

Playing Doctor Frankenstein when Re-forming the Constitution? Some thoughts on recent developments in the United Kingdom and Norway

Paper for the international conference “The Importance of Constitutions”
Held at the Swedish Institute in Istanbul, Turkey,
23-25 October 2013.

Iris Nguyễn-Duy
Postdoctoral Research Fellow
Faculty of Law, University of Oslo
Department of Public and International law
i.n.duy@jus.uio.no

[*WORK IN PROGRESS*]

The main purpose of this conference is to assess the importance of Constitutions in today’s democracies.

My aim will be to demonstrate that the importance of the Constitutions is reflected in, and can also be measured by, the way they are modified. Indeed, the importance given to the revision of the Constitution, the way it is performed and the way it is limited, tells us a lot about both the status enjoyed by a Constitution in a country’s legal system and the real balance of powers in the polity.

The analysis of constitutional change in a country opens the door to the country’s legal system “in its entirety”, encompassing both its formal and informal rules. Knowledge about the impact of constitutional rules, seen for example through the prism of constitution-amending, may contribute to a better conceptualisation of the Constitution, its status in a given society and its impact.

Why have I chosen to compare the UK and Norway?

Apart from a personal interest I have in both countries’ legal systems (I wrote a PhD thesis on the Sovereignty of the British Parliament and I am now assessing the extent of the power of the Norwegian parliament, as it is facing pressing internal and external challenges), my research lead me to believe that, even though they seem to be completely different, they share a lot more in common than what we think.

Both countries are currently either undertaking (UK) or about to set in motion (N) deep, intense, substantial constitutional reforms. From both a quantitative and qualitative point of view, the effective or, in the case of Norway, potential constitutional changes are considerable. What does this “trend” reveal? At such a rate, one may even wonder whether it is constitution-amending or an entire constitutional re-forming (implying an alteration of the current political balance) the countries are experiencing.

But first let’s begin with some definitions:

- Constitution.

It is not easy to define what a Constitution is (or should be).

- In the broad, material, sense, a Constitution is the set of the most important rules that organises, distributes and regulates power between the different State authorities, as well as the relationships between the State and the people, the citizens of the State. It sets out the structure of the State, the major state institutions, and the principles governing their relations with one another and with the State’s citizens. In the narrow, formal, sense, the Constitution is the written constitutional text adopted by the original constituent power (*pouvoir constituant originnaire*), sometimes referred to as the “founders” or “founding fathers”.

As underlined in the summary for the conference, two different aspects of what we define as a Constitution should be included, the formal and informal rules of the political system. It is what I am going to do, through the prism of constitutional change.

- In the case of the UK, the task of defining the Constitution is challenging, not to say nearly impossible – even though it is admitted worldwide that the UK also has a Constitution in the material sense. But one could try a general definition and distinction. As it is well known, Britain lacks a written Constitution. More precisely, it has no codified Constitution, as there is no single legal document which sets out in one place the fundamental laws outlining how the state works. It doesn’t mean, however, that the Constitution cannot be modified.
- The Norwegian Constitution of 17 May 1814 stands at the apex of the Norwegian legal system. It is the oldest written Constitution still in force in the world, after the US Constitution of 1787.

- Since no Constitution can claim to be perfect, its modification / amendment is inevitable. Constitutions have to be updated over time to reflect changes in the polity’s circumstances and in the society’s values.

One can suppress, add, modify a few words or whole sections of the constitutional text (the modification can be partial or complete. → abrogation, replacement by a new one). There is also a difference between reforming, amending and altering a Constitution.

One can distinguish between the major (revisions) and minor (amendments) formal constitutional modifications of a Constitution.

A distinction can also be made between the formal ways to amend the constitutional text and the informal ways to do it. The table designed by Bjørn Erik Rasch should be applied here.

	LEGAL CONSTITUTIONAL CHANGE	UNCONSTITUTIONAL CHANGE
EXPLICIT CHANGE (change of text)	Formal amendment procedures	Irregular procedures
IMPLICIT CHANGE (no change of text)	Judicial interpretation	Political adaptation

I will first make a few observations on the way the British and Norwegian Constitutions are formally amended (I.), before I focus on the content of the current constitutional reforms in both countries in order to determine the scope or extent of constitutional change in both countries – and what it means for the importance of their Constitutions (II.).

I. Some thoughts on the WAY the British and Norwegian Constitutions are formally and officially amended

I will first some preliminary observations on the age and longevity of both Constitutions (1.), before comparing their respective systems for constitutional amendment (2.). I will then highlight two strong, common features regarding the way Constitutions are officially changed in Norway and in the UK, by opposition to informal constitutional change that does not follow a special amending procedure (3.).

1. SOME PRELIMINARY OBSERVATIONS ON BOTH CONSTITUTIONS

TWO OLD CONSTITUTIONS

The British and the Norwegian legal systems both rely on two very old, “enduring” (as Tom Ginsburg would say), Constitutions.

The fact that Britain lacks of a “written” constitution can be explained, on the one hand, by its history as a stable land (no conquest or domination by a foreign power since 1066 / the 11th century) that progressively became an Empire, and, on the other hand, by “a cautious, sense-oriented pragmatism, that primes adaptation and abhors radical change and rupture”¹. The adoption of a written Constitution was a necessity in countries that had experienced revolution or regime change. They had either to start from scratch or to choose relying on other principles, constructing new state institutions and defining in detail their relations with each other and their citizens. By contrast, the British Constitution has evolved over a very long period of time, reflecting the relative stability of the British polity. “The British model of constitutionalism is one of immanent constitutionalism that emerges gradually by means of a process of accretion”². Instead of having one single, written document in guise of Constitution, the British Constitution consists of an accumulation of various laws and conventions (constitutional in nature), judicial decisions and the law and practice of Parliament – which collectively can be referred to as (sources of) “the British Constitution”. It is thus more accurate to refer to Britain’s constitution as an “uncodified” constitution, rather than an “unwritten” one. One of the first documents that could be included in the British Constitution is the *Magna Carta* of 1215. This way, the British Constitution’s origin can be traced back to the 13th century. Parliamentary sovereignty is commonly regarded as the defining principle of the British Constitution. Other core principles of the British Constitution are often thought to include the rule of law, the separation of government into executive, legislative, and judicial branches, and the existence of a unitary state, meaning ultimate power is held by ‘the centre’ – the sovereign Westminster Parliament. However, as explained by UCL’s Constitution Unit, some of these principles are either considered “mythical” (the British constitution may be better understood as involving the fusion of executive and legislature) or doubtful (Parliamentary sovereignty may now be called in question given the combined impact of Europe, devolution, the Courts, and human rights).

¹ M. Rosenfeld, “Constitutional Identity”, in M. Rosenfeld & A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, (2012), Oxford: Oxford University Press, pp. 756-776, p. 764.

² Ibidem, p. 764.

Norway, like the UK, is a constitutional monarchy and a representative democracy. It has evolved continuously over the last two centuries, gradually subjecting the exercise of formerly wide powers held by the King or head of state and government to legal and conventional constraints. The Norwegian Constitution of 17 May 1814 is the oldest single-document national constitution in Europe and the second oldest in the world (the US Constitution being the first), still in force. It will celebrate its 200-year anniversary in May next year.

The fact that these Constitutions are very old, show their continuity and endurance, but suggests that they are also able to face and adapt to the challenges of modern times and the evolution of society.

However, it is paradoxical that, while the respect for a Constitution grows with its increasing age, at the same time, this very same old age makes the Constitution a less adequate expression of the society's / the People's political needs.

2. DIFFERENT METHODS FOR AMENDING THE CONSTITUTIONS - ASSESSING FORMAL CONSTITUTIONAL CHANGE IN BOTH COUNTRIES (in the case of the UK, when constitutional change takes a written form)

A procedure to amend the constitutional text can be found in the quasi-totality of the written Constitutions.

The founding fathers have theoretically four choices, regarding the amendment of the Constitution: they can choose to remain silent on that topic (French Charter of 1814); they can decide that the constitutional text can be modified by way of ordinary Act / following the normal legislative procedure (Israel, until 1992); they can prohibit all modifications to/of the constitutional text; finally, they can opt for a special procedure. Nearly all written Constitutions provide for a special amending procedure.

The Norwegian Constitution makes no exception to this rule. § 112 of the Constitution provides for a special procedure to be followed in order to amend the Constitution. A proposal to amend the text of the Constitution must be submitted to the Storting during one of the first three years of a four-year parliamentary term. Such constitutional proposals cannot be considered by the Storting until one of the first three years of the next parliamentary term, so that the electorate has the opportunity to express itself on the matter through the election of the new Parliament. The proposal is then considered by the newly elected Storting in a sitting in which at least two-thirds of the members of the Storting must be present to constitute a quorum. Of these, at least two-thirds must vote in favour of the proposal (without being able to change a word of it) in order for it to be adopted.

The constitution is simultaneously a description of how, for the moment, we are governed and a prescriptive account of how we ought to be governed. In both respects (the former much more than the latter) it undergoes constant change (Stephen Sedley). Since the UK does not have a codified Constitution (and therefore no "higher law", formally speaking), it is better to focus on what makes the changes special, "constitutional", from a substantive/material perspective – and that's what I am going to evoke in the second part of this paper. But right now, I will focus on the "formal" way of amending the British Constitution. Since the British Constitution is largely "political" and not entrenched, it is flexible: any aspects of the British Constitution can be changed by way of ordinary legislation adopted by the British Parliament (Westminster) and certain aspects of the Constitution can be modified by convention [NB: Conventions are unwritten practices which have developed over time and regulate the

business of governing]. The UK's system of constitutional change is paradigmatic in that there are no special procedural requirements for constitutional change: the ordinary legislation passed for changing the Constitution does not require the organisation of a referendum, the intervention of an election or special majorities in Parliament – and the courts will not intervene (save as to interpretation of constitutional laws): any political majority can in theory change the Constitution. “[R]eliance is placed on politicians and the political culture to secure the quality of Constitutional reforms”.[p. 403] However, there are permanent select committees (such as the House of Lords Constitution Committee, the Delegated Powers and Regulatory Reform Committee, the Joint Committee on Human Rights) that scrutinize the reform proposals and report to their House on constitutional issues. Some special, ad hoc, select committees are sometimes established to scrutinize specific draft bills.

3. COMMON FEATURES REGARDING THE “OFFICIAL” CONSTITUTION-AMENDING POWER (the constituted constituent power)

We could say that in both countries strong parliaments hold the power to amend the Constitution, while the people are being “left out of the picture”.

TWO STRONG PARLIAMENTS VESTED WITH THE CONSTITUTION-AMENDING POWER

It has traditionally been suggested that the British Constitution can be summed up in eight words: “What the Queen in Parliament enacts is law”. This means that the sovereign Parliament (using the power of the Crown) enacts law which no other body can challenge. Since the 17th century, “since the sovereignty of the people as such and their role as actual holders of constituent power were discredited in favour of the view that parliament was the true representative of the people”³, Westminster has emerged as the ultimate source of constitutional legitimacy and has been vested with the ultimate law-making power. It is supposedly able to create or abolish any law. There is no formal (as opposed to material) distinction between constitution-making and legislating.

The Norwegian parliament, the Storting, is, according to the Scandinavian tradition, a quite strong parliament. It could be argued that it is not as strong as it was, but, in the particular case of the revision of the Constitution, the Storting enjoys a monopole of the power to do so. Since the Government has not used its power to propose new constitutional amendments for quite some time (since 1956 on its own initiative), the initiative belongs to the sole parliament (individual members of Parliament).

THE ISSUE OF THE PEOPLE

Even though both countries are democracies that thus rely, at least theoretically, on the fundamental principle of “popular sovereignty”,⁴ the people are shining by their absence in the constitution-amending process. Both Norway and the UK are essentially true representative democracies, where the people generally exercise the power indirectly, through their representatives. In his post-war “Thoughts on the Constitution” (1964), L.S. Amery said

³ *Ibidem*, p. 768.

⁴ The principle of popular sovereignty appears most explicitly in Article 49 and Article 75 of the Norwegian Constitution, where it is stated that the people issue laws, grant state funding, impose taxes and supervise the Government, through the Storting.

that “Our system is one of democracy, but of democracy by consent and not by delegation, of government of the people, for the people, with, but not by, the people”.⁵

Truly enough, the Norwegian procedure for amending the Constitution provides an opportunity for the electorate to have their “say” through the election of the new Parliament: since the deadline for submitting proposals goes out approx. one year before a general election, then it offers, in theory, “reasonable opportunity” for public debate, and the people / the voters are given time to pay attention to how the candidates express their views on the proposals. However, in practice, most constitutional proposals do not attract the attention of the people either during the campaign or in the public debate. Indeed, since the constitutional proposals usually contain several options or alternatives, it is often difficult for voters to know how the different parties position themselves on the proposal. The Constitution’s language form also contributes to increasing the distance between the people and its constitution. Moreover, there are no provisions relating to the organisation of referendums or plebiscites in the Norwegian Constitution. The only active role the people have is in the process for constitutional change through a general election.

In the UK, the people do not traditionally play any direct role in either governmental decision making or constitution amending. Until recently, there were no referendums or plebiscites in the UK either. As Anthony King explains, “No feature of the British political doctrine was more deeply entrenched under the traditional constitution than the belief that the people should not take policy decisions: the politicians, and the politicians alone, should take them.”⁶ In addition, constitutional change does not usually trigger partisan battles. As Dawn Oliver explains: “It is broadly agreed and understood among Westminster parliamentarians and among the general public that constitutional change should not be brought about with a view to benefiting the party or parties in government or their supporters; rather constitutional changes should promote honestly held views about the public interest and where the balance between individual rights and conflicting public interests lies. Allegations of partisanship are of course made, especially by opposition parties and the critical press, when constitutional changes are under consideration. But Governments proposing change in the UK will never admit to partisanship: if they were to do so this would attract general public disapproval (...) This non-partisan understanding about constitutional change in the UK may exist because each government is an opposition in waiting and each opposition party is a government participant in waiting. The electoral system operates so that there are regular changes of government. It is not therefore in the interests of either government or opposition parties to concede a right to the others to use their power in relation to the constitution for party political advantage without any public interest justification. The terms of such debates take for granted that constitutional change should be non-partisan.”⁷

However, in recent years, the politicians have felt more frequently the need to organise referenda (or to open for this possibility), as well as to ask for the people’s opinion by way of public consultations during the preparation of constitutional reforms (especially with Tony Blair and Gordon Brown).⁸ A total of 11 referendums have been held in the UK since 1973,

⁵ L.S. Amery, quoted by A. King (2001), *Does the United Kingdom still have a constitution?*, The Hamlyn Lectures 52nd Series, London: Sweet and Maxwell, p. 32.

⁶ A. King, *op. cit.*, p. 32.

⁷ D. Oliver, “Parliamentary Sovereignty in Comparative Perspective”, *UK Const. L. Blog* (2nd April 2013) (available at <http://ukconstitutionallaw.org>).

⁸ See, f.ex., D. Oliver & C. Fusaro, “Changing Constitutions: Comparative Analysis”, in D. Oliver & C. Fusaro (eds.), *How Constitutions Change*, (2011), Oxford: Hart Publishing, p. 393.

two of them at national level.⁹ But the “referendum lock” mechanism inserted in the *European Union Act 2011* seems to open for the potential organisation of many more national referendums in the future – not to mention the “in-out referendum” on European membership the British Minister is keen on organising by the end of 2017, if the Conservative party is re-elected. The mechanism of “referendum locks” included in the *EUA 2011* and “the emergence of the referendum as a more systematic feature of the constitution”¹⁰ seem to confirm Vernon Bogdanor’s analysis of the direction taken by constitutional change in the UK, *i.e.* towards a mixed system with formal and legal popular sovereignty, as well as parliamentary and constitutional sovereignty.¹¹ According to Professor Bogdanor, we are witnessing the emergence of a new constitutional convention according to which a referendum would have to be held either “for any significant devolution of power away from Westminster” to devolved institutions (in Scotland, Wales and Northern Ireland) or even to European institutions or “when a wholly novel constitutional arrangement is proposed”.¹² The political actors seem to have (unwillingly?) created an expectation in the public that they are to be consulted, by referendum, on major constitutional issues. But the tradition for representative democracy is still stronger in the UK, for the moment at least – and I should note also that there has been no pressure for organizing a referendum prior the adoption of the constitutional Act entitled *Fixed Term Parliament Act 2011*.¹³

II. Some thoughts on the SUBSTANTIVE aspect of the constitutional reforms and their meaning for/when assessing the importance of the Constitution

One can in the first place observe that Norway and the UK share a common problem: their Constitutions seem quite inadequate as they do not properly reflect the actual balance of powers in the polity.

⁹ In 1975, the British held their first national referendum, on whether the UK should remain in the European Community as it was then. The referendum was organised after the British had already entered the European Community. The second nationwide referendum, the so-called “alternative vote referendum” (on the voting system for electing MPs), took place in May 2011. The electorate had the choice between the current first past the post system or an alternative. 68% of the electors voted in favour of the first past the post system for general elections. The Scottish Government plans to hold a referendum on the independence of Scotland by the end of 2014. On referendums in the UK, see House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom*, HL Paper 99, 2010, accessed April 15, 2013, <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf> and V. Bogdanor, *The New British Constitution*, Oxford: Hart Publishing, 2009, Chapter 7.

¹⁰ Stephen Tierney, “Britain wakes up to the referendum”, UK Constitutional Law Group, May 10, 2011, accessed April 16, 2013, <http://ukconstitutionallaw.org/2011/05/10/stephen-tierney-britain-wakes-up-to-the-referendum/>.

¹¹ Vernon Bogdanor, *The New British Constitution*. Oxford: Hart Publishing, 2009, chapter 7.

¹² Evidence to the House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom*, Minutes of evidence, accessed March 26, 2013, <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/10012002.htm>; House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty. Written evidence from Vernon Bogdanor*, accessed March 26, 2013, <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633ii/633we10.htm>.

¹³ The *Fixed-term Parliaments Act 2011* is an Act of the Parliament of the United Kingdom that introduced fixed-term elections for the first time to the Westminster parliament. Under the provisions of the Act, parliamentary elections must be held every five years, beginning in 2015. Before the passage of the Act, Parliament could be dissolved by royal proclamation by virtue of the Royal Prerogative, which meant that the British Monarch could decide when to dissolve Parliament.

The Norwegian Constitution does not reflect properly the new balance of powers in the polity. The British Constitution is so elusive, ungraspable that it is difficult to know its proper content.

I will first make some observations on how strongly the Norwegian and British Constitutions are protected, from a substantive point of view (1.). I will then show that a presentation of constitutional change in the UK and in Norway would far from complete if one did not also take into account the informal, substantive change of their Constitutions (2.). Lastly, I will try to assess what the current trend of multiple constitutional reform means in terms of the importance vested in the Constitution in both countries (3.).

1. SOME OBSERVATIONS ON THE LEVEL OF PROTECTION OF THE CONSTITUTIONS

1st REMARK:

The nature of the amending process, and of the substantive limitations to the revision of the Constitution, gives the measure of the protection of the Constitution the founders wanted to grant it.

The way a Constitution has been changed over the years, as well as the frequency of constitutional amendment, give the measure of how it is perceived by its enforcers and of its importance in general in a country's system.

2nd REMARK:

In addition to the procedural or “manner and form” limitations of the amending process of a Constitution, the substantive limitations attached to the amending process are key-elements in the appreciation of level of protection a Constitution enjoys (its degree of rigidity).

Indeed, the substantive limits are qualitatively more important than the formal ones as attempts to amend the very core, essence or “identity” – I could say the “DNA” – of a Constitution, would lead to the abrogation of the current Constitution by its denaturation or its re-formation, and/or another political regime.¹⁴

At first glance, it seems that the Norwegian Constitution, like the US Constitution, and 200 hundred years after its adoption, still looks like its “old self”, even though it has been amended 287 times between 1814 and 2011.

Moreover, § 112 of the Norwegian Constitution contains an “eternity clause”, since certain fundamental characteristics of the Constitution, that is its “spirit” (*aand*) and “principles” (*principer*), cannot be amended.¹⁵ The large number of changes undergone by the Norwegian Constitution show that it is far from unamendable, despite its eternity clause. But the Constitution's old age, its long-term constitutional development and the fact that it still looks much like what it was in 1814, shows that this provision played its role – though less than during the 19th century, when “Norway's political leadership was largely preoccupied with drawing the substantive limits enshrined in article 112 of the Constitution. (...) it seems reasonable to believe that, at least on some occasions, references to the ‘spirit and principles’

¹⁴ O. Pfersmann, “De l'impossibilité du changement de sens de la Constitution”, in *L'esprit des institutions, l'équilibre des pouvoirs. Mélanges en l'honneur de Jean Pactet* (2003), p. 353; A. Le Pillouer, “De la révision à l'abrogation de la Constitution : les termes du débat”, *Jus Politicum*, http://www.juspoliticum.com/IMG/pdf/JP3_lepillouer.pdf.

¹⁵ Official translation: “(...) Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution. (...)” – Full text (not up to date...) available on <http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/>.

clause has contributed to constitutional integrity by forcing the rewriting of amendment proposals and sometimes completely blocking proposed solutions”.¹⁶

In the UK, there are obviously no unamendable constitutional provisions. But sovereign parliament has traditionally shown both pragmatism and self-restraint when legislating as the constitution-amending power. Moreover, while the UK Constitution is, in theory, easy to change (see above), “the existence of and widespread acceptance of some ‘fundamental principles’ can make it practically impossible to legislate for change that challenges those principles”.¹⁷

2. THE FUNDAMENTAL ROLE PLAYED BY *INFORMAL* CONSTITUTIONAL CHANGE IN BOTH COUNTRIES

All Constitution in the broad sense undergoes a continual process of change. Not all change is constitutional, of course. But there are ways, *i.e.* other than formal amendments adopted by a qualified majority, to change the Constitution *de facto*, if not in name. Put another way, constitutional change can substantially occur, even in the absence of formal amendments.

Most (if not all) countries with a difficult or craving system of amendment have in fact developed alternatives, more precisely “non-textual ways of introducing changes in the life of the constitution (in part, of course, through judicial review of legislation)”. The degree of rigidity of the Constitution affects, among others, the informal ways of pursuing change, since the level of rigidity will directly have repercussions on the extent to which the courts and the representative bodies will have to interpret in a creative manner and to negotiate more informally in order to obtain (informal) constitutional change.

The Norwegian Constitution is a quite rigid Constitution. This has not hindered the fact that the Constitution has been amended quite often (keeping in mind that formal rigidity depends both on the established procedures and on the much broader political, cultural and sociological context). Yet, the perhaps biggest or most important constitutional changes (judicial review of legislation; parliamentarism until 2007) took place without the letter of the constitutional being first amended. What does it have to say about the importance of the Constitution of 1814? A written Constitution, in our Western democracies at least, is supposed to be the work of the sovereign people – and it derives its authority from the people.

So why and when does informal constitutional occur? Is it in order to respond to “constitutional disharmony”¹⁸? Is it an answer to the *de facto* rupture of balance within the constitution?

The continuity or maintenance of any constitutional order whatsoever requires some constitutional interpretation, which, in turn, is sometimes more than just interpretation, but constitutional creation (usually in the silence of the text).

Some judicial interpretations (that are *de facto* “constitutional” or of a “constitutional essence”) can be understood “as constructing and preserving identity in the sense of selfhood”.

¹⁶ E. Smith, “Old and Protected? On the Supra-Constitutional’ Clause in the Constitution of Norway”, (2011), *Israel Law Review*, vol. 44(3), pp. 369-388, p. 388.

¹⁷ D. Oliver & C. Fusaro, “Towards a Theory of Constitutional Change”, in D. Oliver & C. Fusaro (eds.), *op. cit.*, p. 410.

¹⁸ M. Rosenfeld, “Constitutional Identity”, *op. cit.*, p. 760.

“Not only judges but also legislators interpret when they resolve constitutional doubts for or against a bill as do executive officials when they decide they can, or cannot, consistently with their oaths of office carry out a particular public policy.”

However, the fact that some of the most important “customary constitutional laws” (such as parliamentarism, § 15 and the government’s duty to provide information to Parliament, § 82) are now constitutionalised / codified in the Norwegian Constitution constitutes both an argument in favour of formal constitutional change – and of the importance of (and respect for) the written Constitution – on the one hand, and an argument against some kind of acceptance or legitimisation of this system of informal constitutional change, on the other hand.

As for the British Constitution, it is easier to say that there is no proper mechanism for constitutional change. Significant constitutional changes are relatively easy to secure, both formally and informally, in order to reflect changed circumstances, priorities or demands. As a matter of fact, constitutional change occurs in an informal manner, when instead of being adopted in the form of ordinary Acts of Parliament, it takes the form of constitutional conventions. Indeed, the British Constitution consists of fundamental statutes and a group of practices generally referred to as “constitutional conventions”, for which no authoritative textual source exists, and “[l]aw in the usual, positivist sense, gives only a very partial picture of how the system actually works and what the rules really are. Its workability therefore depends in very large measure on the culture of its actors, especially parliamentarians, government members, judges, and civil servants, and on their observation of non-legal rules.”¹⁹

The Executive has power under the royal prerogative to establish new departments or to introduce the delegation of government activities to agencies.

Decisions of the courts may also “effect changes of a constitutional nature, for example by subjecting the exercise of royal prerogative powers to judicial review, altering the principles for statutory interpretation, modifying the principle of parliamentary sovereignty in favour of the rule of law”.²⁰

Yet, as stated earlier, there has been, since the 1990s, a multiplication of formal constitutional reforms in the UK – as well as in Norway. What does it indicate?

3. WHAT THE CURRENT TREND OF *FORMAL* CONSTITUTIONAL REFORM IN BOTH COUNTRIES SHOWS:

All constitutions change more or less continuously, in both a formal and informal way. There is however a very “palpable” wave – if not an “avalanche”²¹ – of constitutional reforms in both countries. And it is interesting to understand what function the constitutional reforms are supposed to fulfil – and what their consequences are for the value and significance of the Constitution. Are they aiming at maintaining the current constitutional order or are they

¹⁹ D. Oliver, “The United Kingdom”, *op. cit.*, p. 355.

²⁰ D. Oliver & C. Fusaro, *op. cit.*, p. 459.

²¹ D. Oliver & C. Fusaro, “Changing Constitutions: Comparative Analysis”, *op. cit.*, p. 397: “From the 1940s until 1979 proposals to change constitutional arrangements in the UK (except in respect of local government) were strongly resisted for largely political, but also cultural reasons: since 1979 the politics have changed and the UK has experienced an avalanche of formal – and informal – constitutional change (...).”

changing it by re-forming it completely?²² It is extremely difficult to give a straight answer, but various observations may help giving a more precise answer.

It could have been possible to apply to Norway and the UK, for example, the five categories of function presented by Brannon Denning and John Vile when analysing the way the 5th article (on how to amend the US Constitution) has been applied in the USA.²³ They distinguish:

- A *corrective function of the formal constitutional amendment* by which deficiencies in the Constitution that become apparent are corrected as circumstances arise.
- a *checking function* permitting a popular check on branches of government, notably the Supreme Court, which are not otherwise immediately susceptible to direct public pressure.
- A means to *domesticate revolution* by providing the legal means to alter the fundamental law short of revolution.
- A *legitimizing function* that permits institutions charged with implementing the changes, like courts, to presume that new norms written into the Constitution can be enforced to their conceptual limits.
- And, finally, a *publicity function*, since, by providing for a method to add text to the Constitution, the Framers ensured a way for constitutional norms to be publicized and reinforced.

One could then say that in both countries, the reformers are mainly trying to correct constitutional deficiencies with diligence and efficacy (proposal for a new chapter in the Norwegian Constitution that would act as an upgraded “catalogue of rights”) – and probably to reinforce State powers as well by given them more legitimacy (codification of judicial review in Norway, for example). One could even say that, in the case of Norway, the proposals show, in addition, a will to “face-lift” the Constitution, to update it and to modernise it (i.e. to translate it into *bokmål* or *nynorsk* instead of keeping the 1903-version), so that it is more accessible to all.

But, in the end, it is less the content of the amendments and their apparent finalities than the fact that they are numerous and not well thought through that is problematic.

AN ACCENTUATION OF THE RHYTHM OF CONSTITUTIONAL CHANGE

What can be observed in both countries is an accentuation of the rhythm of constitutional change.

In the UK, as the British constitutional model relies on a political, more than a legal Constitution, constitutional reform occurs in a piecemeal fashion. There have been piecemeal changes to aspects of the way in which the country is run and the values that underpin it, but there has never been a comprehensive attempt to adopt a written Constitution.

It is true that the British Constitution is so flexible that it is, by nature, less prone to radical change and the need for a written Constitution was not then triggered by a dramatic turn of event or revolution, for example. But the limits of the flexibility of the British Constitution

²² If the multiplication and intensification of constitutional reforms gradually modifies all the original features of the Constitution, a Constitution’s DNA, one ends up eventually with a new Constitution. There is a threshold beyond which one does not only amend the Constitution, but completely alter it.

²³ B.P. Denning & J. R. Vile (2002-2003), “The Relevance of Constitutional Amendments: A Response to David Strauss”, *Tulane Law Review* nr. 77, pp. 247-282, p. 274.

cannot – and should not – be stretched too far. While Parliament showed, traditionally and pragmatically, some self-restraint, the multiplication of statutes of “constitutional substance” and acceleration of the reforms makes one wonder what lies behind this new trend – and raises concern: the reformers seem to have formally opted for incremental constitutional change, mostly in written form (by ordinary Acts of Parliament), but with the result of turning towards a comprehensive revision in substance. Does it mean that the Constitution has lost its elasticity and capacity of adaptation – is it necessary to take the matter in hand more formally? Does it mean that instead of “constitutional maintenance”, the multiple reforms take the shape of radical constitutional change that even threatens the identity of the British Constitution? What triggered these reforms?

Especially since 1997, when ‘New Labour’ came to power, the UK has been undergoing a long and intense period of constitutional reforms (with measures including the *European Communities Act 1972*, the devolution legislation of 1998, the *Human Rights Act 1998*, The *House of Lords Act*, removing most of the hereditary peers from the second chamber, and the *Greater London Act* of 1999, establishing a London Assembly and an elected Mayor, The *Freedom of Information Act* and the *Political Parties, Elections and Referendums Act* of 2000, the *Constitutional Reform Act* of 2005 establishing a Supreme Court of the United Kingdom, the *Government of Wales Act 2006*, the *Constitutional Reform and Governance Act 2010*, the *Fixed Term Parliaments Act* and the *European Union Act* of 2011).

The reform process is still not complete and it is wide-ranging.

As Bogdanor explains: “Since 1997 (...) Britain has been engaged in a process that seems quite unique in the democratic world—that of converting an uncodified constitution into a codified one by piecemeal means, there being neither the political will to do anything more, nor any consensus on where the final resting-place should be.”²⁴ The UK seems to be heading towards a separation of powers (both vertical: devolution and horizontal: reform of the Lord Chancellor, creation of a Supreme Court of the United Kingdom, etc.) and a written, entrenched Constitution in the UK, since the adoption of ordinary Acts of Parliament is more systematic. As some observed, “Griffith’s political Constitution has been substantially ‘legalised’.”²⁵

Some wonder whether the UK now has higher laws and whether, as a consequence, Parliament no longer is the sovereign constituent power, at least as devolution and human rights are concerned.²⁶

Some argue that there are now “entrenched laws”, laws that, for historical, political or social reasons, have become embedded within the Constitution: it would be very unlikely that Westminster would, for example, dismantle the current devolution scheme or abrogate the *Human Rights Act* of 1998.²⁷

²⁴ V. Bogdanor, “Constitutional Reform in Britain: The Quiet Revolution”, (2005), *Annual Review of Political Science*, pp. 73-98, p. 74.

²⁵ D. Oliver, “The United Kingdom”, *op. cit.*, p. 342.

²⁶ V. Bogdanor, “Constitutional Reform in Britain: The Quiet Revolution”, (2005), *Annual Review of Political Science*, pp. 73-98, p. 94.

²⁷ The HRA gives British courts the power to issue declarations of incompatibility when legislative provisions are in contravention of the rights guaranteed by the *Human Rights Act 1998* (HRA). While some critics of parliamentary sovereignty (among others, several judges in *Jackson v. Attorney-General* [2005] UKHL 56) have asserted that it could not be reconciled with the expanded judicial role under the HRA, it is possible to affirm that, since the sovereign Parliament has enacted the HRA, it can also repeal it at any time. Moreover, the Act does not give the courts the power to disapply or invalidate Acts of Parliament, it only gives them considerable latitude to interpret them. Interestingly enough, on March 3, 2013, the British Justice Secretary, Chris Grayling, and the British Home Secretary, Theresa May, announced that they wanted the UK to withdraw from the ECHR by 2015, in order to let the British courts interpret the law without any interference from the European Court of Human Rights (ECtHR) in Strasbourg. Lady Hale, one of the members of the British Supreme Court warned

Are the reformers in search of legal stability (since informal change is by nature, or inherently, unstable) and legitimacy? The term “stability” is perhaps inadequate, especially in the case of the British legal system in constant flux. It would probably be better to say that the reforms indicate the (perhaps unconscious) need for finding a new balance in the polity that has to adapt more and more – and quicker – to the increasing pressures coming from Europe, while facing the challenges coming from its own nations (from devolution to secession?).

As I said earlier, the current constitutional reforms in the UK are mainly driven by politically pragmatic, opportunistic, *ad hoc* decisions, both on the form taken by the reform and its content: “While participatory theory is supposed to dictate the process for constitutional change, in reality the predispositions of governments favour ad hoc, opportunistic change. If it suits government to follow participatory or consensual procedures, they will do so. If it does not they may seek to get away with unilateral changes. On the prospect of protest from opposition parties and the press, or the real prospect of proposed changes turning out to be mistakes deters government from taking steps to change the system if it can do so”.²⁸ When presented this way, one may wonder whether there is a (material/substantial) difference at all for the British, between constitutional reform and ordinary legislation. The will to adopt more constitutional acts (i.e. acts with a constitutional content) seems to be strong, yet, at the same time, the pace at which constitutional acts are passed suggests that there really are no barriers against hasty governmental decisions. It is not even sure that the reformers are in total control of the reform, or have necessary distance and hindsight to appreciate and evaluate their long-term consequences. Undoubtedly, the reform trend in the UK sends mixed and confusing signals on both the exercise of constituent power and the aim behind the reforms.

As long the British Parliament remains sovereign, there is no alteration of the core, of the essence of the current Constitution and what it is built on.²⁹ Yet, it seems that the “frenzy” which animates the British reformers and the now more open will to codify it, might have unwanted consequences: The British undoubtedly show signs of wanting to render their Constitution more visible by progressively codifying pieces of it more systematically, mainly in the form of legislative acts. Paradoxically, the British seem to be about to give up their constitutional identity by wanting to codify it. One may wonder whether the reformers are aware of that fact (that they might be on the verge of “re-forming” drastically their Constitutions)?

And are we heading towards a “modernised” (and more effective?) Constitution in Norway? On the occasion of the 200 year-jubilee of the Constitution, the State authorities have been more aware of the defects of the Norwegian Constitution, *inter alia* the problem of the language of the Constitution, the lack of a decent catalogue of rights (only 14 rights explicitly

against repealing the HRA, as it would require Britain to leave European institutions, such as the Council of Europe and the EU. – Joshua Rozenberg, “Judges would regret Human Rights Act Repeal, warns Lady Hale”, *The Guardian*, March 14, 2013, accessed April 14, 2013, <http://www.guardian.co.uk/law/2013/mar/14/judges-regret-human-rights-act-repeal>. As for the *EC Act 1972*, in January 2013, 40 years after the United Kingdom (UK) joined the European Union (EU), the British prime minister David Cameron called for a radical reform of the EU and announced that, should the Conservative party win the next national election in 2015, he would hold an “in-out referendum” on the United Kingdom’s future in Europe by the end of 2017 .

²⁸ D. Oliver, “The United Kingdom”, *op. cit.*, p. 354.

²⁹ In 2011, Dawn Oliver was still able to say that “the basics [of the British Constitution] remain in place: a constitutional monarchy that enjoys broad public support, especially in England; a sovereign bi-cameral Parliament, the lower chamber of which is elected at about four yearly intervals by universal suffrage on the first-past-the-post or relative majority system; a parliamentary executive; and an independent judiciary”. – D. Oliver, “The United Kingdom”, in D. Oliver & C. Fusaro (eds.), *op. cit.*, p. 329.

recognised in the Constitution, according to the data found on the Comparative Constitutions Project's website, <http://comparativeconstitutionsproject.org/ccp-rankings/>). A newly formed Parliament will usually have to study approximately 20 reform proposals. The new Parliament will have to consider no less than 42 constitutional proposals.³⁰ This is a record! How can we interpret this intense increase in the number of constitutional proposals?

Can we explain this amount of proposals by the obligation to perform constitutional maintenance and update? (Inge Lønning, in January 2012, referred to this task, even duty, the reformers have: “*Vi plikter å vedlikeholde grunnloven.*”); Rune Slagstad pointed out the fact that the Norwegian Constitution “needs a deeper makeover”: “*grunnloven trenger en dypere overhaling*”)

Can we explain it by the will or even need to restore the importance of the Norwegian Constitution and to take into account its evolution from *rettsstat* to *menneskerettighetsstat* (Rune Slagstad - “*en tydeliggjøring av utviklingen fra rettsstat til menneskerettighetsstat*”)? (Constitutional amendments are also supposed to reflect a decisive act by the people, *via* their representatives);

Can we explain it by the need to rely on a domestic *lex superior*, in order to resist the pressure and influence of the European courts, such as the European Court of Justice in Strasbourg? This could be achieved by rendering it more accessible to all and by developing its protective function, *i.e.* a text that could be invoked more often, both in courts, but also in public and political debates.

This could be the result of the reforms for the jubilee of the Constitution.

However, when one looks at the content of the proposals, this interpretation of the reformers' intentions is not as clear as one would think and hope for. The MPs have presented proposals on nearly “everything”: from the ban of atomic weapons to the right to vote for 16 year old teenagers, from the constitutional entrenchment of the Bank of Norway (*Norges bank*) to the instauration of a Republic, as well as a proposal of the removal of the government's right to send troops abroad without a parliamentary vote. In addition, there are, *inter alia*, proposals to entrench either the principle of local self-government or of local democracy in the Constitution, not to mention the proposals on extending the catalogue of human rights (both civil, political, economic, social and cultural). Moreover, the work of the Human Rights Commission (*menneskerettighetsutvalget*) is criticisable, because of the time they had to work with the elaboration of proposals, the process followed and the content of their rapport (aim: to entrench central, fundamental human rights in the Constitution). The Commission only had one year or so to come with many heavy constitutional proposals. This shows that they were pressed into rendering a rapport quickly, to be sure that it would be possible to present reform proposals that would be examined before the Jubilee. A constitutional amendment should not be some sort of “marketing brochure” for the anniversary of the Constitution. Constitutional amendments should be the result of the widest possible debate. So far there hasn't been much debate, despite the organisation by the Storting of open seminars on the Constitution since last year. And the content of the rapport is also worrying: apart from mistakes (“the representants of the Storting”, in § 49), the content of certain rights – and their protection – seems either diluted or dangerously not well enough thought through (right to life, etc.) *inter alia* because of their formulation.

CONSTITUTIONAL REFORMING OR CONSTITUTIONAL MESS?

Are the British and the Norwegian on the verge of constitutional “re-forming”?

³⁰ <http://stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Grunnlovsforslag/>

In the case of Norway, it is difficult to assess the potential impact of the reform proposals: as they are currently being studied by the newly formed Parliament and as they contain so many different alternatives, we do not know yet on which ones we should base our critics. But even if we just focus on the inclusion of an extensive human rights catalogue, as well as a constitutionalisation of judicial review, these proposals, if they were adopted, would have strong repercussions / consequences / impact on the current constitutional order and its balance, by, *inter alia*, giving a stronger weight to the Judiciary and by diminishing the scope of the legislative power.

First remark: In an article where he tries to identify patterns in the use of the amendment process and to create useful empirical standards for a theory of constitutional amendment, Donald Lutz shows that: “The higher the formal amendment rate, a) the less likely the Constitution is being viewed as a higher law, b) the less likely a distinction is being drawn between constitutional matters and normal legislation, c) the more likely the Constitution is being viewed as a code, and d) the more likely the formal amendment process is dominated by the legislature”.³¹ It seems that his theory is confirmed, at least partly, by what happens in both countries.

Second remark: Even more worrying or disquieting is the fact that both in Norway and in the UK, we can observe a constitutional reform mess, resulting from a probable common lack of “big plan” or “grand design” or of “constitutional vision”. Piecemeal constitutional change is, we saw it, nearly customary in the UK. Piecemeal change works best for adjusting rules to slowly changing circumstances. The rapidly changing circumstances are challenging, and the reformers do not use the proper tools or mechanisms to face this kind of challenge. In addition, what is a novelty and makes a difference is the multiplication and acceleration of reforms of constitutional nature/content. As we saw, there are plenty of reforms, planned or completed, some qualitatively very important, some less.³² But strangely enough, when one think about the importance of both the tool (the amending power), and the mission (to amend the Constitution), there is apparently no great master plan. On the contrary, the reforms give the feeling that there is a lack of vision or of long term perspective. “Constitution-making is ‘a pre-eminently political act’. ‘it is a decision-making process carried out by political actors, responsible for selecting, enforcing, implementing, and evaluating societal choices; and it is shaped by the socio-political order in which it takes place and, in turn, it strongly influences that order’. The participants are well aware that they are involved in ‘higher law-making’ and this creates special expectations, roles, and rules. Constitution-makers may rise above ordinary attitudes of ‘business as usual’ and are capable of adapting non-parochial, long-term perspectives”.³³ In the case of Norway and the UK, the reformers should be aware of that. Instead, they continue to reform in a piecemeal fashion and try to catch the eye of the public opinion by face-lifting the Constitution. Their aims seem to be more politically *ad hoc*, shallow and opportunistic than pondered and wise. The reformers did not and do not seem to adopt a system-wide perspective. They seem to be more in the (hurried) reaction to current societal needs (the derived constituent power behaving like a modern legislator) than into the careful planning of something solemn that will resonate in the corridors of eternity. The

³¹ D.S. Lutz, “Towards a Theory of Constitutional Amendment”, (1994), *The American Political Science Review*, vol. 88 (2), pp. 355-370, p. 365.

³² Also worrying is the fact that the word «democracy» seldom occurs in the reform proposals...

³³ C. Klein & A. Sajó, «Constitution-making: Process and Substance», in M. Rosenfeld & A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, (2012), Oxford: Oxford University Press, pp. 419-441, p. 420.

power of amending the Constitutions seems to have lost some of its majesty (see the disinterest of the Norwegian government for constitutional amendments). Since the amending power is kind of “perverted” in both countries, it is something which is immediately worrying for the Constitution – and eventually those that will be ruled by it.

It seems that both the British and the Norwegian constitutional reformers have not analysed well enough what the combined effects or consequences the constitutional reforms would / will have on the long run. They seem to minimize (whether consciously or not, that I don't know...) the polity-wide scale of the changes. It is, in a way, even more criticisable for the Norwegian reformers: they probably think that they merely adjust or “face-lift” the Constitution to render it more presentable to the world in 2014 (especially with a longer catalogue of human rights), in order to celebrate with pride its 200 year-jubilee.

Instead of applying beneficial reconstructive surgery to the Constitution, the recent, current or coming constitutional reforms look more like “Frankenstein's monsters”, made of different pieces of various qualities. Hopefully they will be more controllable (in their effects) than the now legendary creature...

*

Constitution-amending is a way to respond to imperfection. In order to appreciate the full extent to which a Constitution is amended, one has to understand who is in charge of doing it, how much is changed, how well it is done and at which rate (how often).

The British and the Norwegian Constitutions may not seem comparable at first glance (one is written, the other is the paradigmatic unwritten Constitution; one country belongs to the common law family, the other to the Nordic one, etc.), yet they share troubling common features.

Both from a qualitative and quantitative point of view, the effective or potential constitutional changes in the UK and in Norway are massive. They reveal the inadequacy of the current constitutional provisions (that thus need to be amended), the difficulty to adapt to the rapid evolution of society, as well as a renewed respect for the constitutional text if one reads it in a positive way – or a trivialization of the constitution-amending power and the fact that it is more continuity than the Constitution itself that is valued, if one adopts a more negative perspective – the reformers seeming somehow quite oblivious of the essential finality of the task in both countries.

Constitutional reform happens at such a rate in both countries that one may wonder whether it still is constitutional maintenance or constitutional re-forming, but one thing is sure: these are exciting times for a constitutionalist!

*