THE PROS AND CONS OF A WRITTEN CONSTITUTION

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The Mayflower 400 Lecture

It is a real pleasure to be back to give another lecture in your Pilgrim Fathers' series and an even greater pleasure to be able at long last to deliver the lecture originally planned to mark the 400th anniversary of the voyage of the Mayflower from Plymouth to New England in 1620. The Pilgrim Fathers had originally intended to found a colony in the North of Virginia but the weather defeated them and so they founded their New Plymouth Colony in what is now Massachusetts instead. While still on board ship the male passengers – or most of them – had signed the Mayflower Compact. It was a short document. After declaring themselves loyal subjects of His Majesty King James, the 41 signatories 'solemnly and mutually in the presence of God and one another covenant and combine ourselves together into a civil Body politick, for our better Order and Preservation, and Furtherance of the Ends aforesaid [ie the foundation of a colony for the Glory of God, the Advancement of the Christian Faith and the Honour of our King and Country], And by virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Offices from time to time as shall be most meet and convenient for the general Good of the Colony unto which we promise all due submission and obedience'. This has been called the 'first real Constitution of modern times'. It was democratic, in the sense that the majority of the male settlers agreed to it and agreed to abide by the rules they were to lay down. It was revolutionary, in that *those* were the rules that they agreed to abide by, rather than the rules laid down by others. But at the same time they maintained their allegiance to the King. That lasted until the thirteen colonies declared themselves independent sovereign states in 1776. They then agreed to form a confederation and eventually adopted the Constitution of the United States of America in 1789, adding the Bill of Rights in 1791. But each of the States of the

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Union, including Massachusetts, still has its own Constitution.

To lawyers, this is the principal difference between the United States and the United Kingdom. They have a written Constitution – indeed many written Constitutions – and we do not. But these days there is much talk about whether we too should have a written Constitution – I am asked this almost everywhere I go.

This is not surprising, for two main reasons.

The first, and less controversial, is the enormous amount of constitutional change we have had over the last 25 years or so. The Labour government came into power in 1997 with a major change programme, much of which it implemented in the first three years. This included devolution for Scotland and Wales, a new devolution settlement for Northern Ireland, the beginnings of a sort of devolution in England with the creation of a Mayor for Greater London, the exclusion of most of the hereditary peers from the House of Lords, the Human Rights Act 1998, the Freedom of Information Act 2000 and the Political Parties, Elections and Referendums Act 2000, which, among other things, created the Electoral Commission. Later came the Constitutional Reform Act 2005, which set up the Supreme Court, de-politicised the process of appointing judges, and radically altered the role of the Lord Chancellor, no longer Head of the Judiciary and champion of the rule of law in government, or even a lawyer, but a Secretary of State in a big-spending department responsible for legal services, the courts and tribunals, and the prison and probation services.

Then there was a lull as other distractions took over, not least the Iraq war and the financial crash. The next wave of attempts at constitutional change came when the Liberal Democrats were in coalition with the Conservatives from 2010 to 2015, but much less was achieved. Reform of the voting system was a top priority for the Lib Dems but the proposal for alternative votes was decisively defeated in the referendum of 2011 (could this have encouraged Prime Minister Cameron to see a referendum as a way of seeing off unwelcome ideas?). Reform of party funding and further reform of the House of Lords got nowhere.

There was an attempt to solve the so-called 'West Lothian' question by setting up a system in Parliament where only MPs representing English constituencies could vote for laws which only affected England – unfortunately labelled EVEL. And there was the Fixed Term Parliaments Act 2011, an attempt to prevent the Prime Minister dissolving Parliament at a time which gave him or her the best chance of winning the ensuing general election. But the Act was overridden to

allow both the election called by Theresa May in 2017 and the election called by Boris Johnson in 2019, so it was easily circumvented if the Prime Minister had a sizeable majority. Both EVEL and the Fixed Term Parliaments Act were done away with during the Johnson administration.

Then, of course, we had the Scottish independence referendum of 2014 and the Brexit referendum of 2016, both motivated by short term political considerations rather than deep constitutional thinking, neither supported by serious planning for what would happen if the result did not go the way the Cameron government wanted, both generating a huge amount of controversy and bad feeling.

All of this reform was done in a piecemeal way without in-depth study of the options and the consequences. Much of it was not followed through to its logical conclusion – the devolution settlements, for example, had to be revisited several times, reform of the House of Lords was never completed, reform of the electoral process never really got off the ground. More fundamentally, recent history has led commentators to question the fundamental principle of our constitution – that Parliament is sovereign. In reality, it is said, it is not Parliament which is sovereign but the government of the day which can command a majority in the House of Commons.

This leads us to the second reason why there are now calls for a written Constitution. That is the willingness of government to transgress constitutional boundaries, to make constitutional change for their own advantage, often party-political advantage, and to ignore constitutional conventions. For a lawyer, the obvious examples are the two *Miller* cases, where the government tested the boundaries of the royal prerogative to its limits. There was a reasonable excuse for the first of these, although not the excuse which the government first gave but one which they were handed by clever academic lawyers. There was no reasonable excuse for the second, a blatant attempt to achieve an excessively long suspension of Parliament which would have seriously hampered Parliament's ability to do its job of overseeing and legislating for the Brexit process. Both of these the Supreme Court could do something about because they were unlawful. But the Court could do nothing about the flouting of constitutional conventions, including the Sewell convention, under which the UK Parliament will not normally legislate in relation to devolved matters without the consent of the devolved Parliament.

Examples of constitutional legislation for party political gain include the Elections Act 2022, which will compromise the independence of the Electoral Commission, by requiring it to have

regard to a strategy and policy statement set out by government, and will make it less likely that younger and poorer voters will be able to vote, by requiring voter ID at polling stations; the Judicial Review and Courts Act 2022 which limits the use of judicial review, although not to the large extent that the government originally wanted to do; and the Bill of Rights Bill which drastically reduces the protection given to human rights in UK law.

Weakening the standards of conduct in public life includes the attempt to change the process for disciplining errant Members of Parliament with retrospective effect in order to help a Member who had been found guilty of an egregious breach of the rules against paid lobbying; the watering down of the Ministerial Code so that Ministers found to have broken it were able to retain or regain their posts; and the conferring of peerages on party donors or supporters despite the lack of approval by the House of Lords Appointments Commission.

And all this came along with attacks on the judiciary for simply doing its job. Examples are given in a recent report from the All-Party Parliamentary group on Democracy and the Constitution. Dominic Raab, for example, when a junior Minister in the Ministry of Justice described the first *Miller* decision as 'an unholy alliance of diehard Remain campaigners, a fund manager and an unelected judiciary' which had 'thwarted the wishes of the British people', when it did no such thing. He has also floated the idea of giving the government – as opposed to Parliament – the power to ignore judicial decisions which it does not like. Another example was Suella Braverman KC, when Attorney General, who criticised several Supreme Court decisions in a speech to the Public Law project without, in the Group's view, any substantial legal analysis. And I must mention Boris Johnson's famous remark during the debate on the unusual motion that 'this House has confidence in Her Majesty's government' on 18 July this year that 'With grim determination we saw off Brenda Hale and we got Brexit done'. Wrong on so many fronts. Yet again, the Lord Chancellor did not leap to the defence of the independence of the judiciary, as the then Lord Chancellor had failed to do after the infamous 'Enemies of the People' headline in the Daily Mail of 4 November 2016.

All that adds up to a formidable case for codifying our Constitution. If we truly believe in the rule of law, that we should be governed by laws and not by the diktat of individual men or women, that the governors should be subject to the law just as much as the governed, should we not want to place more constraints upon the deeds of those who govern us?

But let us think a little about what that might entail. As an active member of the Judicial

Committee of the Privy Council for 16 years, I became familiar with the Constitutions of many of the countries which still use the Privy Council as their final court of appeal. The largest of these is Trinidad and Tobago. The Constitution which they were given on gaining their independence in 1961 was replaced in 1976 when they became a Republic, although there were not many differences. Like many such Constitutions, it begins, in chapter 1, with the recognition and protection of fundamental rights and freedoms. In chapter 2, it defines who are the citizens of the State of Trinidad and Tobago, those who in the words of the Constitution of Bermuda 'belong' to the State. In chapter 3, it establishes and defines the Head of State – an elected President. In chapter 4, it establishes and defines a Parliament, consisting of a Senate and a House of Representatives, its powers, privileges and procedure, its summoning, prorogation and dissolution (which the President may do at any time, acting on the advice of the Prime Minister), elections and boundary commissions, and the system of balloting (by secret ballot in a first past the post system). Chapter 5 deals with executive powers. These are technically vested in the President, but actually exercised by a Cabinet consisting of the Prime Minister and such other Ministers as the Prime Minister shall advise the President to appoint. The President has to appoint the leader of the majority party in the House of Representatives as Prime Minister, but if there is no leader or no majority, he or she must appoint the member of the House who appears most likely to be able to command a majority in the House – in other words, the Westminster system codified. The President has to exercise almost all his or functions in accordance with the advice of the Prime Minister. Chapter 6 deals with the Director of Public Prosecutions and the Ombudsman. Chapter 7 deals with the Judicature, consisting of a High Court and Court of Appeal, with appeals from the Court of Appeal to the Judicial Committee of the Privy Council, the appointment of judges by a Judicial and Legal Service Commission and their security of tenure. Chapter 8 deals with finance and Chapter 9 deals with appointments to and tenure in a variety of public offices, such as civil servants, police officers and teachers.

In short, the basic structure of this and many other Commonwealth Constitutions is on the Westminster model. People became expert in drafting these Constitutions from scratch. They show that it can be done. But the first question which the drafters of any UK Constitution would have to answer is whether to codify the status quo or whether to incorporate some changes and if so what.

First, it would have to define the Head of State. Support for the monarchy is still quite strong. The sexism in the rules of succession to the throne has been corrected (but the sexism in the rules of succession to peerages and other titles of honour has not). The rule that the Monarch

cannot be married to a Roman Catholic has also gone. But should the Constitution codify the rule that the Monarch is Supreme Governor of the Church of England? Indeed, the whole business of the establishment of the Church of England would have to be considered: this includes the appointment of Bishops and Archbishops (by the Crown on the advice of the Prime Minister); the effective veto of the House of Commons over Church legislation, even in matters of doctrine and liturgy; and of course the presence of 26 Bishops in the House of Lords.

Then the Constitution would have to define the legislature. So what about the House of Lords? Could anyone codify its present composition with a straight face? Ironically, however difficult to defend, the presence of 92 hereditary peers and 26 Bishops is relatively easy to describe. But what would the present patronage powers of the Prime Minister look like in statutory language – in particular, should the customs about who contributes names to the honours list, and when, be codified? And should the role of the House of Lords Appointments Commission be strengthened? Or, of course, should we be considering whole-sale reform of the composition of the House of Lords – making it wholly or even partly elected, but on what basis?

When it comes to the powers of the House of Lords, would the Parliament Acts 1911 and 1949 survive intact? Or would there be calls to curb the powers of the House of Lords even further, for example by enshrining the self-denying ordinance that they will not hold up a government bill enacting a manifesto commitment? On the other hand, if an element of democracy were to be introduced into the composition of the House, there would be calls to expand its powers, which the House of Commons would resist because it doesn't want competition.

When it comes to the House of Commons, it would not be difficult to retain the existing electoral law, which is already in statutory form. We might want to strengthen the independence of the Electoral Commission and the boundary commissions from party political influence. We might want to enshrine the principles of universal suffrage and a secret ballot in the Constitution (but what would we then do about sentenced prisoners?). But would we want to enshrine the 'first past the post' principle in the Constitution (as it is in Trinidad and Tobago)? There are many who would like to see a more proportional electoral system, in which there is a closer relationship between the votes cast and the composition of Parliament.

Then there is the whole question of the relationship between government and Parliament. Should it be expressly provided that the leader of the political party which can command a majority in the House of Commons shall become Prime Minister (as it is in Trinidad and

Tobago)? If so, should it be left to each political party to decide how its leader should not only be chosen but also be dismissed and replaced? We have recently had no less than four examples of a leader who had been endorsed by the electorate at a general election being replaced by a leader chosen either by the party's members of Parliament or by the party's members in the country: David Cameron was replaced by Theresa May, chosen by MPs; Theresa May was replaced by Boris Johnson, chosen by party members; Boris Johnson was replaced by Liz Truss, chosen by party members; and Liz Truss was replaced by Rishi Sunak, chosen by MPs.

More important still, how many of our constitutional conventions should be codified? I was brought up on the idea that Ministers were answerable to Parliament for what went on in their departments. Not only that they should not mislead Parliament, but also that if something went badly wrong, they should resign, whether or not it was their fault. But the only two clear post World War II examples are Tom Dugdale (MP for Richmond in Yorkshire) who resigned over the Crichel Down Affair in 1954 and Lord Carrington who resigned over the invasion of the Falklands in 1982. Should we try to codify the responsibility of Ministers to Parliament? It is not only Parliament's job to pass laws. It is also Parliament's job to hold the government to account. That is the quid pro quo for choosing a government which can command a majority in the House. But does anyone really believe in it?

And what about the Royal prerogative, that residue of the ancient powers of the monarch which has not been abolished or regulated by Acts of Parliament? Any attempt to codify the whole of it would be very dangerous – something would be bound to be left out or set in unnecessary and inconvenient stone. But what about the prerogative to prorogue or dissolve Parliament? We have seen how the attempt to place statutory limits on the power to dissolve Parliament has been abandoned. We have also seen how there must be limits to the power to prorogue Parliament. But should we think about these again? Or should we do what Trinidad and Tobago appears to have done and leave it wholly to the discretion of the Prime Minister?

More fundamentally, should we also ourselves whether there is any discretion left to the Monarch? Some years ago, there was a very entertaining play in the West End about whether a future King Charles III could and would refuse royal assent to a Bill passed by Parliament which seriously curtailed freedom of speech. But the Monarch has not refused royal assent since the days of Queen Anne. However, it is not so very long ago that the Conservative party did not have a formal process for choosing a leader, so the Queen could choose whom she would ask

to succeed Harold MacMillan. More recently, there have been debates in some Commonwealth countries about whether the Governor-General can dissolve Parliament or sack a Prime Minister. But in the prorogation case, no-one argued that the Queen could have rejected the Prime Minister's egregious advice and we proceeded on the assumption that she could not.

In practice, these are the really difficult questions which written Constitutions on the Westminster model tend to leave unanswered. The Constitution of Trinidad and Tobago does not answer the first of the questions raised by Mrs Miller – how far does the Royal prerogative to make or unmake treaties extend? But it looks as if it gives a black and white answer to the second - how far does the Royal prerogative to suspend the operation of Parliament extend? Could that be challenged?

Then, of course, there is the relationship of both Government and Parliament with the judiciary. At present, the independence of the judiciary is protected, both by the rules about security of tenure and the current de-politicised appointments process, which leaves the Lord Chancellor with little choice but to accept the recommendations of the appointments commissions. These could easily be translated into a written Constitution, as they are in Trinidad and Tobago. But not everybody is comfortable with the current lack of political input into judicial appointments. This is not just the government, which was trailing changes to the method of appointing Supreme Court Justices after the prorogation case. More thoughtful voices have argued that Parliamentarians are now too detached from the justice system. There are no longer so many lawyers in Parliament. The Lord Chancellor is no longer a senior lawyer who understands the justice system and the importance of defending the rule of law and the independence of the judiciary in Cabinet. Greater involvement in the process of judicial appointments might bring greater 'buy-in' to the justice system from the government. But it would be strenuously resisted by most judges and many lawyers.

And are security of tenure and independent appointments enough to protect the independence of the judiciary? Some Constitutions also have rules prohibiting the reduction of the pay and pensions of serving judges. And what about retirement ages? There are governments in Europe which have reduced retirement ages as a way of getting rid of judges they don't like and giving them the opportunity to appoint more judges whom they do like.

Last but by no means least, a written Constitution would have to enshrine the devolution settlements. But should they be in their present form or is there room for improvement? And

what about England? How about reviving the ancient Anglo-Saxon kingdoms of Northumbria, Mercia, Wessex, Essex and Kent? Is it not time for the UK to become a genuine federation rather than the present half-way house?

This all leads on to the biggest question of all. Section 2 of the Constitution of Trinidad and Tobago spells it out: 'This Constitution is the supreme law of Trinidad and Tobago and any other law that is inconsistent with this Constitution is void to the extent of that inconsistency'. This means that the judiciary have to have the power to decide whether a law is inconsistent with the Constitution and to declare it void if it is. This is the task of Supreme Courts throughout the Anglo-American legal world wherever there is a written Constitution – and only the UK, New Zealand, Israel and the Isle of Man do not have a written Constitution of some sort or other. In the Mayflower lecture, it is appropriate to think about how the Supreme Court of the United States performs this role.

In *Roe v Wade* (410 US 113) in 1973, the Supreme Court held that the right to privacy, which earlier courts had discerned in the 14th amendment's guarantee of due process, included the right to an abortion during the first trimester of pregnancy. During the second trimester, the state's interest in protecting the health of the woman justified some regulation of this right. And during the third trimester, when the foetus reached viability, the state's interest in protecting the life of the foetus outweighed the right. Accordingly, a Texas statute which permitted abortion only when the life of the pregnant woman was in danger was unconstitutional. In 1992, in *Planned Parenthood of South Eastern Pennsylvania v Casey* (505 US 833), the right to abortion was confirmed but based on liberty rather than privacy, while the standards for reviewing State legislation were revised. Yet in *Dobbs v Jackson Women's Health Organisation* (597 US _) earlier this year, the Supreme Court overturned *Roe* and *Casey* and upheld a Mississippi statute which banned abortions after 15 weeks except where there was a medical emergency or severe foetal abnormality. Chief Justice Roberts would have confined his decision to that, but five of the Justices went much further and overturned *Roe v Wade* and *Planned Parenthood* in their entirety, removing the constitution right to abortion, and leaving it to each State to decide what its abortion laws would be. Three Justices dissented. They protested that it was unprecedented for the court to remove rights which had previously been identified by their predecessors (perhaps they could bring back segregation and even slavery one asks?), without any consideration at all of the effects this might have on the health and welfare of pregnant women, and relegating women to second class citizens without the right to control their own bodies.

Whatever one's views on abortion, and it is a difficult subject, it is not difficult to have views on the role of the US Supreme Court. And this is not so much because of the supreme power which it wields – not only over State legislation such as this but also over federal legislation – but because of the way in which its Justices are appointed. When a court has the final word in this way, it is natural for politicians to want to pack the court with their supporters. Justices of the Supreme Court of the United States are appointed by the President on party political lines. Everyone knows what their politics are – whereas I could honestly say that I did not know the politics (if any) of most of my colleagues in the House of Lords and Supreme Court. Of course, a conscientious judge will decide in accordance with his or her judicial oath rather than in accordance with his or her political opinions. Five of the seven Justices in the majority in *Roe v Wade* were appointed by Republican Presidents. The five Justices who affirmed the right to abortion in *Planned Parenthood v Casey* were appointed by Republican Presidents. But the majority who decided to overturn them both were not only appointed by Republican Presidents, but in three cases by a President who had deliberately set out to find Justices who would do just that. And the Justices went out of their way to attract the case to the court. The striking feature of the opinions is that each side accuses the other of judicial legislation. The majority accuse the dissenters of supporting 'raw judicial power'. The dissenters observe that 'The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.'

Currently the United States has a Democrat President and (for the time being) Democrat majorities in both the House of Representatives and the Senate. Public opinion polls suggest that the majority of Americans support the right to abortion. So the Republican Presidents who packed the Court in this way and who do not currently enjoy electoral support are able to rule from the grave and dictate to the political party which does have that support what the answer to some pretty important questions may be. And to those who argue that this is a particularly egregious example, it can be argued that it was ever thus. Packing the court to achieve a particular result is not unknown in UA history.

So it is scarcely surprising that recently when we were debating the constitutional issue in the Reform Club – set up to celebrate the Great Reform Act of 1832 – the two politicians on the panel were seriously opposed to a codified Constitution. Michael Howard, for example, argued that it would take us in the opposite direction from the great Reform Act and make us less democratic rather than more. I think that Secretary of State Hillary Clinton would agree that the

US Supreme Court cannot be called democratic. And Lord Howard also argued that if we had a written Constitution, Parliament would want a greater say in the appointment of Judges.

On the other hand, it can be argued that we should not be over-influenced by the example of the United States. Apart from the UK, Israel, New Zealand and the Isle of Man, all the other countries in the developed world have Constitutions which limit the powers of their Parliaments and give Judges the power to decide whether they have acted outside their powers – this is not always a Supreme Court on Anglo-American lines; in systems following the model established in continental Europe, there is often a separate Constitutional Court with a composition which gives it greater democratic legitimacy to challenge what the elected Parliament has done. But most of these countries seem to manage pretty well and their courts are not politicised in the way that the Supreme Court of the United States has become. So perhaps we should be looking, for example, to Canada instead.

But there is another feature of a written Constitution that is problematic in the eyes of UK politicians. The most important parts of a written Constitution are 'entrenched' – so that they cannot be changed by ordinary legislation. Section 54 of the Constitution of Trinidad and Tobago, for example, provides that a Bill to alter certain sections of the Constitution can only be passed if it is supported by the votes of not less than two thirds of all the members of each House of Parliament; this includes the whole of chapter 1, dealing with fundamental human rights and freedoms. A Bill to alter certain other sections can only be passed if it is supported by the votes of three-quarters of all the members of the House of Representatives and two-thirds of all the members of the Senate; this includes the right of appeal to the Privy Council. The Constitution of Jamaica, on the other hand, does not entrench the right of appeal to the Privy Council, but it does entrench the independence of the Jamaican Judiciary. So the Judicial Committee of the Privy Council was persuaded that it was not possible to replace the right of appeal to the Privy Council with a right of appeal to the Caribbean Court of Justice by an ordinary Act of Parliament, because this would put the final word on the rights of the Jamaican citizen in the hands of a court which did not enjoy the same protected independence as do the Courts of Jamaica - thus showing that sometimes things have to be implied into a written Constitution. In some Constitutions, certain provisions can only be amended after a referendum, and in federal Constitutions, such as that of the United States, the Constitution may provide that it can only be amended the consent of a certain number of the States. In the US, three quarters of the States have to agree, which is why their Constitution is so difficult to amend.

So if we were to have a written Constitution, we would have to decide which parts of it would be entrenched and how and whether the devolved Parliaments would have to agree to amendments, raising yet again the England question in a particularly acute form.

But of course, these two features of a written Constitution – constraining the content of what Parliament may do, for example in relation to fundamental rights, and preventing it from changing the Constitution whenever it wants – these two features mean that it is highly unlikely ever to happen in this country. Parliament would have to vote to give up some of its powers and the Government which controls Parliament would have to agree to its doing so. Turkeys and Christmas come to mind.

This is not to say that things should remain as they are. There are plenty of think tanks looking at constitutional reform these days, including the Institute for Government which is conducting a review of the Constitution. There are plenty of things which could be done short of codification in a written Constitution with all that that would entail, such as legislating the ministerial code. But above all we need to build more coherence into the process of constitutional change and some mechanism for securing cross party agreement to the changes which are made. The Constitutions of the modern world were the product either of revolution – as in the United States and France – or of decolonisation – as throughout the Commonwealth – or of some other cataclysmic event – as in Italy and Japan. Vernon Bogdanor has suggested that Brexit is such a constitutional moment. But I think that the problem is that we had our revolution too long ago – indeed, in the same century that the Mayflower crossed the Atlantic.