as they are not compatible with European law. This form of judicial action is the closest equivalent found in the UK to constitutional review. It has the effect of providing European law with an entrenched status. That European law should enjoy this privileged position is a necessary consequence of UK membership of the EU, and was established as principle even before the UK joined the European Economic Community in 1973. Review under the European Communities Act poses a greater legal challenge to the doctrine of parliamentary sovereignty than any other practice in the UK constitution, even human rights review. Indeed, objections to this consequence of participation in continental integration provided an important fuel for Euroscepticism over a prolonged period of time. This aversion was a reason that some wished to leave the EU, and now provides part of the rationale for exit. In its paper, *The United Kingdom's exit from and new partnership with the European Union*, published in February 2017⁴⁷, the UK government stated that (paragraph 2.1): '[t]he sovereignty of Parliament is a fundamental principle of the UK constitution. Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that.' The repeal of the European Communities Act is now in prospect under the proposed Great Repeal Bill.⁴⁸ The Bill will follow the same passage through Parliament as any other statute. The differences will be that it will have been preceded by a referendum affording it extra political impetus – though with no direct legal

45 Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, Oxford, 2008).

46 The relevant parts of the Convention are attached to the Act, schedule 1.

47 Cm 9417. < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf >

48 Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (London, 2017), Cm 9446 < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf >; Richard Gordon and Tom Pascoe, *Preparing for Brexit: the legislative options* (The Constitution Society, London, 2017) < <https://consoc.org.uk/wp-content/uploads/2017/04/Preparing-for-Brexit-text-pdf-A4.pdf> >

impact – and it will need, unlike many other changes in the law, expressly to state its purpose.

The repeal of the 1972 Act will bring to an end one of the most important entrenching measures ever introduced into the UK legal system. Yet, assuming the UK does exit the EU, other challenges to parliamentary supremacy could manifest themselves in future. As noted above, some members of the judiciary have expressed the view that parliamentary ‘sovereignty’ itself derives its force from common law. Consequently, according to this ‘common law constitutionalism’ school, the courts are the source of parliamentary authority, and are therefore able to place limits upon it, or perhaps reject it altogether. For instance they may decide that certain enactments are of a constitutional nature and should be subject only to express as opposed to implied amendment or repeal. In other words, the courts – so this theory runs – could decide that Parliament must make its intention positively clear if it is to alter certain earlier statutes it has produced, even if these previous Acts do not specify that they are protected in this way.⁴⁹ Perhaps legislation providing for devolution might fall within a category of statute that was not on the surface immune to implied repeal, but which a judge could decide a later Parliament could only change using precise terms. This theory, were it put into practice, would seem to imply the courts reading an implicit intention into some legislation, that prevented it from inferring another implied purpose from later Acts. A variant on this idea might hold that amendment and repeal of statutes deemed constitutional might not require express words, but would at least need to make it hard to avoid the conclusion that such alteration was needed.

An extreme form of the ‘common law constitutionalism’ model proposes that there are certain constitutional principles so fundamental that a court should refuse to recognise as law any attempt by Parliament to abrogate them.⁵⁰ Such proscribed measures might include the abolition of judicial review or the mandating of torture, the judicial aversion to which is a principle that long predates the existence of the ECHR. It is also possible that a court might not recognise an attempt to bypass the Parliament Act precaution against extensions in the duration of a Parliament, through first using the Parliament Act to force through a bill removing this protection, then – having abolished the prohibition – using the same power to prolong a Parliament. These projected scenarios would amount to a major clash between politicians on the one hand and judiciary on the other hand, meriting the label constitutional crisis. They may seem far-fetched, but the challenge to the *Hunting Act 2004* has at least established the principle that the courts can consider validity of an Act of Parliament. If the courts began to regard assessing Acts in this way as a more usual task, they might become more willing to apply constitutional principles they discerned for themselves in the process.

There are some other types of legislation that would certainly fail to receive judicial recognition, this time by courts outside the UK. Parliament might try, if it chose, to amend or repeal Acts of Parliament providing for the autonomy of former colonies, such as the *Canada Act 1982*, which included the Canadian constitution as a schedule and pronounced the ‘Termination of power to legislate for Canada’ for the UK Parliament (section 2). A Canadian court would surely not accept any unilateral effort by the Westminster Parliament in this direction. Here, then, is a class of entrenched legislation. One interpretation of the reason for this special status is that a new consensus has emerged across different branches of government in the territories concerned. Where once the accepted ‘rule of recognition’ was that an Act of Parliament had supremacy over all other law, the

⁴⁹ A celebrated expression of this view came in obiter comments made by Lord Justice Laws in the *Thoburn* or ‘Metric Martyrs’ case. [2002] EWHC 195 (Admin) para. 102.

⁵⁰ See: *Jackson and others (appellants) v. Her Majesty’s Attorney General (Respondent)*, [2005] UKHL.

new common understanding is that the written constitution is the ultimate source of authority.⁵¹

The post-EU referendum environment

The present UK government has chosen to interpret the ‘leave’ result of the referendum of 23 June 2016 as necessitating departure from the EU. A core part of this policy is the repeal of the most powerful legal source of entrenchment that has existed in the UK, the *European Communities Act 1972*. But, assuming the current intended course of action is maintained, whatever legal order takes the place of incorporated European law may well need to include various forms of entrenchment. It is widely recognised that a replacement for the 1972 Act will need to create expansive delegated authorities for ministers, including ‘Henry VIII’ powers allowing them to amend or repeal primary legislation. This provision will in turn generate a requirement for special protections to ensure that there is no misuse of these powers, a protection that might be seen as a form of entrenchment.

Furthermore, while the UK may formally remove itself from the purview of European law and the European Court of Justice, it might need to submit itself to some form of binding adjudication mechanism as part of the post-exit Free Trade Agreement (FTA) the UK hopes it can obtain.⁵² The white paper of February 2017 states that (paragraph 1.3) ‘[o]nce we have left the EU, Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of [European-derived] law to keep, amend or repeal.’ But it then notes in paragraph 1.5 that ‘[d]omestic legislation will also need to reflect the content of the agreement we intend to negotiate with the EU.’ This formulation could be read as leaving open the possibility that some courses of legislative action will be ruled out because they entail violation of the EU-UK FTA. Enforcement of this principle could require entrenchment mechanisms of some kind, legal or otherwise.

A further issue arising from the EU referendum and the government interpretation of it involves the territorial governance of the UK.⁵³ Many of the functions being repatriated from EU level will be seen as engaging the interests of the devolved legislatures and executives. It could well be necessary to ensure that these institutions are given a clear part to play in decisions about the use of these newly reacquired powers. Equally, it will be important to ensure that their actions are coordinated with one-another and the UK centre as appropriate. For this reason it might be necessary to create mechanisms, possibly with a role in the UK law-making process, that rest on territorial consensus. The procedures employed might resemble a form of entrenchment, making certain actions dependent on approval from a majority – or perhaps a supermajority – of UK and devolved levels deliberating together.

A reason that territorial matters have attracted so much interest in the wake of the EU referendum is the geographically differentiated nature of the results. While England and Wales voted ‘leave’ on 23 June 2016, Northern Ireland and Scotland (and, within England, Greater London) delivered

51 See: Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010).

52 For a discussion in the government white paper of February 2017 of dispute resolution mechanisms, see paras 2.4-2.10.

53 For contrasting views, respectively, from the Welsh, Scottish and UK governments on these matters, see: Welsh Government (2017), *Securing Wales’s Future: Transition from the European Union to a new relationship with Europe* <<https://beta.gov.wales/sites/default/files/2017-02/31139%20Securing%20Wales%20C2%B9%20Future%20Version%202020%20WEB.pdf>>; Scottish Government (2016), *Scotland’s Place in Europe* <<http://www.gov.scot/Resource/0051/00512073.pdf>>; and *The United Kingdom’s exit from and new partnership with the European Union*.

‘remain’ votes. This outcome raises challenging questions about the relationship between referendums and entrenchment. How best should they be designed as a means of ensuring considered, inclusive systemic change? Should simple majorities be sufficient in the context of a multinational, territorially diverse state such as the UK? Or does this approach mean that the preponderance of England in population terms will provide it with an inappropriate dominance? If so, should there be some form of territorial supermajority stipulation, requiring at least three or perhaps all of Wales, Scotland, Northern Ireland and England to consent to a radical course of action such as departure from the EU? Would this kind of rule be acceptable from the perspective of England, and would it be democratically proper?

The EU referendum has also given rise to further considerations regarding the nature of entrenchment in the UK. Discourse surrounding referendums in the UK has always contained tensions. These devices appear to challenge core features of our constitution, such as parliamentary supremacy, and some have depicted them as alien to the UK tradition. Yet calls for their use from within the UK date back to the nineteenth century. Moreover, while their advocates have often seen them as a means of preserving existing arrangements – for instance, blocking the introduction of Home Rule – there has long been another side to referendums. Some supporters of the use of popular votes have regarded them as a means of bringing about sweeping changes that might not otherwise have been attainable, such as tariff reform, Scottish independence or exit from the EU. In this sense, referendums are the opposite of entrenchment devices. They are a means of driving change. While referendums can have value as a means of securing public consent to important constitutional measures, they contain within them the potential for abuse.⁵⁴ Following the EU referendum, some have claimed the supposed existence of a popular will in favour of departure in efforts to stifle deliberation about the appropriate policy to follow.⁵⁵ In this sense, a referendum is not only a device for change rather than entrenchment. It is being deployed as a means of circumventing other entrenchment mechanisms discussed in this paper, such as the role of Parliament as a representative institution and protector of rights and democratic principles. The potential role for referendums that has manifested itself since 2016 emphasises the need for the discussion of future possibilities that follows.

Options

Entrenchment has, from a constitutional viewpoint, certain attractions. In particular, it makes possible the protection of fundamental principles; and can help ensure that constitutional change, if it does occur, is more likely to proceed on a basis of careful consideration and consensus. Moreover, recent legislative initiatives in areas such as devolution suggest an increased interest in political circles in the idea of promoting entrenchment (though that involving the incorporation of European law is clearly in the process of being ended). Yet if our constitution is becoming more clearly entrenched, or if new forms of entrenchment must be developed in place of those derived via the *European Communities Act 1972*, it is important that this shift is itself carefully and openly executed, following thorough deliberation. On a basis of the previous discussions, the options for entrenchment of constitutional provisions or principles in the UK are:

1. To draw inspiration from understandings prevailing in New Zealand, one of the few countries that like the UK lacks a written constitution. The New Zealand *Cabinet Manual* sets out

⁵⁴ Atkinson and Blick, *Referendums and the Constitution*.

⁵⁵ Eg: Blick, *Taking Back Control?*.

certain principles that should apply to exercises in constitutional change (see the excerpts from the New Zealand text that comprise Appendix a). Perhaps a future edition of the UK *Cabinet Manual* could set out similar rules, and seek to promote certain core principles around how constitutional alteration should take place. Such a statement could originate in a joint declaration agreed by multiple parties, then referenced in the manual. Its contents could, however, in theory be overridden by an Act of Parliament at any point, though there might be negative political consequences for a government embarking on such a course of action.

2. New processes whereby Parliament can identify for itself legislation of constitutional significance and apply procedures it deems appropriate to it. The courts might then take into account the view of Parliament that a particular Act is constitutionally important when deciding whether or not it is subject to implied repeal by a subsequent piece of primary legislation.⁵⁶
3. Changes to the Standing Orders of one or both Houses of Parliament to establish procedures – such as supermajority requirements – entrenching particular legislative provisions, or classes of legislative provision. The EVEL mechanism could provide a basic model. Any such change would be vulnerable to being overturned by a simple majority, however.
4. Inclusion of additional protected provisions in the Parliament Act, or in a similar statute. This method may be vulnerable to reversal by a determined House of Commons, and intervention from the courts might prove necessary to seek to prevent such action. This paper attaches as Appendix b a ‘Basic Law’ bill. It was drafted by a parliamentary clerk as an exploration of how this approach might be followed (also introducing a Commons supermajority provision and providing for oversight from the Supreme Court).
5. Protection from implied repeal, using the Human Rights Act or the European Communities Act (however unfashionable) as a model, with the judiciary playing an enforcement role.
6. Self-entrenchment of the type the Treaty and Acts of Union apparently seek to achieve, though perhaps not successfully, by simply stating that they are in force forever. The *Scotland Act 2016* and *Wales Act 2017* follow a self-entrenching pattern, that again seems not to be secure against a determined Parliament. To seek more security, an Act might impose a super-majority or referendum requirement upon amendments to itself, or an Act might stipulate similar procedures for the amendment or repeal of another Act or Acts (as the Scotland Act does with its referendum requirement protecting the Scottish Parliament and Government). In New Zealand, the *Electoral Act 1993* (section 268) makes certain provisions in the *Constitution Act 1986*, involving elections, subject to heightened procedures. A UK entrenchment measure might also provide for a body created under other powers, such as the recognition body referred to in the Enterprise and Regulatory Reform Act, that could in turn contain in its own terms of incorporation protection through supermajority or perhaps referendum stipulations. Yet it remains possible that Parliament could repeal the provision for such protections using ordinary legislative processes. The courts may, once more, become the adjudicator in such circumstances. They may well be reluctant to resist a majority in the Commons.
7. To rely on common law protections. This course of action seemingly leaves excessive discretion to the judiciary in defining what are the entrenched provisions, and perhaps invites destabilising constitutional conflict.

⁵⁶ See: Blick, Howarth and le Roux, *Distinguishing Constitutional Legislation*.

8. A provision, perhaps contained in an Act of Parliament, that certain decisions are subject to approval by a majority or supermajority of the UK Parliament and the devolved legislatures. There might also be a requirement that UK-wide referendum results advocating a move away from existing arrangements are valid only if there is support from a majority or supermajority of the different components of the UK, as well as a majority of all voters taking part across the UK. Some precedent for referendum supermajorities – or rather thresholds – can be found in the votes on Welsh and Scottish devolution in 1979, for which there was reference to a need for at least 40 per cent of registered voters and a majority of all those participating to support the new system for it to come into force.
9. The final option is to seek to establish a new ‘rule of recognition’, such as that which has taken hold in former UK colonies. This change could make possible the entrenchment of one or more constitutional provisions that were no longer subject to alteration, either express or implicit, by Act of Parliament, at least using its regular processes. Amendment might require a legislative supermajority, referendum, or perhaps approval from a specified number of nations and regions of the UK. Protected provisions could include a Bill of Rights and the legal basis for the devolved institutions, similar to the entrenchment of the ‘state’ level of government in a federal system. Achieving this fundamental status would require a process commanding such legitimacy that it would be able to create a ‘rule of recognition’ supplanting notions of parliamentary ‘sovereignty.’ A constitutional convention, separate from Parliament but incorporating parliamentarians, alongside representatives of the regions and nations of the UK, as well as members of the public possibly chosen at random, might be an appropriate vehicle for achieving such an outcome.⁵⁷

Were a more deliberate and concerted approach taken towards constitutional entrenchment in the UK, those provisions selected for special protection (by whatever means adopted) might between them begin to resemble a written constitution. If one regards such a document as desirable, it could be that, in the UK context, the most effective means of achieving this outcome is through this route. Rather than seeking to draft and ratify a potentially vast text through a single process, it might be more practical to entrench a relatively small number of stipulations in the first instance, with the possibility of more to follow over time. The entrenchment mechanism itself would be the crucial achievement, more than the extent of its coverage. A merit claimed on behalf of a written constitution is that it is a means of entrenching core principles. However, a more successful approach could be to invert this logic. The implementation of an entrenchment mechanism could be a way of attaining a written constitution.

Whether or not this ultimate goal is appropriate or even achievable for the UK by this or any other means remains a point of contention. However, it is probably easier to achieve consensus around the plausibility and desirability of a slightly less ambitious but nonetheless significant objective: the protection of certain principles against casual modification. In recent decades, governments of all parties have taken tentative steps in this direction. While they might not fully have embraced the idea, they have all demonstrated some susceptibility to the concept of entrenchment, albeit in ways that have suited their particular objectives. This pamphlet has considered the merits of and prospects for establishing more comprehensive and definitive processes for distinguishing constitutional from other rules, and subjecting those rules to different procedural standards according to the category they are in. Without such a mechanism, the constitutional system of the UK can

⁵⁷ For a consideration of the options for a convention, see: Alan Renwick, *After the Referendum: Options for a Constitutional Convention* (The Constitution Society, London, 2014) < http://www.consoc.org.uk/wp-content/uploads/2014/05/J1847_Constitution_Society_Report_Cover_WEB.pdf >

appear to be lacking in normative clarity, and be vulnerable to partisan manipulation. They were hoping to raise £300 million pounds. If such a system were introduced the UK constitution could adopt a hierarchy that reflected and enforced the values intended to underpin it.

Appendix A

Excerpts from *New Zealand Cabinet Manual* (Cabinet Office, Wellington, 2008)

Excerpt i, p.6.

Changing the constitution

In theory, many parts of the constitution can be amended by legislation passed by a simple majority of the Members of Parliament. That power is, however, restrained by law, convention, practice and public acceptance.

Some limits on constitutional change arise from the international obligations which have just been mentioned.

Certain key elements of the electoral system can be amended only if the people in a referendum approve, or three-quarters of the Members of Parliament agree. The provisions thus protected concern the three-year term of Parliament, the membership of the Representation Commission, the division of New Zealand into general electoral districts, the voting age, and the method of voting. In accordance with that requirement, the amendments made in the last 40 years to those provisions have been made only following agreement between the major political parties in the House or, in the notable instance of the change to proportional representation, following a binding referendum (which had itself been preceded by an indicative referendum).

It also appears to be accepted, at the level of convention, that those voting requirements also apply to any proposal to amend that protective provision. Similarly, Standing Orders provide that an entrenched provision should be introduced by the House only by the vote which would be required for the amendment or repeal of the provision being entrenched. The 1986 Constitution Act itself was enacted with general bipartisan support in the House. And recommendations to the House for new Standing Orders, in accordance with convention, are adopted by consensus in the Standing Orders Committee.

Other constitutional changes arise from legislation enacted in the regular way, such as the New Zealand Bill of Rights Act 1990, from decisions of the courts, from new prerogative instruments, and from changing practices (which may contribute to new conventions). Some matters are better left to evolving practice rather than being the subject of formal statement. But such development, like other changes to the constitution, should always be based on relevant principle.

Excerpt ii, p.72

Constitutional issues and Cabinet

5.72 Any proposal that will affect New Zealand's constitutional arrangements must be submitted to Cabinet. Where significant constitutional change is contemplated, issues of process

and appropriate public participation must be clearly and fully addressed in the Cabinet paper.

Appendix B

The following text was drafted by an official in the UK Parliament for The Constitution Society as an example of how an Act of the UK Parliament might provide for entrenchment of ‘basic law’ in the UK.

A **BILL** TO

entrench the basic law of the United Kingdom.

Be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Claim to form part of basic law

1. This Act forms part of the basic law of the United Kingdom.

Definition of basic law

2. Any Act which forms part of the basic law of the United Kingdom shall state this (and nothing else) in its first section.

Majority requirement to establish the basic law

3. No Bill which on being presented for the royal assent would form part of the basic law of the United Kingdom shall be deemed to have been passed by the House of Commons unless the motion in that House that the Bill be now read the third time was agreed without a division or, if the motion was passed on a division, it was agreed by the required majority of that House.

Majority requirement to amend the basic law

4. No Bill which on being presented for the royal assent would by any of its provisions amend the basic law of the United Kingdom shall be deemed to have been passed by the House of Commons unless the motion in that House that the Bill be read the third time was agreed without a division or, if the motion was passed on a division, it was agreed by the required majority of that House.

Disapplication of the Parliament Act from basic law Acts

5. Subsection (1) of section 2 of the Parliament Act 1911 as amended (*Restriction of the powers of the House of Lords as to Bills other than Money Bills*) shall be amended by inserting, after the

words “five years” the words “or any Bill purporting to form part of or to alter the basic law of the United Kingdom as defined by the United Kingdom Basic Law Act 2016”.

Acts already forming part of the basic law

6. (1) In each of the Acts named in subsection (2) of this section, there shall be inserted as the first section the following:-

“This Act forms part of the basic law of the United Kingdom.”

(2) The Acts referred to in subsection (1) of this section are:-

- (a) the Parliament Act 1911, as amended;
- (b) the Scotland Act 1998, as amended;
- (c) the Government of Wales Act 2006, as amended;
- (d) the Northern Ireland Act 1998, as amended; and
- (e) the Human Rights Act 1998.

Other proceedings subject to the required majority

7. (1) None of the types of motion specified in subsection (2) of this section shall have been passed by the House of Commons unless agreed by that House without a division or, on a division, by the required majority of that House.

(2) The types of motion to which subsection (1) of this section applies are:-

- (a) motions to agree with any Lords Amendment proposed to a Bill which started in the House of Commons to which section 3 or 4 of this Act applies; and
- (b) any motion to approve any instrument of delegated legislation which would amend any part of the basic law of the United Kingdom.

The required majority

8. (1) The required majority for the purposes of this Act is a number of members of the House of Commons equal to or greater than two-thirds of the number of seats in that House, including vacant seats.

(2) Before any Bill to which section 3 or 4 of this Act applies is presented for the royal assent, the Speaker of the House of Commons must issue a certificate that the requirements of subsection (1) of this section, and of section 7(2)(a), have been met, and that certificate must be published.

(3) Before any Instrument to which section 7(2)(b) of this Act applies can enter into force, the Speaker of the House of Commons must issue a certificate that the requirements of subsection (1) of this section and of section 7(2)(b) have been met, and that certificate must be published.

Challenge to proceedings

9. (1) Any member of the House of Commons or of the House of Lords who claims that the Speaker of the House of Commons has wrongly issued, or should have issued but has not, a certificate in accordance with the requirements of this Act may apply to the Supreme Court for a

determination of the question.

(2) In determining any application under this section (but only under this section), the Supreme Court may question or impeach proceedings in Parliament.

(3) If the Supreme Court determines that the provisions of this Act have not been complied with, it must state in its determination what proceedings were defective and any proceedings of Parliament so specified are null and void.

Citation and commencement

10. (1) This Act may be cited as the United Kingdom Basic Law Act 2016.

(2) This Act comes into force on the day on which it is passed.