



Radical departure or opportunity not taken? The Johnson government's Constitution, Democracy and Rights Commission

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Abstract

In its 2019 manifesto, Boris Johnson's Conservative Party pledged a *Constitution, Democracy and Rights Commission*, to consider far-reaching constitutional change. This appeared to signal a radical departure from UK precedent in approaching constitutional reform. In this paper, we examine the Johnson government's initial proposals and subsequent actions, placing them in comparative context and contrasting them with UK precedent. We show that the government's explicit pledge to appoint a single Commission to develop the reforms along with its emphasis on restoring public trust in politics through the constitutional reform process, reflected several internationally recognized principles and models for constitutional reform. In practice, however, the government abandoned these potentially radical procedural ambitions, and instead appointed several issue-specific elite-led reviews. We argue that the government's procedural approach has so far closely followed recent UK precedent, and that the Commission turned out to be an opportunity not taken rather than the radical departure that initially seemed possible.

Keywords Constitutional reform · Constitution, Democracy and Rights Commission · Executive–legislative relations · Judicial reform · Human rights · Prerogative powers

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Introduction

During the 2019 British general election, Boris Johnson's Conservative government promised to instigate major constitutional reforms. In its manifesto, the Conservative Party pledged to establish a 'Constitution, Democracy, and Rights Commission.' This Commission was to be tasked with examining wide-ranging reforms of the relationship between the executive, parliament and the courts; the role of judicial review; executive powers deriving from the royal prerogative; the role of the House of Lords; and relations between citizens and the state, including the Human Rights Act and access to justice. In addition, the government also pledged to introduce a requirement for voter identification and to repeal the Fixed-term Parliaments Act. These pledges amounted to an ambition to alter some of the most fundamental rules defining democracy and the political system in the United Kingdom (UK). This electoral promise seemed radical not only in scope, but also in form. The 2019 Conservative manifesto envisaged a single Commission to develop these reforms. Moreover, it billed the constitutional reform process as a mechanism for rebuilding 'public trust in government and politics' (Conservative and Unionist Party 2019, p. 48).

A pledge of constitutional reform so radical in scope and form deserves attention and analysis. To be sure, manifesto pledges are not cohesive, detailed blueprints for policy. But as the extensive literature on election pledges makes clear, manifesto promises matter because democracy ultimately depends on a degree of linkage between citizens, government and policy (Naurin et al. 2019). The election promises of political parties form a crucial part of that chain. Parties focus their electoral promises on important and salient policy issues (Håkansson and Naurin 2016; Mansergh and Thomson 2007). These pledges play a role in voter choices to empower a government (for reviews see Lewis-Beck and Paldam 2000; Lewis-Beck and Stegmaier 2018), and incumbents can expect to be held accountable at the next election for delivering on their promises (Thomson 2001). That is, manifesto pledges matter precisely because they may be kept or broken, and a sceptical perspective that dismisses parties' campaign promises generally as inconsequential is not consistent with the evidence.

The Conservative Party's 2019 manifesto commitment to fundamental constitutional reform by forming a 'Constitution, Democracy, and Rights Commission' is of particular interest because it appeared to signal a major procedural departure from UK precedent. In this paper, we shed light on the procedural aspects of this important moment in British constitutional development. When politicians seek to restructure fundamental constitutional rules, as the Johnson government plans to, procedural choices are important because the process used to draft constitutional reforms has consequences for their substance (Ginsburg et al. 2009). We analyse the implications of the choices made—and opportunities not taken—by the government in its procedural approach. We begin by outlining its initial proposals as detailed in the 2019 manifesto, before placing them in the context of internationally available models and recent UK precedent. Finally, we examine the path that the government has in fact taken since 2019 in developing reform



proposals and examine its likely implications for the ability of the process to deliver joined-up reforms that engender public trust. Throughout, we focus on the process by which constitutional changes are drafted, rather than their substantive content.

Overall, we argue that the Conservative Party's manifesto pledge to form a single Constitution, Democracy and Rights Commission, the proposals of which would 'restore trust in our institutions and in how our democracy operates' (Conservative and Unionist Party 2019, p. 48), appeared to signal a radical new direction in the UK's procedural approach to constitutional reform.¹ We demonstrate that there was significant overlap between the government's declared ambitions and several internationally available models for developing major constitutional reform (Renwick 2014). We also show that the government's procedural ambitions contrasted with UK precedent over the last quarter of a century, by which constitutional review processes have most often been executive dominated or organised as issue-specific elite commissions, with little space for public participation or joined-up constitutional thinking. Ultimately, however, this new approach was a road not taken by the Johnson government. In practice, the government chose not to establish a single over-arching Commission or a process that prioritised enhancing public trust in politics. Instead it has embarked on a series of separate, issue-specific, and elite-led review processes that followed previous UK precedent rather than any of the alternative internationally available models. Thus, the process itself is a far less radical departure from previous practice than initially seemed possible, and we conclude by reflecting on how the government's approach to constitutional reform relates to the wider objectives it set out in its 2019 manifesto. In charting this development, the paper contributes to the growing literature that explores how the UK's constitution has developed in the wake of the Brexit process and its political aftermath (Blick 2019; Craig 2019; Doyle et al. 2021; Elliott et al. 2018; Young 2017).

The Constitution, Democracy and Rights Commission

During the December 2019 UK general election, Boris Johnson's governing Conservative Party promised to establish a 'Constitution, Democracy and Rights Commission'. Its manifesto detailed that the Commission would consider 'the broader aspects of our constitution: the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people' (Conservative and Unionist Party 2019, p. 48). The Commission would also examine judicial review to ensure that it is not used 'to conduct politics by another means or to create needless delays' (Conservative and Unionist Party 2019, p. 48). Moreover, in order to safeguard the

¹ We focus here on the procedural implications of the manifesto's stated goal of restoring trust in "our institutions and in how our democracy operates" (Conservative and Unionist Party 2019, p. 48). Clearly, though, it can also be interpreted as extending not just to the process but also the substance of the constitutional changes as the vehicle for restoring trust.



‘ability of our security services to defend us against terrorism and organised crime’ the Commission would develop proposals for updating the Human Rights Act and administrative law to change the balance between ‘the rights of individuals, ... national security and effective government’ (Conservative and Unionist Party 2019, p. 48).

This interest in an overarching review and reform of the constitution marked a novel departure for the Conservative Party. Recent Conservative Party manifestos had proposed constitutional reforms, such as reforming parliament, extending devolution, and introducing a British Bill of Rights. But the ambition of the 2019 manifesto was novel in scope and procedural approach. Constitutional changes implemented during the 2010–2015 Conservative-Liberal Democrat Coalition government addressed a series of specific grievances rather than a general review of the constitution (see Norton and Thompson 2015).² Similarly, the Conservative manifesto for the 2017 general election (which the party fought under Johnson’s predecessor, Theresa May) promised few specific constitutional changes beyond the wider goal of delivering Brexit. It envisaged repealing the Fixed-term Parliaments Act and introducing a requirement for voter identification, but these reforms were not actioned in government after 2017, and reappeared in the party’s 2019 manifesto.³ The 2019 manifesto commitment to a broad review of Britain’s overall constitutional arrangements in a single process under the aegis of a ‘Constitution, Democracy and Rights Commission’ thus represented a clear contrast with the party’s recent approach to the constitution.

The Conservative Party’s 2019 manifesto suggests that the motivation for this new interest in sweeping constitutional reform stemmed from the Brexit process. Noting that one of the strengths of the UK constitution is its ability to evolve, the manifesto stated: ‘Today, that need is greater than ever. The failure of Parliament to deliver Brexit—the way so many MPs have devoted themselves to thwarting the democratic decision of the British people in the 2016 referendum—has opened up a destabilising and potentially extremely damaging rift between politicians and people’ (Conservative and Unionist Party 2019, pp. 47–48). This controversial framing offered a convenient way of combining pre-existing ambitions with new ones into a major constitutional reform agenda, for which it offered a legitimizing narrative by drawing a direct line to the obstacles that had characterized the Brexit process. The manifesto then cast the constitutional reform agenda as a means of rebuilding ‘public trust in government and politics’ and the Commission’s role as coming ‘up with proposals to restore trust in our institutions and in how our democracy operates’ (Conservative and Unionist Party 2019, p. 48).

While Brexit served as a legitimizing narrative, it also shaped some of the government’s ambitions, including for reforming the role and powers of institutions with which it had clashed since 2016: parliament and the courts. Since the 2016 referendum

² The Conservatives’ 2010 proposals (see Hazell 2010 for a summary) drew partly on the ‘Democracy Taskforce’ they had appointed while in opposition, but this focused on a set of specific issues rather than the constitution as a whole.

³ Neither of these latter constitutional reforms were included in the proposed remit of the Commission.



on Britain's membership of the European Union, successive Conservative leaders—first Theresa May and then Boris Johnson—found that parliament limited their ability to dictate the pace, process and terms of delivering Brexit (see Thompson 2020). The fraying relations between the executive and parliament were increasingly reflected in the government's populist rhetoric, which cast Brexit as a struggle of 'the people' against parliament (Russell 2021). The executive also clashed with the judiciary in this period, after two Supreme Court rulings upheld parliament's right to be involved in the Brexit process. The first of these cases, in early 2017, saw the Court rule that Theresa May could not trigger the UK's withdrawal from the EU without parliamentary approval (see Elliott et al. 2018). In September 2019, the Court overturned Boris Johnson's attempt to 'prorogue' parliament, declaring it unlawful (see Elliott 2020; McHarg 2020). Both judgements led to fierce controversy, with ministers attacking the judges for allegedly overstepping their proper role. These constitutional tensions served as the context and pretext for the Conservative Party's proposals to review the government's relationship with parliament and the courts, the royal prerogative, and judicial review.

The Conservative Party's manifesto complemented the sweeping scope of its constitutional reform ambitions with a suggested radical new departure in its procedural approach to constitutional reform: By committing to a single Commission, it envisaged a newly integrated approach, based on jointly reviewing multiple connected issue areas. Given the range of issues included in the Commission's proposed remit, this effectively amounted to a promise to institute a single overarching review of almost all major aspects of the UK's constitution. Moreover, the manifesto billed the constitutional reform process as a means to produce 'proposals to restore trust in our institutions and in how our democracy operates' (Conservative and Unionist Party 2019, p. 48). This emphasis on institutional and procedural legitimacy as the source of public trust could be read as extending to the constitutional reform process itself, elevating the importance of public legitimacy within it.

The manifesto thus included a clear commitment to a wide-ranging and joined-up review of the constitution, together with an emphasis on public legitimacy that stressed constitutional reform as the pathway for generating greater public trust in politics. As is typical of manifesto pledges, this was not a fully worked out blueprint for reform: The Conservative manifesto pledged that the Commission would be established within a year (i.e., by December 2020), but did not set a deadline by which it would be required to report. Nor did it give any information about who would serve on the Commission, or how it would be required to work. Still, this pledge defined objectives for the Commission and promised a procedural approach to constitutional reform which—as the following section shows—differed fundamentally from recent UK precedent while leaning towards alternative internationally employed models.

The Johnson government's options

International and British experience offered the Johnson government a range of different models for organising constitutional review bodies. This section outlines those options, and discusses how they fit with the government's stated objectives for constitutional reform.



International models

International experience in established democracies suggests four central types of constitutional reform bodies: elite commissions, representative conventions, citizens' assemblies, and citizens' assemblies with political party involvement.⁴

Elite commissions are small bodies composed of experts and political figures chosen for their ability to consider the relevant topic effectively (see Renwick 2014, pp. 31–34). These bodies prioritize expertise and political representation. Prominent examples include New Zealand's 1985–1986 Royal Commission on electoral reform, and the French *Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions* established by President Sarkozy in 2007. Conventions of representatives of the people are a second common model for constitutional review bodies. These are larger bodies than elite commissions, and place greater emphasis on broadening representation beyond the political sphere, for instance, by including civil society groups in addition to groups of politicians. Representation of the public in conventions, however, remains indirect.⁵ One example is Australia's 1998 Constitutional Convention, which considered whether (and if so, how) the country should become a republic (see Renwick 2014, pp. 74–83). The third model is a citizens' assembly: a deliberative body composed of members of the public. This model prioritizes representation through direct participation by members of the public. Random selection to recruit members is typically employed to ensure that the assembly is broadly representative of the public at large. Assemblies of this kind have been used to discuss constitutional reform in Canada and the Netherlands (see Renwick 2014, pp. 66–73). A fourth model modifies citizens' assemblies by providing for a membership that combines members of the public and party politicians. A prominent example is Ireland's Constitutional Convention, which discussed various constitutional reform proposals between 2012 and 2014 (see Farrell et al. 2020).

The choice between these models matters, because each draws to varying degrees on different normative principles identified in previous work as encapsulating desirable features of constitutional review. These are expertise, impartiality, public participation, and joined-up constitutional thinking. First, the desirability of relevant expertise in informing constitutional reform is uncontested (Renwick 2014). Changing the fundamental constitutional rules of a polity is a complex task that requires knowledge and systematic analysis of the available evidence if dysfunction and unanticipated consequences are to be avoided (Ginsburg et al. 2009). A second principle that guides the formation of constitutional reform bodies is impartiality or public-spiritedness (Elster 2012, p. 18). This prevents constitutional 'self-dealing' and impartiality is more likely to result from procedures that require support across political parties and institutions (for example: parliament, executive, judiciary, and

⁴ Existing work offers various typologies for categorizing constitutional reform processes (Ginsburg et al. 2009; Renwick 2014). In particular, Renwick's comprehensive overview suggests six pure categories, as well as possible mixed types (Renwick 2014, pp. 21–25).

⁵ This category combines several distinct models described by Renwick (2014, pp. 23–24)—appointed or indirectly elected political conventions, civil society conventions, and directly elected constituent assemblies.



devolved administrations), thereby promoting the development of functional and durable reforms. By implication, impartiality requires a process that is removed from executive control, ensuring that no momentary majority is able to instrumentalize constitutional reform to bolster its grip on power, for instance, by reducing institutional checks on itself.⁶ Third, public participation in constitutional reform is increasingly regarded as normatively desirable, because it raises the probability that the changes are viewed as legitimate, have broad public support, and show themselves to be durable (see Dakolias 2006, pp. 1211–1122; Ginsburg et al. 2009, p. 206). A final normative consideration in organising reform processes is whether they encourage joined-up thinking about constitutional issues (see Flinders 2009). If reforms are developed in separate, disjointed processes, there is no overarching analysis of their combined effect on the constitution, increasing the risk of unanticipated consequences. All four of these principles are particularly important when major constitutional reform is envisaged, which increases the risk of unexpected consequences, raises the stakes of institutional self-dealing, heightens the need for public legitimacy, and reinforces the value of a coherent approach that builds on an overarching analysis.

How are these principles reflected in the different models above? First, *expertise* is prioritised most clearly in elite commissions, which allow experts to have direct input in drafting constitutional change proposals. The other models instead access expertise indirectly, either through consultations or evidence-taking sessions. Second, *impartiality* is achieved in different ways across the models. Three of the models—expert commissions, representative conventions, and citizens’ assemblies with party involvement—can achieve impartiality if they balance a range of partisan and/or non-partisan voices. Composing these bodies, however, is an active choice, in which impartiality is not always prioritized. By contrast, a pure citizens’ assembly achieves impartiality by design, through the explicitly non-partisan nature of the body, e.g., random selection of members of the public and the exclusion of political parties. Third, only citizens’ assemblies allow direct *public involvement* in the process of drafting reform proposals. Expert commissions typically only allow the public to submit their views through a consultation process (Renwick 2014, p. 33). Representative conventions may organise similar consultations but are also based on the indirect representation of the public by their members. Finally, all models have the potential to provide *joined-up* constitutional thinking. However, like impartiality, making provision for a joined-up process is a matter of political choice. It requires a sufficiently broad remit of the reform body and a concomitant breadth of expertise among its members. If the reform body’s remit is too narrow, it lacks the authority to consider the wider ramifications of the constitutional issue it is investigating. If its expertise is too narrow, it lacks the capacity to do so.

Table 1 summarises this discussion and shows how each model balances these four normative principles differently. The central insight is that international

⁶ A study of 411 constitutional design processes by Ginsburg et al. (2009, p. 213) demonstrates empirically that institutional self-dealing is a significant risk: processes that are dominated by the executive result in significantly weaker parliaments than those that are free from executive domination.



Table 1 Procedural options for drafting constitutional change

Model of drafting body	Expert input	Impartiality (non-/cross-party)	Public participation	Joined-up thinking
Elite commission	Direct	Possible	Consultation	Possible
Representative convention	Consultation	Possible	Consultation and indirect representation	Possible
Pure citizens' assembly	Consultation	Non-party	Direct	Possible
Citizens' assembly with party involvement	Consultation	Possible	Direct (but not exclusive)	Possible

experience offered several tried and tested models to the Johnson government for organising the Constitution, Democracy and Rights Commission, with different emphasis on key normative principles. The Conservatives' 2019 manifesto proposals reflected one of these normative principles directly: The promise of forming a single commission to review multiple connected issues suggested a commitment to adopt a joined-up approach to constitutional reform. This goal could conceivably be achieved under any of the four models discussed above, provided the reform body was given a sufficiently wide remit and expertise. Beyond this, the government emphasized building public trust in politics through the process of constitutional reform. Although it is conceivable that proposals generated by any of these models could successfully garner public trust, only the citizens' assembly models procedurally prioritise public trust and legitimacy by directly involving the public in the deliberation of reform proposals. Thus, conditional on sufficiently wide remit and expertise, the government's commitment to a joined-up review could be met by any of these models, while the enhancement of public trust is most directly prioritised by the citizens' assembly models.

Recent UK practice

Which of these available models have been used for drafting recent British constitutional reforms? To explore this, we have studied all pieces of UK legislation that implemented constitutional reforms from 1997 onwards and identified twenty major reforms affecting national-level political processes.⁷ These twenty reforms were

⁷ We created this list by beginning from the list of 'Acts of Parliament of Major Constitutional Significance' provided by Mortimore and Blick (2018) for 1997 to 2016. We then removed those which relate solely to rights or criminal offences, the royal succession, local government, and parliamentary standards. Though these are undoubtedly important topics, we exclude them in order to focus on major constitutional reforms affecting national-level political processes. This ensures they are relevant points of comparison for the proposals discussed here. Finally, we added four post-2016 Acts which relate to devolution or the Brexit process.



Table 2 Procedural models used for drafting UK constitutional reforms, 1997–2020

Model of drafting body	No. (%)	Acts
Elite commission	6 (30%)	Political Parties, Elections and Referendums Act 2000 Government of Wales Act 2006 Scotland Act 2012 Wales Act 2014 Scotland Act 2016 Wales Act 2017
Representative convention	1 (5%)	Scotland Act 1998
Elite negotiation	2 (10%)	Northern Ireland Act 1998 Northern Ireland (St Andrews Agreement) Act 2006
Executive-led	11 (55%)	Bank of England Act 1998 Human Rights Act 1998 Government of Wales Act 1998 House of Lords Act 1999 Constitutional Reform Act 2005 Constitutional Reform and Governance Act 2010 European Union Act 2011 Fixed-term Parliaments Act 2011 European Union (Notification of Withdrawal) Act 2017 European Union (Withdrawal) Act 2018 European Union (Withdrawal Agreement) Act 2020

developed through one of four different types of reform processes—elite commissions, representative conventions, elite negotiation, or an executive-led process (i.e., without involvement of any special constitutional reform body).⁸ Table 2 reports the number, percentage, and titles of Acts which were developed via each of these models.

Four main patterns emerge from Table 2. First, the largest share of all constitutional reforms in the UK between 1997 and 2020—fully 55%—were executive-led, i.e., drawn up by the government of the day without involvement of any special constitutional reform body, and put before parliament. Though these reforms sometimes followed public consultations, and built on longer-term constitutional discussions, the proposals were developed by the sitting executive, often without the involvement and support of other parties. These were not minor or peripheral changes, as might be concluded from the lack of cross-partisanship, or expert or broader public representation in developing them. Rather, this category includes major reforms such as the House of Lords Act 1999, which restricted membership of the House of Lords by virtue of a hereditary peerage, and the Fixed-term Parliaments Act 2011, which regulated the calling of early parliamentary elections.

Second, elite commissions have been the second most common procedural choice for drafting constitutional changes in the UK since 1997, accounting for 30% of the

⁸ Elite negotiation—Renwick’s (2014) ‘negotiation among leaders’ category—covers bargaining among political leaders of the kind that delivered the Belfast/Good Friday Agreement in Northern Ireland. This approach is not discussed above, as negotiation between different sets of political elites has limited relevance as a model for a government-initiated review of the kind considered here.



reforms that we identified. In particular, the extension of devolution to Scotland and Wales has been greatly influenced by proposals from the Richard Commission, Calman Commission, Silk Commission, and Smith Commission.⁹ In addition, the Political Parties, Elections and Referendums Act (2000), which represented a major overhaul of how democratic competition is regulated in the UK, was based on recommendations from the Committee on Standards in Public Life. Commissions give prominence to expertise and non-party or cross-party deliberation, and are used chiefly to address representationally, politically and technically complex issues like devolution and the regulation of parties, elections and referendums.¹⁰ This suggests that governments have often valued expertise and impartiality when considering constitutional reform.

Third, the British public has had only limited involvement in constitutional reform. Table 2 shows that the public has not been *directly* involved in *deliberating and recommending* proposals for constitutional reform. The Scottish devolution process saw some *indirect* public involvement at the stage of developing reform proposals through the Scottish Constitutional Convention, which represented the public through delegates drawn from political parties, local government, and civil society. However, the concept of direct citizen participation in constitutional reform through citizens' assemblies has gained traction in the UK in recent years. Parliamentary committees have used citizens' assemblies to discuss climate change and social care, and the Scottish government recently established a citizens' assembly to consider broad questions about Scotland's future.¹¹ Several other citizens' assemblies have also been convened by a number of research organisations (see Flinders et al. 2016; Renwick 2017). Yet, to date, the British public have not had a direct role in deliberating proposals for constitutional change.

This lack of a direct role for the public in drafting constitutional change proposals contrasts with increasing public involvement in their *endorsement*. Referendums were initially highly unusual in the post-war era, and up to the 1970s they were seen as an unconstitutional break with the principle of parliamentary sovereignty, or even a tool used by dictators (Bogdanor 2019, pp. 87–89). However, there has since been a clear growth in the use of referendums to endorse constitutional change. The first UK-wide constitutional referendum was held in 1975 on the question of Britain's continued membership of the EEC. Further referendums followed in Scotland and Wales in the late 1970s, as part of unsuccessful devolution attempts. After these votes, there were no further referendums in the UK until Labour returned to office

⁹ As shown in Table 2, devolution to Northern Ireland has developed through a separate process. This has centred on negotiations involving the key Northern Irish political parties, the UK government, and the government of the Republic of Ireland.

¹⁰ Not all elite commissions produce successful proposals. For instance, investigations of Lords reform (the Wakeham Commission), electoral reform (the Jenkins Commission), and human rights (the Commission on a Bill of Rights) failed to result in reform.

¹¹ The 'Citizens' Assembly on Social Care' was appointed by two House of Commons select committees and reported in June 2018. The 'Climate Assembly UK' was commissioned by six House of Commons select committees and reported in September 2020. The 'Citizens' Assembly of Scotland' was commissioned by the Scottish government and reported in early 2021.



in 1997. But since then, the use of referendums has increased dramatically. Referendums have been held on Scottish independence (in 2014), electoral reform (in 2011), and EU membership (in 2016), as well as devolution to Wales (in 1997 and 2011), Scotland (in 1997), Northern Ireland (in 1998), London (in 1998), and the North East of England (in 2004). This suggests that a convention has developed, which requires popular approval for certain kinds of major constitutional change. This expectation is also reflected in several pieces of UK legislation that have established a *statutory* requirement for referendums before certain types of constitutional change. The European Union Act 2011 created a ‘referendum lock’, requiring a public vote before any future transfers of powers to the EU. Similarly, the Scotland Act 2016 and Wales Act 2017 both provide that the devolved institutions cannot be abolished without popular consent in a referendum.

There is a fundamental difference, however, between referendums and more direct forms of public involvement in deliberating and shaping constitutional change. Referendums offer voters a ‘take it or leave it’ vote on a proposal rather than a chance to shape its content. For example, the UK’s 2011 referendum on electoral reform gave voters the choice to support or reject the proposal to move to the ‘alternative vote’ system (AV). The proposal itself resulted entirely from an elite-level compromise between the Conservative Party (who favoured retaining the existing ‘first-past-the-post’ system), and their Liberal Democrat coalition partners (who backed AV in the referendum but actually favoured the Single Transferable Vote). Likewise, the 2016 Brexit referendum, which asked voters to endorse or reject the broad principle of EU membership, did not envisage a role for the public in the process of deliberating and developing any detailed proposal for a particular form of Brexit.¹² Whether a referendum is held before or after a process of drafting proposed constitutional reforms, it provides for no direct role of the public in shaping those reforms. Recent British practice thus shows a clear acceptance of the public’s role in *endorsing*, but not in *deliberating and shaping*, proposals for constitutional change.

Fourth, the table makes clear that the UK typically addresses major reforms in a piecemeal manner, through multiple parallel processes. For instance, devolution to the different nations of the UK has overwhelmingly been handled through several separate processes. The Calman and Smith Commissions examined Scottish devolution, the Holtham, Richard, and Silk Commissions considered Welsh devolution, and the McKay Commission investigated the implications for England.¹³ While this approach reflects variation in the demand for devolution across the different nations, it has resulted in a fragmented and inconsistent approach. The sheer number of Acts listed in Table 2 is an indication of recent governments’ tendency to pursue constitutional change in a piecemeal manner, rather than through any joined-up, coherent process. Anthony King (2007, p. 349) noted in his discussion of New Labour’s

¹² The same might also be said of the 2014 Scottish independence referendum. While the Scottish Government set out its proposals for how an independent Scotland would be governed, these would ultimately be subject to future negotiations.

¹³ One important earlier exception to this pattern is the 1969–1973 Royal Commission on the Constitution (the ‘Kilbrandon Commission’), which considered the territorial constitution more generally (see Mitchell 2009).



constitutional reforms that this has often resulted in unanticipated implications for the constitutional framework as a whole: ‘some of the changes were intended, some were unintended, some were intended but had unintended consequences, and some were undoubtedly intended, but not as part of any scheme of constitutional change.’ The House of Commons Political and Constitutional Reform Committee (2013, p. 5) reached a similar verdict about the various commissions established under New Labour and the subsequent Coalition government: ‘[D]espite the reams of recommendations from these commissions that the Government has implemented, or has indicated that it will implement, there has been no analysis of the combined effect that these changes have had on the constitution as a whole.’

Overall, Table 2 underscores the potential radicalism of the Johnson government’s plans to advance major constitutional change through a single commission and of using the process of constitutional change as a means to generate greater public trust in the UK’s institutions and democracy. The direct commitment to joined-up constitutional thinking contrasts starkly with the procedures used in the UK to develop constitutional change over the last quarter of a century: Irrespective of the model followed, even ambitious constitutional reform agendas, such as New Labour’s reforms, were pursued through separate, disjointed and issue-specific processes, rather than an integrated approach to major constitutional reform. Moreover, the public’s role has mostly been limited to consultation (although *ex post* endorsement by referendum is occasionally used) and there has been no element of *direct* involvement of the public in deliberating and shaping of any reforms. Most often, reforms have simply been developed by the government, rather than by a specifically constituted constitutional review body, commission, or convention. Only in a minority of cases—just under a third—has the process of drafting reform proposals been undertaken by commissions of expert and/or party-political elites expressly composed for the purpose.

The Johnson government’s choices in practice

Having reviewed the Johnson government’s potentially radical initial ambitions for the Constitution, Democracy and Rights Commission, examined their fit with the available models suggested by international experience, and analysed the contrast with domestic precedents, we now turn to the government’s actual implementation choices. In practice, the Johnson government abandoned its initial proposal for a single overarching Commission with a remit to review the full range of connected aspects of the constitution. Instead, it established several separate reviews with narrower, issue-specific remits. These reviews were organised as elite commissions, composed of experts in the relevant areas.

Two initial review panels were set up during 2020. First, the Johnson government established an Independent Review of Administrative Law (IRAL) in July 2020, to examine whether there is a need to reform the judicial review process. This review took the form of an expert panel, composed of lawyers and legal academics. Returning to the principles discussed above, this suggests an acknowledgement of the importance of expertise. However, this expertise was not paired with complete



impartiality, as the chair, Lord Edward Faulks, had previously served as a Conservative justice minister between 2014 and 2016. The IRAL was tasked with considering ‘[w]hether the terms of Judicial Review should be written into law ... Whether certain executive decisions should be decided on by judges ... Which grounds and remedies should be available in claims brought against the government ... [and] any further procedural reforms to Judicial Review, such as timings and the appeal process’ (Ministry of Justice 2020a). The IRAL’s remit clearly followed from the 2019 manifesto commitment to ‘ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays’ (Conservative and Unionist Party 2019, p. 48). Like that commitment, the review had obvious roots in the government’s clashes with the judiciary during the Brexit process. Given its terms of reference, Elliott (2020, p. 20) has argued that it is ‘perfectly clear that *Miller II* [the Supreme Court’s prorogation ruling] forms part of the impetus for the Review’. Moreover, the panel’s chair had publicly criticised the Supreme Court’s prorogation judgement as ‘a significant, unjustified constitutional shift’ (Faulks 2020). The review panel reported in March 2021, after which the government opened a further consultation, which was criticised both for its short time-scale and for appearing to push for further reforms beyond the more modest changes recommended by the IRAL (see Craig 2021 for a summary of the report and the government’s response). The process culminated in the publication of the government’s Judicial Review and Courts Bill in July 2021.¹⁴

The government created a second review panel, the ‘Independent Human Rights Act Review’ (IHRAR), in December 2020, and tasked it with investigating whether the Human Rights Act should be reformed. The IHRAR was organised similarly to the IRAL, as a panel of legal experts. However, one important difference was that its chair—Sir Peter Gross—was a retired senior judge with no prominent affiliation to any particular party (see Marsons 2021). These organisational decisions thus appeared to reflect both expertise and impartiality. The IHRAR’s remit was to consider ‘[t]he relationship between the domestic courts and the European Court of Human Rights ... The impact of the HRA on the relationship between the judiciary, executive and Parliament, and whether domestic courts are being unduly drawn into areas of policy ... [and t]he implications of the way in which the Human Rights Act applies outside the territory of the UK and whether there is a case for change’ (Ministry of Justice 2020b). It delivered its report in October 2021, and the government then announced a further consultation to run from December 2021 to March 2022. As with the IRAL, this consultation has been criticised for diverging from the review’s recommendations (see Kazim et al. 2022).

Despite the initiation of separate, independent review processes without any mechanism to integrate their findings into a coherent approach to constitutional

¹⁴ The content of the bill lies beyond the scope of this paper, which is focused on drafting processes. However, it is worth noting that initial responses to its clauses affecting judicial review suggested that they owed more to the IRAL’s recommendations than to the controversial wider ambitions signalled in the government’s consultation (e.g. Mountfield 2021).



reform, the Johnson government has continued to express a rhetorical commitment to the idea of a Constitution, Democracy and Rights Commission. When announcing the IHRAR, it attempted to obfuscate, claiming that the IRAL, the IHRAR, and unspecified future reviews, represent separate ‘workstreams’ that collectively ‘deliver the Commission on Constitution, Democracy, and Rights’ (Ministry of Justice 2020b). However, in practice the Commission will have existed in name only since the ‘workstreams’ established to date are organisationally entirely separate.

Given the steps taken so far, the government’s approach falls short of the potentially radical procedural implications of the plans outlined in the Conservatives’ 2019 manifesto, and suggests a reversion to domestic precedent. Three choices are particularly striking in light of the ambitions outlined in the Conservative manifesto. First, the government has abandoned its explicit commitment to a single commission, which had promised an integrated, joined-up approach to major constitutional reform. Instead, it has reverted to a fragmented approach, by which separate, disjointed reviews are launched to address related topics. This is evident from the decision to establish two separate panels that simultaneously address the closely related and partially overlapping issues of judicial review and human rights. Second, as part of this fragmented and piecemeal approach the government itself has developed draft constitutional changes that pre-empt some conclusions of the reviews it instigated. For instance, as part of its efforts to repeal the Fixed-term Parliaments Act (FTPA) 2011, the government published a draft bill in 2020, which contained a so-called ‘ouster clause’, intended to ‘make clear that the exercise of the prerogative powers to dissolve Parliament, and the extent of those powers is non-justiciable’ (Cabinet Office 2020).¹⁵ Put differently, the ouster clause proposed that prime ministerial decisions to request the dissolution of Parliament by the Queen cannot be challenged in court. This ouster clause addresses the relationship between the judiciary and the executive that the IRAL was tasked to examine, but the draft bill was published before the IRAL had produced its report. The government thus proposed legislation that sought to protect prerogative powers from judicial review, pre-empting the conclusions of the review that it instigated to consider precisely that subject. Third, the government’s broader objective of building public trust in the UK’s institutions and operation of democracy failed to inform its procedural choices: Neither the elite commission model, nor proposals being drawn up unilaterally by the government, envisages any role for direct public participation and deliberation in shaping the constitutional reforms. Instead, these paths permit only limited and indirect public consultation (through responses to the panels’ calls for evidence).

These choices are notable for the opportunities not taken. In opting to consider constitutional reform through a series of separate elite commissions, the government chose a procedural approach to constitutional reform that is characterized by continuity with recent UK precedents, rather than taking the opportunity of developing a new joined-up approach to considering the constitution as a whole. As we saw above, expert commissions have been the most common type of constitutional

¹⁵ This clause was also included when the bill was formally introduced to parliament in May 2021 as the Dissolution and Calling of Parliament Bill.



review body in the UK since 1997, and produced reforms that were criticised for their piecemeal nature and lack of a joined-up approach. The Johnson government's approach continues precisely this tradition of drafting constitutional changes in a disjointed, elite-led manner (while still acknowledging the importance of expertise and—to a lesser extent—impartiality). Beyond the use of review panels, the government has also continued the practice of initiating constitutional reform directly, through executive-drafted bills without any form of prior independent expert review as in the case of the repeal of the Fixed-term Parliaments Act 2011.¹⁶ Moreover, the government's broader goal of enhancing public trust in political institutions has arguably not been prioritised in its procedural choices which offer little room for direct public involvement. In sum, the government's approach to delivering the Constitution, Democracy and Rights Commission has not been the radical procedural departure that the manifesto appeared to signal, but shows striking continuity with the British approach to constitutional reform since the late 1990s.

To the extent that the government has acknowledged these deviations from its manifesto promises, it has focussed its explanation for the change in approach on time pressure and convenience. It has cited the 'effects of Covid-19 as well as the need for the Government to get on with their business' (see House of Commons Public Administration and Constitutional Affairs Committee 2020, p. 2), and implied that it considers the breadth of the Commission's remit inconvenient, contrasting 'a Royal Variety Performance of a range of different issues being dealt with at one sitting' with 'a series of focused reviews of independent men and women' (House of Commons Public Administration and Constitutional Affairs Committee 2020, p. 2).

While an in-depth examination of the reasons for the Johnson government's decision to deviate from its initial manifesto promises about the process of constitutional reform lies beyond the scope of this paper, a central alternative explanation lies in the change of political circumstances. Future work might explore this motivation. Specifically, the government won a substantial Commons majority in 2019, which may have had two effects. First, it may have reduced ministers' interest in building broad support for their constitutional reform programme (by promising a joined-up process and building public trust) because they were confident in their ability to achieve their goals without abiding by a more rigorous and demanding process.¹⁷ Second, given that the substantive objective of many of the proposed reforms is to shift power to the executive by weakening judicial and parliamentary checks, a fragmented process based on multiple separate reviews may benefit the government by obscuring the combined effect of any changes and fragmenting opposition to them.

¹⁶ The government did publish a draft bill for repealing the Fixed-term Parliaments Act 2011 (Cabinet Office 2020), allowing pre-legislative scrutiny in parliament. However, it did so at the same time as appointing the (legally-required) committee to review that Act, rather than waiting for its report before bringing forward any concrete proposals.

¹⁷ A further interpretation of the initial proposals is that they were insincere, and never intended to be delivered. However, the failure to implement manifesto promises has been shown to incur electoral punishment (Thomson 2001). It is therefore more plausible that the Conservative Party made these promises because they had a political function and were intended to be kept under some set of circumstances which, following the election of 2019, failed to materialize.



Conclusion

In this paper we have analyzed the wide-ranging constitutional review process proposed by Boris Johnson's Conservative government. In its 2019 manifesto, the Conservative Party outlined constitutional reform ambitions of unprecedented scope, focusing on many of the most fundamental relationships at the heart of the UK constitution. It envisaged reform of the relationship between the executive, parliament and the courts, alongside changes to judicial review, royal prerogative powers, the role of the House of Lords, human rights, access to justice, and requirements for voter identification. The scale of these ambitions appeared to be matched by an equally radical new approach to the process of constitutional reform. In particular, the government's commitment to appoint a single Constitution, Democracy and Rights Commission to develop reform proposals appeared to signal a newly joined-up approach to constitutional reform. Moreover, the government raised the prospect that it would prioritise the public legitimacy of the process, by declaring that the purpose of the reforms was to 'restore trust in our institutions and in how our democracy operates' (Conservative and Unionist Party 2019, p. 48). Given the substantive importance of procedural choices in constitutional reform, this paper analyzed these initial procedural proposals and the government's subsequent actions, placing them in comparative and recent domestic historical context.

We showed that the Johnson government took a different and a much less radical approach than had first seemed possible. As we have demonstrated, international experience made available several tested procedural models which were compatible with the government's commitment to conducting an overarching joined-up constitutional review. Moreover, several of these models could also have facilitated direct public input, which might have served the government's ambition of enhancing public trust in its proposals. Instead of adopting one of these approaches, or developing its own approach in light of this experience, the government chose to U-turn on its stated procedural ambitions. It has reverted to domestic precedent with a fragmented and piecemeal, elite- and executive-led approach to constitutional reform that contains no clear mechanisms for the overarching analysis of the effects of reforms in different areas of the constitution, nor any obvious procedural means for ensuring their public legitimacy. This process could well yield large changes to the British constitution, as various commentators have already suggested (see e.g. United Kingdom Constitution Monitoring Group 2021). But while these changes may prove radical, the process by which they are being investigated is much less so than was first suggested.

We have argued that the government's change of approach is important because it raises questions about the extent to which it delivers on the Conservatives' initial manifesto commitment, and the degree to which any constitutional reforms will meet its original goals. Advancing its reform agenda through separate and parallel processes without any clear co-ordination mechanism is likely to stymie any coherent review of the constitution as a whole. Moreover, in 2019 the Conservative Party framed constitutional reform as a way to restore public trust in political institutions, but this ambition does not seem to have been prioritised in the government's choice



of a process based predominantly on expert discussion and executive proposals, rather than any wider public deliberation (see Russell and Renwick 2020; Schleiter and Fleming 2021; Walker 2020). Taken together, the evidence to date suggests that the Johnson government's procedural approach to constitutional reform has been marked by opportunities not taken, rather than a radical new departure.

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