A WRITTEN CONSTITUTION?

In *Our Mutual Friend*, Mr Podsnap felt able to tell the foreign gentlemen that "We Englishmen are Very Proud of our Constitution ….. It was Bestowed Upon Us by Providence". Trollope took a similarly benign view of our constitutional arrangements:

> "At home in England, Crown, Lords and Commons really seem to do very well. Some may think that the system wants a little shove this way, some the other. Reform may, or may not be, more or less needed. But on the whole we are governed honestly, liberally and successfully, with at least a greater share of honesty, liberality and success than have fallen to the lot of most other people. Each of the three estates enjoys the respect of the people at large, and a seat, either among the Lords or the Commons, is an object of high ambition. The system may therefore be said to be successful".[1]

If these quotations now seem a little dated, we may remind ourselves that an opinion poll in 1956, four years after the accession of our present Queen, showed that 35 per cent of the population believed that she had been chosen by God.[2]

[1] *The West Indies and the Spanish Main*, vol 1, chap IX (1859) (Trollope Society reprint, p.120).
[2] V Bogdanor, *Power and the People*, 1999, p.172.

Whether or not our constitutional arrangements can claim a providential provenance there can be no doubt that the incoming government elected in 1997 gave the Unmoved Mover very powerful and practical assistance. In the first three parliamentary sessions, an amazing and perhaps unprecedented burst of legislative activity produced a series of constitutionally significant measures, among them the Referendums (Scotland and Wales) Act 1997, the Data Protection Act 1998, the Scotland Act 1998, the Government of Wales Act 1998, the Northern Ireland Act 1998, the Greater London Authority (Referendum) Act 1998, the Human Rights Act 1998, the Regional Development Agencies Act 1998, the European Parliamentary Elections Act 1999, the Greater London Authority Act 1999, the House of Lords Act 1999, the Local Government Act 1999, the Regulation of Investigatory Powers Act 2000, the Political Parties, Elections and Referendums Act 2000, the Disqualifications Act 2000, the Representation of the People Act 2000 and the Freedom of Information Act 2000. Few, if any, of those measures were entirely uncontroversial. Some were felt in some quarters to be unnecessary or undesirable; some were thought to go too far; others were thought not to go far enough. But most of them, I think, won a measure of acceptance, even if grudging. There were perhaps two reasons for this. First, the more eye-catching of these changes were not new. Northern Ireland, after all, had enjoyed a large measure of devolved government for the first 50 years of its existence as a separate province. Acts to create devolved government in Scotland and Wales had been passed in 1978-1979 and had failed of implementation only for lack of

popular support. Two bills to incorporate the European Convention on Human Rights had earlier completed all legislative stages in the House of Lords, only to founder in the House of Commons. Reform of the composition of the House of Lords had been expressly on the agenda since 1911. A private member's Freedom of Information Bill foundered on the dissolution in 1979. So whether one welcomed these measures or not, they at least had the virtue of familiarity. And, secondly, the measures seemed to give effect to a coherent democratic vision: governmental decisions should be made at a level as close to those affected by them as is consistent with reasonable efficiency, economy and good government; citizens should be informed about, and encouraged to participate in and exercise a responsible judgment on, decisions affecting their lives; certain rights are so fundamental as to call for a defined measure of formal, even if qualified, legal protection. Taken together, and whether one agreed with them all or not, the measures seemed to represent a coherent and principled package.

Predictably enough, this first phase of constitutional reform has not been free of difficulty. Devolved government in Northern Ireland has been suspended on (I think) four occasions and the constitution, carefully crafted to encourage movement towards the centre and weaken the extremes, has not, so far, achieved those objects. Among many Scottish and Welsh voters there is a feeling of dissatisfaction, although the call is not for a return to the status quo ante but for more of the same. In London the relationship between the mayor's administration and the central government has not been a wholly easy one. In

the human rights field a number of the most difficult problems likely to be thrown up by the Act have yet to be confronted. The Freedom of Information Act, born handicapped, has yet to take full effect. So, inevitably in an imperfect world, the going has not been altogether smooth. But on the whole those who were optimistic have cause to remain so, and the worst fears of the pessimists have not as yet been realised.

Even those who would welcome, with whatever degree of caution, the first phase of reform may well have reservations about some proposals which have been made or announced, and about proposals not made, since those initial changes. I have in mind the proposal, on expelling the remaining 92 hereditary peers, to establish a wholly appointed second chamber; the neglect of the recommendations on electoral reform made by the late Roy Jenkins and his committee; the failure to address in any way the West Lothian question; the proposal made in May 2001 (and happily not implemented) to transfer the responsibility for the courts of England and Wales from the Lord Chancellor to the Home Secretary; the abolition of the ancient office of Lord Chancellor; the establishment of a Supreme Court independent of the House of Lords; the establishment of commissions to appoint or recommend the appointment of judges; curtailment of the right to seek judicial review of some executive decisions; alteration of the standard of proof in some criminal cases; allocation of certain cases to approved, specially-vetted, judges.

There may be some among those present this evening who are critical of all these proposals or non-proposals. I am not myself one of them. For instance, I still regard the establishment of a suitably accommodated, adequately resourced, appropriately staffed, supreme court, visibly separate functionally, institutionally and geographically from either house of the legislature, as an all but imperative feature of a modern democratic state. I have yet to hear any principled argument to the contrary, although many vocal critics are of course opposed to the proposal. To dismiss a supreme court as "second class" because it lacks the power to annul primary legislation is to disparage the principle of parliamentary sovereignty, which (subject to appropriate checks and balances) I would not myself wish to do. Similarly, although in this instance with a measure of reluctance, I would accept that the old, informal, rather personal way of appointing judges had probably had its day. I am far from sure that the new procedures, whatever they finally turn out to be, will produce better appointments; the decision of a committee will not necessarily be better than that of a single, knowledgeable, wise and on occasion bold individual. But it is very important indeed that there should be procedures for appointment which command the confidence of the public, and the old procedures, despite some improvements over the years, had come to be seen as opaque, incestuous and unaccountable. These changes seem to me entirely consistent with the democratic vision of which I earlier spoke. In every other democracy in the world the supreme court is visibly separate functionally, institutionally and, I think geographically, from the legislature. This separateness reflects the fact

that members of the supreme court are judges and not legislators. Both the possibility and the appearance of conflict are minimised. And there is no very good reason why appointments procedures thought appropriate for other high-ranking and politically independent public servants should not, with some adaptation, be appropriate for judges also.

Other of the proposals and non-proposals I have mentioned seem harder to reconcile with any liberal, democratic vision. Can a wholly-appointed second chamber – no matter how careful, wise and conscientious the process of appointment to it – be seen to promote a representative, participatory democracy? Is the will of the people adequately reflected by an electoral system which can and does deliver landslide majorities to governments which more people voted against than for? Ought it to be possible for House of Commons votes on matters pertaining only to England and Wales to be determined by members representing constituencies outside England and Wales where the matter in question is reserved to the devolved administration? If it is desirable to diffuse power, and avoid potentially dangerous aggregations of power, can it be acceptable to entrust one minister – himself, through the nature of his responsibilities, the subject of very regular forensic challenge – with responsibility for the courts as well as the police, immigration, criminal law, the probation service, penal policy, the prisons, parole and the prerogative of mercy? If it is desirable to ensure protection of fundamental human rights, is that object well-served by destroying an office whose holder had as an

overriding duty the guardianship of legal and constitutional propriety? Is the right to seek judicial review of executive decisions a right which should enjoy any special constitutional protection? Is the standard of proof in criminal cases a fixed standard applicable to all cases or a variable standard applicable to some crimes and not others? Should those found fit to hold high judicial office be further assessed for fitness to be entrusted with state secrets?

Some of these matters, like reform of the House of Lords and proportional representation, have been long-standing staples of political debate. Others, like the proposal to transfer responsibility for the courts to the Home Office and abolition (as opposed to re-modelling) of the office of Lord Chancellor, have until recently been the subject of no consultation or debate at all. They were not preceded by the detailed and expert consideration which led to the Judicature Acts of 1873-1875. I am, however, less concerned about the answers to be given to the questions I have just raised than by the apparent lack of any agreed and authoritative principles to be applied in framing answers. As one commentator (a Liberal Democrat) has recently written:

> "In their [the reformists'] view, why the momentum was not sustained was because reform lacked a coherently devised overall plan. As it was, the reforms were seen as a series of ad hoc, stand-alone initiatives. Initiatives could be clothed in the rhetoric of participation, subsidiarity and the like, but the wave of constitutional reform had never been adequately thought through.

> The idea of a written constitution was as much an anathema to new Labour as to any die-hard Conservative. Instead, it preferred to believe it was allowing changes to evolve in some undefined Burkean manner."[3]

The Burkean philosophy of gradual organic development is not one to be lightly rejected. But if, constitutionally speaking, we now find ourselves in a trackless desert without map or compass, perhaps the time has come to re-consider an old and thorny problem: should we at long last follow almost all other countries in the world, by adopting a codified and to some extent entrenched constitution? It is, after all, ironic that we should have thought it necessary to bequeath a codified constitution to most of our overseas territories before granting them their independence, while continuing to regard such provision as unnecessary for ourselves.

Before confronting this difficult problem, I digress to ask why it is that we lack such a constitution. It is not that we have never had one, since Oliver Cromwell's 1653 Instrument of Government was a codified and to some extent entrenched constitution. Under it the government was entrusted to a Protector, an elected unicameral Parliament and a Council of State. Executive authority was vested in the Protector assisted by the Council. Responsibility for military and foreign affairs was entrusted to the Protector, in whose name legal process

[3] Trevor Smith (Lord Smith of Clifton), "'Something Old, Something New, Something Borrowed, Something Blue': Themes of Tony Blair and his Government, *Parliamentary Affairs* (2003), 580 and 591.

was to be issued. Bills were to be presented to the Protector for his consent, but were to become law after a specified lapse of time even if he did not consent. Oliver himself was to be Protector during his lifetime. His successors were to be selected by the Council. An agreed annual budget was to be agreed by Protector and Council, not to be altered without the consent of both. No laws were to be altered, repealed or suspended, and no additional tax imposed, without the consent of Parliament, which was to include representatives of England, Wales, Scotland and Ireland. The constituencies and number of representatives elected for each were specified for England and Wales. A property qualification for voting was laid down. A new Parliament was to be summoned in every third year and could not be dissolved without its consent until it had sat for five months. The Protector was to act in accordance with the advice of the Council of State, the fifteen members of which were nominated in the Instrument. When Parliament was not sitting, the Protector and the Council were to have the power to make ordinances, which were to remain in force until confirmed or disallowed by the next Parliament. On a vacancy occurring in the Council, Parliament was to nominate a shortlist of six successors; the Council was then to reduce the shortlist to two, of whom the Protector would appoint one. Certain great officers of state, including the chief justices, were to be "chosen by the approbation of Parliament" or, if Parliament was not sitting, by the Council, and afterwards approved by Parliament. A wide degree of toleration was to be extended to all Christian sects. There was no provision for

amendment of this constitution.[4] An earlier instrument had enumerated certain "native rights", as they were called, which were to be unalterable.[5]

This characteristically imaginative and forward-looking constitution anticipated a number of ideas with which we have since become more familiar: the separation of powers as a safeguard against the tyranny both of a single person and of a representative assembly; the control of the executive by Parliament; representation of the whole United Kingdom; provision for a redistribution of seats and a uniform franchise. But the Instrument of Government was, perhaps, too far ahead of its time, and it expired with the collapse of the Commonwealth. The settlement which eventuated in 1688 was of a much less prescriptive nature, expressly based on little more than a change in the succession to the throne and a far from comprehensive bill of rights.

Apart from bequeathing to posterity no codified or entrenched constitution, the 1688 settlement is, I think, notable for present purposes in two respects. First, by leaving power divided between King, Lords and Commons, it effectively ensured that any one of these three bodies could, wholly or to a large extent, thwart the exercise of power by either or both of the other two. There was thus an institutional check on the exercise of power by any one of the three. As Lord Scarman put it,

[4] I have taken this account from the convenient summary of Holdsworth, A History of English Law, vol VI, pp 154-155.

> "If the Crown wanted legislation to support some course of action which it desired to pursue in the exercise of the executive power of government but could not persuade Parliament to agree, it would not get it. If the Commons proposed legislation unacceptable either to the Crown or the Lords, they could not get it. And the Lords likewise could not get legislation they wanted unless they could persuade the Commons and the Crown to agree to it. Here was a set of genuine checks and balances in restraint of power. They were political in character, but none the less effective so long as the partnership of the Crown in Parliament was a partnership of equals."[6]

The corollary was also true, as Joseph de Maistre pointed out in 1819:

> "They say that in England sovereignty is limited. Nothing could be more false. It is Royalty which is limited in that famous country. But if the three powers which constitute sovereignty in England (Crown, Lords and Commons) are of one mind, what can they do? One must reply with Blackstone: *Everything*. And what can legally be undertaken against them? *Nothing*."[7]

---

[5] The Agreement of the People: see Holdsworth, *op.cit.*, p.153. The protected rights included rights that laws should be equal for all and "not evidently destructive".
[6] "Why Britain Needs a Written Constitution", Charter 88 Sovereignty Lecture, 20 July 1992.
[7] Quoted by F F Ridley, "There is no British Constitution: A Dangerous Case of the Emperor's Clothes" in *Parliamentary Affairs* (1988) 41 (37), 340 at p.348.

In the course of the three centuries which have passed since 1688 the balance of power within the British state has, of course, altered very markedly. The political power of the monarch has diminished to vanishing point, since the personal discretions which remain are very limited, must be exercised according to clearly-understood principles and cannot be regarded as an exercise of independent power in any ordinary sense. The prohibitory power of the Lords has similarly been converted to a delaying power, and even that cannot be exercised in relation to the all-important matter of supply. So the House of Commons (or, in truth, the Executive, supported by a solid House of Commons majority) has emerged from the constitutional struggles of the past as the undisputed victor. This may or may not be seen as a desirable outcome. But it does mean that the checks inherent in the 1688 settlement have ceased to operate, to be replaced by what may become, in Lord Hailsham's much misquoted expression, an elective dictatorship.[8]

The second feature of the 1688 settlement notable for present purposes is that it did not in any formal and direct manner receive, nor like the American and French constitutions a century later claim to derive from, the support of the whole people. It has indeed been a continuing feature of our constitutional development that even major changes have not been thought to require the imprimatur of direct popular affirmation. Thus there was no referendum when the balance of parliamentary power was tipped conclusively in favour of the

[8] *"Elective Dictatorship"* was the title of Lord Hailsham's Dimbleby Lecture in 1976.

Commons in 1911 (although there had been three general elections) nor when we joined the European Economic Community. Indeed, the only national referendum there has ever been was that held in 1975 to decide whether we should remain members of the Community, and the expedient was then resorted to largely to address divisions of opinion within the governing party. Otherwise the only constitutional referendums have been held locally: in 1973 to decide whether Northern Ireland wanted to remain in the United Kingdom, and to test opinion on devolution in Scotland and Wales. The referendums to decide which Welsh counties should permit Sunday drinking in public houses, for all their importance to those affected, can scarcely be dignified as constitutional.

Against this very general background, I return to the main question, whether we in the United Kingdom should now consider the adoption of a codified constitution with some degree of entrenchment. The argument in favour usually begins with recognition that every members' club, every trade union, every company, every charity, every university or college has, in some form, an instrument which (usually) defines its object and purposes, prescribes its powers and regulates, at least in some general way, who is to do what. When things are running smoothly the instrument may attract little notice, and may even be ignored. But when doubt arises or difficulties occur, the instrument is there, to be consulted and (it is hoped) to yield a clear and decisive answer. If all these lesser entities require such an instrument, the argument runs, surely the desirability of such an instrument in relation to the state itself is self-evident.

The standard riposte to this argument is, I think, that while we have no single constitutional instrument, suitable for display in a glass case, we do have a plethora of statutes governing most of the matters which would feature in a constitution if we had one: succession to the throne, the right to sit in the House of Lords, the powers of the House of Lords, representation in the House of Commons, the government of Scotland, Wales and Northern Ireland, the powers and responsibilities of local government, the structure of the courts, the tenure of the judges, and so on. This is, of course, fine, so far as it goes. But the adoption of a codified constitution would not dispense with the need for very detailed regulation of some of these matters. The Local Government and Housing Act 1989, for instance, ran to nearly 200 sections and 12 schedules, and there have been around a dozen statutes affecting local government since then. No one would propose to include, or expect to find, that much detail in a codified constitution. But if the constitution were sparely drawn, and confined to the statement of a few governing principles regarded as fundamental and indispensable, the instrument would have the virtue of enabling any citizen to ascertain the cardinal rules regulating the government of the state of which he or she is a member. If the rule of law requires, as I suggest it does, that the citizen should be entitled to know the framework of law which governs him or her, this must apply with particular force to the constitution of the state itself.

It is easy to discount this argument by pointing out that very few citizens would in practice take the trouble to read and study any constitutional instrument. Shareholders do not in the ordinary way pore over the memorandum and articles of the companies in which they invest. Criminals do not consult Archbold before embarking on their nefarious careers. But there is a deeper point. The existence of a constitutional document would, I think, inculcate a constitutional sense and awareness which are now lacking. At present many British Citizens grow up believing - because it can (depending on the definition of "constitution" which one adopts) be, and is, plausibly argued - either that Britain has no constitution[9] or that it has no written constitution.[10] The merits of these arguments are perhaps less important than their consequence, which is a high degree of confusion and ignorance and a failure to distinguish between measures which really bear on the constitution of the state in which we live and those that do not.

It is perhaps instructive to look across the Atlantic. While I know of no reliable data on the subject, my instinctive feeling is that most citizens of the United States have a better understanding of their constitutional arrangements than most British citizens have of ours. If that is true, as I think, it is surely because the Constitution as, in itself, a relatively short and intelligible instrument can be introduced to schoolchildren who will grow up with some understanding of the role of the President and members of his cabinet, the

[9] See the article by F.F. Ridley referred to in footnote 7 above.

relationship of the states to the federal government, the role of the Senate and the House of Representatives, the function and powers of the Supreme Court, and so on.

Partly as a result of this greater knowledge and understanding, many Americans have a sense that their Constitution belongs to them. I do not think this is a sense which, on the whole, British people share, partly because – if they think about the subject at all – they are unsure whether they have a constitution or not. Now this may or may not matter. But I think there are at least two reasons why it may matter to us in this country.

The first is that we live at a time when a number of our public institutions are not held in high regard. While one could debate the reasons for this, I doubt if many would question the fact. It is reflected in the very low level of participation in local government and national elections, betraying a widespread sense of alienation from political life. It is reflected also in a widespread distrust of many holders of public office (with the armed services as perhaps the most notable exception). This distrust often extends to the institutions they serve. It might no doubt be that the more people knew and the better people understood the working of our constitutional arrangements, the greater their sense of alienation and the deeper their distrust. But my own conviction is that

[10] See for example Rodney Brazier, "*How near is a Written Constitution?"* 52 NILQ Vol 1, p.3 (2001).

the opposite outcome would be evident. In current Whitehall-speak, people would be much more supportive of our constitution if they had ownership of it.

My second reason is that a codified constitution can serve as a unifying force. It has surely done so, with the flag, in the United States, which has since early days faced the problem of knitting together people from many different countries, bringing with them different languages, religions, cultures, histories and traditions. Until recently, we were inclined to think of ourselves, not entirely accurately, as a rather homogeneous people (at any rate outside the *environs* of Murrayfield, Cardiff Arms Park and the Millennium Stadium). To the extent that that view was ever tenable, the history of immigration over the last 50 years has clearly demolished it. We too are a polyglot, multi-cultural, religiously diverse, plural society. Historically, the unifying force in British life has been the Crown, not the flag, and certainly not the constitution. But it would seem, through no fault whatever of the present Queen, that the Crown may no longer be as potent a symbol as it was. And it has to be remembered that, for those of our citizens born and brought up in our overseas territories during their struggles for independence, the Crown was not necessarily seen as a symbol of tolerant, even-handed, liberal, democratic government.

In ventilating these thoughts (if I may call them such) I may no doubt be succumbing to a vice of professional lawyers, the tendency to attach undue weight to what is written on a piece of paper. It is plainly absurd to suppose that

adoption of a codified constitution would resolve all the ills that British flesh is heir to. The most that even the most committed advocate of a codified constitution could plausibly claim is, I think, that such a constitution might well help. Such a view is in my opinion fortified by our experience thus far of "Bringing Rights Home" through incorporation of the European Convention. I am of course aware that there are substantial bodies of British opinion, well represented in the tabloid press, which view the Human Rights Act with a mixture of hostility and derision. My own opinion, unsurprisingly, is quite different. To the extent that the Convention has prompted changes in our institutions, procedures and administrative practices, these have been, very largely, changes for the better. But many claims now based on the Convention are claims which could have been brought anyway. Respect for fundamental human rights in Britain was not born on 2 October 2000 (or 10/2 as perhaps we should call it). What however matters for purposes of my present theme is that the Convention is, I think, recognised as guaranteeing to everyone – including, particularly, the poor, the disadvantaged, the unpopular members of despised minorities – the same rights as everyone else. Even rights which existed before become more real when written down in a single, readily-digestible document.

Inherent in the argument for a codified constitution is the belief that some degree of entrenchment should protect at least some provisions of a constitutional character. Here, of course, one encounters a familiar difficulty. As Professor Bogdanor has written,

> "The British Constitution can be defined in eight words: 'What the Queen in Parliament enacts is law.'"[11]

Since, therefore, no Parliament can bind its successor and since, under our constitution, Parliament is sovereign, any attempt to confer special legislative protection or any constitutional provision can be overridden by the majority in any later Parliament. I do not think there is a wholly satisfactory theoretical answer to this problem. But there are ways in which the problem could be effectively mitigated. If a codified constitution, endorsed by popular referendum, were to be adopted, and if it were enacted that no measure certified by the Speaker to amend that constitution should be enacted without submission of the amendment to a popular referendum, it would be a bold government which would rely on a temporary parliamentary majority to override that provision. A similar result could perhaps be achieved by providing that the Lords' power to block legislation, at present applying only to Commons proposals to extend the life of a Parliament, should apply also to any certified constitutional amendment not already endorsed by popular referendum. In reality, there are many statutory provisions which, although theoretically vulnerable to revocation or amendment by a transient parliamentary majority, are in reality invulnerable: one might instance the reforms effected by the Representation of the People Act 1918 and the Equal Franchise Act 1928, giving women the right to vote in parliamentary elections on the same terms as men.

---

[11] *Power and the People: A Guide to Constitutional Reform* (1997), p. 11.

The most potent argument against a codified constitution is, as it seems to me, the degree of inflexibility which it necessarily, and intentionally, imposes. However wise, well-balanced and comprehensive the terms of a constitution may be at the time of its adoption, the passage of time is bound to render some of its provisions obsolete, mischievous or embarrassing. Familiar examples from the United States are the impediment caused to effective gun control by constitutional protection of the citizen's right to bear arms[12] and the difficulty of dispensing with jury trial in civil cases given the constitutional protection of juries.[13] These provisions are not of course immutable, but the process of amendment is cumbersome, slow and uncertain and there are likely to be powerful bodies with a vested interest in resisting change. Some of these difficulties may be avoided if the constitutional instrument eschews undue detail and specificity. But had a codified constitution been adopted in 1688, it is difficult to think that this would not have greatly inhibited, if it did not altogether prevent, the evolution of cabinet government and constitutional monarchy as we now know them.

It is in my opinion a further argument against adoption of a codified constitution that it may open the door to excessive legalism, and to that extent subvert the political process. Whether this is a necessary result, I doubt: I am not sure that the problem arises in France, Germany, Italy, Spain or other

[12] Act II of the 1791 amendments.

European countries with codified constitutions. But it is, I think, true that issues such as race discrimination and abortion have in this country been addressed very largely through the political process and in the United States through a process of constitutional adjudication. Now this may, I suppose, be a matter of personal preference, but my own preference is, in general, that such problems should be addressed through the political and not the legal process. Lawyers and even judges have many skills, but political judgment and sensitivity to public opinion are not necessarily among them. In some situations this can be a strength; in others it is a weakness. As was said in a recent case:[14]

> "It would no doubt be possible, in theory at least, to devise a constitution in which all political contingencies would be the subject of predetermined mechanistic rules to be applied as and when the particular contingency arose. But such an approach would not be consistent with ordinary constitutional practice in Britain. There are of course certain fixed rules, such as those governing the maximum duration of parliaments or the period for which the House of Lords may delay the passage of legislation. But matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the crown (whether to grant a dissolution). Where constitutional arrangements retain scope for the exercise of political judgment

[13] Act VII of the 1791 amendments.

they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude."

This point is perhaps reinforced when account is taken of constitutional conventions. Since I would for my part share the view of the late Professor Wheare that a constitution should contain "the very minimum, and that minimum to be rules of law",[15] it would follow that conventions, so described because they are not rules of law, would find no place in it. Opponents of codification would contend that any constitution which did not refer to the more important constitutional conventions would inevitably give an incomplete, and to that extent misleading, account of the constitution. The problem would be mitigated if, as in Australia, an attempt were made to list the major conventions of the parliamentary system.[16] But conventions evolve, and even a non-binding codification could never be final.

Debate over the past few years makes plain that there are those who strongly support and those who strongly oppose adoption of a codified constitution in this country. Having always adhered to the latter view, I have moved towards agnosticism. The instinct of many lawyers, not firmly committed to one view or the other, is to ask, before making a judgment, what

---

[14] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390, para 12.
[15] Quoted by Dawn Oliver, *"Written Constitutions, Principles and Problems". Parliamentary Affairs, 45 (April 1992), at* p. 146.

the document might look like. Happily, we need not go back to the Instrument of Government. There are three relatively recent models to hand: a draft constitution prepared by John Macdonald QC on behalf of the Liberal Democrats in 1990; a draft prepared by Tony Benn in 1991; and a draft prepared by The Institute of Public Policy Research, also in 1991.[17] These models vary considerably in their length, the amount of detail they contain and in the radicalism of what they propose. But there are certain common features. All provide for an elected second chamber, for some protection of human rights, for devolved Parliaments or Assemblies in England, Wales and Scotland, with legislative powers, and for some measure of entrenchment. Two of them provide for a supreme court. Two of them provide for the prime minister to be elected by the House of Commons. Borrowing heavily from Professor Dawn Oliver's interesting discussion of these instruments,[18] I would suggest that a codified constitution, if adopted in this country, should comply with certain very basic but, I think, very important rules:

(1) Its adoption should be subject to popular endorsement. If a change of this kind were to be contemplated, it would be important to ensure that there was a high degree of popular approval.

---

[16] Geoffrey Marshall, "The Constitution: Its Theory and Interpretation," in *The British Constitution in the Twentieth Century*, ed Vernor Bogdanor, 2003, P.41.

[17] These three models are summarised by Dawn Oliver in the article cited in footnote 15 above.

[18] See footnote 15.

(2) It should eschew undue detail. It would no doubt need to identify the major institutions of the state, such as the Crown, the Legislature, the Cabinet, the Judiciary, the Civil Service, the Armed Forces, and so on. But it would seem to me a recipe for embarrassment to attempt to prescribe, in a document intended to have a long shelf-life, matters such as the succession to the Crown, the size or number of parliamentary constituencies, the size or working practices of the Cabinet etc.

(3) By contrast, there would be value in setting out the fundamental principles which now underpin the state in which we live. An example is found in the guarantee of continued judicial independence in clause 1 of the Constitutional Reform Bill. A similar clause could without difficulty be drafted to define the role and protect the independence of the Civil Service. Formal expression might perhaps be given to the principles underlying parliamentary democracy, representative government, the rule of law, equality before the law, non-discrimination and the core human rights found in the European Convention and the International Covenant on Civil and Political Rights.

(4) All provisions of the constitution should be justiciable. The constitution should lay down enforceable rights and duties and not resort to the expression of hopes and aspirations.

(5) Subject to the constraints of parliamentary supremacy, some degree of entrenchment is necessary. The provisions of the constitution should not be amendable by what may be a temporary parliamentary majority without the requirement of an enhanced majority of both chambers or endorsement by a popular referendum, or perhaps both.

(6) The constitution should, so far as achievable, be neutral, not only (of course) as between political parties but also as between systems of social and economic organisation. If the history of the last 50 years shows nothing else, it surely shows that the beliefs of one generation become the heresies of the next. Constitutional provisions should never be allowed to hamper growth, prevent diversity or restrict the scope for new ideas.

And lastly, (7). A constitution should not make provision for a constitutional court. In some countries, as is well known, constitutional courts exist, and operate very successfully. But such a court is alien to our tradition. I do not think the qualities required of judges deciding constitutional questions differ from those called for in other kinds of judicial decision-making, and the line of demarcation between constitutional and other questions would not necessarily be very clear. It would diminish the standing of other courts if they lacked jurisdiction to determine constitutional issues.

Perhaps the last word should come from the Queen. "The British Constitution", she has said, "has always been puzzling and always will be."[19] Perhaps – perhaps – the time has come to simplify the puzzle a little.

[19] Peter Hennessy, *The Hidden Wiring* (1995), p.33.