

The challenge for those who wish to codify the UK's constitution is to make it relevant to voters who may have more pressing concerns.

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Written constitutions tend to be codified when power relations are substantially changed in a political system. [Frank Vibert](#) considers whether the UK is experiencing such a moment and debates the practical and philosophical benefits and drawbacks to putting the constitutional pen to paper.



On December 8th the House of Commons Committee on Political and Constitutional Reform [held a hearing](#) on whether or not the UK should consider codifying its political arrangements thus moving towards a written constitution. I was asked to give evidence along with former Labour MP and Cabinet Minister Tony Benn and Richard Gordon QC. Each of us is on the record as favouring a written constitution – Tony Benn having actually submitted a bill to Parliament and Richard having also drafted a proposal.

The Committee has been set up to monitor the terms of reference of the office of the Deputy Prime Minister (held by Nick Clegg) whose responsibilities include constitutional reform. The hearings on codification are not prompted by any specific item on the political agenda. They are a 'mapping' exercise designed to look into the advantages and disadvantages of any such move; they will be held on an occasional basis with the aim of producing a report by the end of this parliament. If the parliament runs for its full term, the report of the Committee could provide a contemporary backdrop to the celebration of the 800th anniversary of the Magna Carta in 2015.

Among the huge list of difficulties that would have to be overcome in any move towards a written constitution there are two very practical considerations. The first is that constitutional reform is not a 'hot button' issue for public opinion. On the contrary I indicated in my remarks to the Committee that trying to demonstrate salience to voters would be an enormous challenge. I suggested that the target citizen is not a civil rights activist but a working mother who is multi-tasking. The case for codification has to seem relevant to her. Ratification in my view would have to pass a double test – a minimum proportion of eligible voters would need to give their assent and there should be a majority in favour in each part of the UK. This double hurdle would provide an incentive for anyone drawing up a constitution to ensure that it is really relevant to voters and that most people will be comfortable with it.

The second practical challenge revolves around the question of the constitutional 'moment' – the question of what events in the real world would make codification a priority concern. Historically it is easy to identify external shocks as a trigger for a written constitution (for example Soviet withdrawal from Central Europe) or an internal crisis (such as the Arab Spring). I suggested that a different type of trigger is identified in the [constitutional economics](#) tradition of Nobel Prize winner James Buchanan, which looks at the event of major changes to the assignment of powers in a multi level system of government. Such changes require powers to be clearly defined, the conditions for their exercise to be clear and for safeguards to be put in place for how they are to be interpreted and exercised. In theory all of these changes are likely to prompt a move towards written arrangements. The current situation in the UK can be characterised by movements of power, not only between the UK and the EU but also between Westminster and the devolved parts of the UK. However there is still a step between theory and practice.

A very traditional British objection to a written constitution is that such a document introduces an unhelpful rigidity into arrangements and overlooks the importance of unwritten conventions. I suggested in my remarks that any written arrangements had to provide for both soft rules (where there is flexibility) and hard rules that are prescriptive. As an example of the importance of the issue I cited the example of the current debate about fiscal rules in the form of balanced budget stipulations. The US seems to have gone cool on the idea of hard rules – perhaps because of the difficulty of formulating the rule over an economic cycle, and perhaps because of the incentives created for escape mechanisms through the use of off-balance sheet devices such as guarantees and insurance schemes. The Eurozone, on the other hand, is moving towards hard rules.

Tony Benn reminded the Committee that in a democracy the people are the sovereign and not Parliament.

Parliament acts on their behalf. This led to a discussion of the role of referendums. In Germany there is a deep aversion to referendums because the historical record showed that they could be used by governments to manipulate public opinion. I also pointed to other – less disastrous – cautionary tales such as the California example of popular initiatives that go in contradictory directions, the Swiss example of voting ‘every Sunday’ with populists getting their moment in the sun, and the Irish tale of people voting on a question different from that on the ballot. The conditions surrounding the use of referendums therefore had to be carefully framed and their use placed outside the hands of governments.

The hearings of the Committee are not technical; they are not about drafting actual provisions nor do they in any way prejudge whether or not the UK should move towards codification. Nevertheless, it is very useful to have an exercise that clears some of the ground, identifies some of the elephant traps and addresses some of the more basic concerns and possible misunderstandings so that any future changes can be based on sound judgments.

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Frank Vibert gave evidence to the House of Commons’ Political and Constitutional Reform Committee on 8 December. [View the session on Parliament TV](#).

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