

## Session 4

# The flexibility of a new constitution

Jeff King

---

# **Remaking the UK Constitution: The Flexibility of a New Constitution**

Jeff King, Faculty of Laws, University College London

# The Menu of Design Options

---

## *Basic Design Options*

1. Legislative supermajorities
2. Reference to the people (referendums)
3. Double-decision rules
4. References to states, provinces or regions

## *Further Considerations*

1. Amendment vs. total revision
2. The power of initiating constitutional change
3. Different amending procedures for different provisions
4. Unamendable provisions

See further: Markus Böckenförde, *Constitutional Amendment Procedures* (IDEA, 2017).

# Legislative Supermajorities

- Used in most constitutional amendment procedures.
- Most common qualified majority formulas are 60% or 66%.

## Examples of Amending Formulas

US	Germany	Canada	France	UK
66% (Senate & House of Reps)  +  75%(State legislatures)	66% of both Houses (Bundestag and Bundesrat)	Majority (Fed Parl.)  +  (7 of 10 + 50% of population (Provinces))	Majority (Nat Assembly & Senate)  +  Referendum	Ordinary statute (if that)

# Reference to the People (Referendums)

- Around 40% of constitutions make provisions for the use of referendums in constitutional amendments.

Referendum required for all constitutional amendments	e.g. Australia, Denmark, Ireland, Japan
Referendum required only if most fundamental provisions amended or total revision	e.g. Austria, Latvia, Spain
Referendum normally required but can be bypassed by special legislative procedure	e.g. France (art. 89); Italy (art. 138)
Minority of members of legislature can decide amendment should be subject to referendum	e.g. Luxembourg (25%), Sweden (33%)
Non-legislative actors involved in calling a referendum	e.g. Italy

# Double-Decision Rules

Time delays	e.g. Italy, Estonia
Intervening general elections – <i>draft amendment put on hold until after next general election</i>	e.g. Finland, Greece
Intervening general elections – <i>legislature immediately dissolved after adoption of amendment as Act and fresh elections occur after</i>	e.g. Iceland, Netherlands

- Double-decision rules can also be combined with supermajority rules (e.g. Netherlands).

# References to States, Provinces or Regions

- Requirements might only apply to certain parts of the constitution dealing e.g. with federal system or respective powers of levels of government.

Consent given by state or provincial legislatures	e.g. Canada, India, South Africa, United States
Consent given by referendums in each state	e.g. Australia, Switzerland
Consent given by upper house representing state or provincial interests	e.g. Germany



Silvia Suteu

# Constitutional entrenchment and deliberation

Dr Silvia Suteu

UCL Laws

23 February 2019

# Design choices



1. Mechanism for constitutional change
  - Legislative procedure – supermajorities
  - Referendums
  - Citizens' assemblies
2. Stage of the constitutional reform process
3. Function of the amendment mechanism

# Entrenchment in perspective



- All constitutions involve a degree of flexibility and rigidity
- Amendment rules are part of the broader constitutional architecture
- Deliberation is not the only goal here

# Challenges for the UK



- Deliberative mechanisms are no panacea
- Paradox: do deliberative mechanisms need there to already be a deliberative culture in order to work?
- 'Rebuilding the ship at sea'

# Flexibility

Richard Bellamy UCL/EUI

# The Core of Democratic Constitutionalism

- A central element of a democratic constitution concerns the rules for making, interpreting and implementing the rules
- Aim is to create a fair scheme of political cooperation among citizens that shows equal respect to their different views and incentivises collective decision making etc.. so that they are treated with equal concern.

# Constitutionalism, Flexibility and Rigidity

- Fairness so described is procedural – it assumes we disagree and are partial to our own views (inevitably) and seeks impartiality through a fair process that gives us all a say and encourages us to ‘hear the other side’.
- A flexible constitution is one that says all rules - including changes to the rules for making the rules - should be made according to the normal process for making the rules.
- Departures from the normal process designed to make decision-making harder in some way introduce rigidity of a less or greater degree.
- What reasons motivate reducing flexibility, and what forms might such reductions take?



# What Reasons Motivate Making a Constitution Less Flexible?

- Stability – autonomy requires ability to plan, good to remind people of why what they want to change was put there in first place, avoidance of hasty changes/moral panics.
- Improving fairness – a) ensuring equal respect (so everyone has a voice); b) ensuring equal concern (protecting unpopular minorities)
- Improving deliberation – making sure people convinced the change is necessary and likely to work.
- Discouraging self-interested changes

# Forms of rigidity

- **Weak**

Conventions (as RH noted regarding use of royal prerogative)

Form of words – notwithstanding declarations for potential breaches of Human Rights Act

Time constraints – Fixed term Parliaments

Oversight by a different institution – Judicial Review ‘weak form’

- **Strong**

Changes to voting unit – internal – e.g. super majority for legislature, or need for votes either side of an election; external – referendum

Oversight by a different institution – Judicial Review ‘strong form’

# Do the Forms Match the Reasons?

- The worries are a) a given measure may backfire and have the opposite effect to the one intended, b) in serving one reason, a given form may be at odds with another, and c) may be at odds with core aim of a constitution.
- What works may be very dependent on context – it depends on the particular problem (which may be hard to anticipate)
- By and large weak forms fare better than strong forms.

# Some examples

- Rules designed to give legal stability may create political volatility e.g. if a measure people feel is unjust becomes harder to reform. Deliberation may not be enhanced.
- A group fearing electoral defeat may see rigidity as a way of entrenching their policies.
- Super majorities assume status quo more likely to be better than proposed change – but why? – Goes against fairness of the process.
- Improving equal concern may conflict with equal respect.
- May lead to conflicts between institutions

# Weak may be sufficient, and less likely to have negative consequences

- Impossible to do without conventions. Would a rule not likely to be accepted as a convention be a legitimate rule?
- We cannot anticipate all problems or how they may present themselves – the road to hell can be paved with good intentions that backfire.
- Key feature of weak rules is that they enhance deliberation and stability while doing the least damage to procedural fairness.
- The normal rules can accommodate many of the issues about enhancing equal respect and concern (PR vs FPT) – that's where the action lies