1.1 Nationhood and citizenship
1.1 Nationhood and citizenship

Executive Summary

This chapter reviews the available evidence relating to the six ‘search questions’ concerned with nationhood and citizenship.

Our analysis in this chapter identifies a number of changes and continuities since our last full Audit of UK democracy. These are summarised below under three separate headings: (a) areas of improvement; (b) areas of continuing concern; and (c) areas of new or emerging concern.

(a) Areas of improvement

1. Corrections of some unfairness in citizenship legislation.

Amendments to citizenship law have removed some of the features of the system which led in practice to racial discrimination and rendered some people ‘stateless’. (For further details and discussion, see Section 1.1.1)

2. The introduction of a significant body of equality legislation.

In the period considered by the present Audit, numerous additional protections against discrimination were introduced; and the Equality Act 2010 established a single, consolidated framework for equality law. The Equality Act 2006 set up a single Equality and Human Rights Commission, although its effectiveness has been questioned. (For further details and discussion, see Section 1.1.1 and Case-Study 1.1a)

3. Some degree of support for devolution as a means of achieving sub-UK autonomy in the short-to-medium term

The UK is a multinational state upon which, traditionally, there has been an attempt to impose something akin to a unitary system of government. The strains associated with this structure have led to the adoption of approaches which partially resemble federal models, with devolution to Northern Ireland, Scotland and Wales. The arrangement for self-government in Northern Ireland also has a consociationalist dimension to it, through its power-sharing mechanisms. In different ways, the devolution settlements have managed to secure significant degrees of support in the territories where they have been introduced, although often involving the idea that they should be extended, and for some being seen as a staging post to independence. (For further details and discussion, see Sections 1.1.3 and 1.1.4)

(b) Areas of continuing concern

1. Continued resistance to granting voting rights to prisoners.

The UK is one of a relatively small number of democracies in Europe with a blanket ban on prisoner voting. Despite coming under pressure from the Council of Europe to alter this position, the UK government continues to resist. The approach favoured in the UK is founded on the view that all who are imprisoned should cease to play any part whatsoever in the democratic process. (For further details and discussion, see Section 1.1.1 and Table 1.1a)

2. Continued concerns about discrimination against and targeting of minority groups and women.

Concerns persist about various forms of discrimination continuing to be prevalent in UK society. The public tend to share this view, believing that various minority and vulnerable groups are discriminated against, in particular on the basis of ethnicity and age. (For further details and discussion, see Section 1.1.1 and Figure 1.1c)

3. Lack of a clear and inclusive process for amending the UK constitution, in practice affording discretion to the UK executive.

Because there is no written UK constitution, there is no document in which an amendment process can precisely be specified; nor is it always clear when the constitution is being altered. The UK constitution can be altered in a variety of different ways, often swiftly and with relative ease. This arrangement often affords substantial initiative to the UK level executive, although at present the Scottish government is seeking to challenge this tendency over the issue of Scottish independence. The referendum on the alternative vote (AV) in May 2011 demonstrated the limitations of such mechanisms as a means of ensuring more inclusive, impartial constitutional amendment in the UK. (For further details and discussion, see Section 1.1.5, Table 1.1d, and Case-Study 1.1b)

4. The significant discretion possessed by the executive in its exercise of immigration powers.
The Immigration Act 1971 provides the executive with broadly drawn powers in the exercise of immigration policy. In the present Audit cycle the executive attempted to limit further the ability of the judiciary to oversee its conduct in this area. (For further details and discussion, see Section 1.1.6)

(b) Areas of new or emerging concern

1. Problems with the ‘Life in the UK’ test.

Taking the ‘Life in the UK’ test has become a requirement for people living in the UK who wish to be naturalised, in order for them to become citizens and therefore full participants in UK democracy. However, the character of the test may serve to discriminate against certain groups. (For further details and discussion, see Section 1.1.1 and Figure 1.1a)

2. Evidence of a deterioration in the relative international quality of UK measures intended to ensure the integration of immigrants

Detailed assessments have been made of the extent to which measures taken by various states to facilitate the integration of immigrants into society conform to international norms. They show a marked decline in the absolute and relative performance of the UK between 2007 and 2010. (For further details and discussion, see Section 1.1.1 and Figure 1.1b)

3. A difficult to resolve tension between traditional constitutional models and constitutional changes introduced in recent decades.

The UK continues to pass through a period of rapid and unprecedented constitutional change. Changes since the 1970s, such as European Union membership, devolution, and the Human Rights Act 1998 pose difficult questions for such key constitutional traditions as the idea of a centralised, unitary state, and the doctrine of parliamentary sovereignty. At the same time, a clearly defined new constitutional model has yet to emerge. In particular, although there has been movement towards federal structures, they have not yet been adopted fully. The central executive continues to assert the existence of parliamentary sovereignty; and England outside Greater London has no devolved government. (For further detail and discussion, see Sections 1.1.3, 1.1.4 and 1.1.5)

4. Lack of clarity about how decisions about the future constitutional status of Scotland can be made.

It is widely accepted that the Scottish National Party government in Edinburgh, which won an outright majority in the Scottish parliamentary elections in 2011, possesses a mandate to hold a referendum on independence. But there is a lack of clarity about the extent of its legal powers to do so; and there has been disagreement between Edinburgh and London about when the vote should be held, and what options should be presented to the Scottish public. (For further details and discussion, see Sections 1.1.3, 1.1.4 and 1.1.5)

5. Increased disagreements about fundamental features of the UK constitution.

There are pronounced disagreements about a variety of issues, including: the extent of devolution; the status of Northern Ireland, Scotland and Wales within the UK; the role of the UK in Europe; the Human Rights Act 1998; the monarchy; the established church; and the uncodified nature of the UK constitution. Taken together these issues are more than simple political disagreements, and are fundamental to the nature of the democratic system itself. There is evidence of a decline in popular attachment to the UK as a political entity, with increased fragmentation into individual national components, including a pronounced rise in English at the cost of British identity, which could in future prove a destabilising force. (For further details and discussion, see Sections 1.1.3, 1.1.4, Figure 1.1d, and Tables 1.1b, 1.1c and 1.1d)

6. Problems with lack of adherence to international standards regarding the rights of asylum seekers.

A wide range of international agreements bind the UK to various standards in its treatment of asylum seekers. But credible concerns have been raised that the UK is failing to meet the required standards in a range of areas. (For further details and discussion, see Section 1.1.6)

Introduction

This chapter reviews the available evidence relating to the six ‘search questions’ concerned with nationhood and citizenship in the UK

With its origins in the Greek words ‘demos’ (people) and ‘kratos’ (rule), it is widely agreed that democracy represents a system of ‘rule by the people’. Of course, the issue of whether the people do, in fact, rule in a liberal democracy continues to be widely debated. Indeed, the
significance of this debate about the extent to which the people ‘rule’ is central to the purpose of this Audit and its two core principles of popular control over decision-making, and political equality in the exercise of that control. But, in this first chapter, we begin with the seemingly innocuous matter of defining the ‘demos’. As our last full UK Audit put it: ‘Democracy as rule of the people pre-supposes agreement on who constitutes “the people”’ (Beetham, 2002, p. 9). As this chapter illustrates, the existence of such agreement cannot always be taken for granted.

Democracy requires that all full members of the society - its citizens - are defined as equals (Beetham, 2005). As such, there should be no discrimination between different groups of citizens. It is also necessary that those who are not, or not yet, full citizens of a state but are present within its borders, either as refugees or immigrants, should be treated fairly and in accordance with international norms and human rights standards. Furthermore, it is widely recognised that conflicts between different ethnic, linguistic, religious or national groups about the terms of their membership of a given state tend to be deeply problematic for the effective functioning of democracy. Consequently, constitutional and political mechanisms will need to be developed which can resolve disputes arising from such social divisions, where they exist (Dahl, 2000). Finally, if the fundamental rules of a democracy - the constitution - change, the principle of popular sovereignty dictates that such amendment should be conducted in an inclusive and impartial fashion, to ensure citizen ownership of the rules which govern their society.

Based on these values, the following section considers the following aspects of nationhood and citizenship in the UK:

- The inclusiveness of the political nation and state citizenship;
- The extent to which cultural differences are acknowledged, and minority and vulnerable groups are protected;
- The degree of consensus on state boundaries and the constitution;
- The effectiveness of arrangements to moderate or reconcile societal divisions;
- The impartiality and inclusiveness of constitutional amendment procedures;
- The extent to which government respects international agreements on the treatment of refugees and asylum seekers, and the extent to which its immigration policies are free of arbitrary discrimination.

In our 2002 Audit, we found that citizenship laws had a racially discriminatory effect and rendered some individuals effectively ‘stateless’. We noted how minority and vulnerable groups appeared to be victims of discrimination; and that there was no comprehensive framework for anti-discrimination legislation. We described the arrangements for the people of Northern Ireland to determine the future of the province; but concluded that devolution in Scotland and Wales did not directly address the issue of pressures for separatism in either nation. Executive domination of the mechanisms for constitutional amendment meant that the process of making changes to the constitution could not be conducted impartially and was clearly not inclusive, although the use of referendums had improved this position partially. We also stressed in 2002 that the lack of a written UK constitution created or exacerbated many of the problems we identified with respect to these questions of nationhood and citizenship.

The present Audit identifies improvements relating to citizenship rules and anti-discrimination legislation, although we continue to have concerns about the treatment of asylum seekers and the extent of executive immigration powers. We point to evidence of increased popular support for devolution as a means of achieving greater political autonomy in the areas of the UK in which it has been introduced. However, we also find that, after a relatively intense period of constitutional change in the UK, there is a pronounced lack of agreement about many features of the country’s governance arrangements. While this lack of consensus is most evident with regard to the future status of Scotland within the Union, we find grounds to suggest that the process of devolution to Scotland, Wales and Northern Ireland has far wider implications for UK democracy. Indeed, devolution comprises the most fundamental example of how political reform in the UK since 1997 has challenged the traditional constitutional assumptions associated with the ‘Westminster model’, but without giving rise to a coherent new set of constitutional rules to replace it. From this current position of ‘democratic drift’ (c.f. Flinders, 2010), it is by no means apparent how a new constitutional settlement might be arrived at in an inclusive and impartial way.

1.1.1 The political nation and citizenship

How inclusive is the political nation and state citizenship of all who live within the territory?

Since democracy ultimately entails self-government by the people, the concept of citizenship is crucial. The rules for acquiring citizenship must be fair; and citizens should be treated equally. Likewise, the grounds on which citizenship rights can partially or wholly be denied require careful consideration. Moreover, in line with human rights conventions, the treatment of those who are not full citizens but present within the territory must also be taken into account.

The political nation

While the issue of how individuals are admitted to UK citizenship, discussed below, is important to the inclusiveness of UK democracy, it
should not be assumed that all those who are defined as citizens are automatically fully incorporated into the political nation. Many UK citizens, who hold British passports, have begun to define their identity at least partially based on race, ethnicity and religion. In a survey of 96 individuals from a range of ethnic backgrounds in Great Britain, the organisation ETHNOS found that the participants who identified most strongly with ‘Britishness’ were ethnic minorities from England (ETHNOS, 2005). Ethnic groups across Britain also drew on other sources of identification such as religion (Muslims only), ethnicity and race or colour. These traits and characteristics were used to complement a sense of Britishness – creating identities such as ‘British Muslim’, ‘British Asian’ or ‘Black British’. In general, the British were seen as being either exclusively white English people or else a multicultural and diverse group of people. Survey participants from Scotland and Wales more closely identified themselves with these nations than with Britain (see Section 1.1.4).

Citizenship

The possession of UK citizenship is clearly of symbolic importance - and brings with it definite advantages, both perceptual and concrete. The inclusiveness of citizenship therefore remains crucial to the UK as a rights-based democracy. For instance, as Lord Goldsmith, the former attorney general, noted in his 2008 review of citizenship: ‘There is a clear distinction between the rights of citizens and those with limited leave to be in the UK’ (Goldsmith, 2008, p. 11). In the UK, the opportunity to gain British citizenship is highly valued by non-citizens - particularly those with only limited leave to remain - as it is seen to provide a greater level of security and opportunity, especially with regards to economic and social rights. Certain groups, such as refugees, believe that citizenship confirms their right to work and access services, such as banking and health care. Although, technically, asylum seekers and refugees are entitled to NHS services, in reality many GPs are hesitant to provide care if individuals cannot confirm their eligibility for these services by evidence of a British passport. As a result, obtaining a British passport is a key event for asylum seekers, refugees and other migrants.

The previous full Audit identified problems with a lack of inclusiveness in the rules governing UK citizenship. In the long term they have been ‘racially discriminatory both in their intention’ and in their application. While the British Nationality Act 1981 dropped the concept of ‘patriality’ - which provided a category of Commonwealth citizen, who were almost exclusively white, with an equal right of abode in the UK - it retained the racially discriminatory character of previous immigration acts through the distinction it drew between those born abroad to British parents and others. The 1981 act also ‘created a number of categories of British “nationals” who have no right of entry to the UK, some of whom have been rendered de facto stateless’ (Beetham et al., 2002, p. 10). These latter deficiencies were addressed by legislation introduced during the present Audit cycle:

- The British Overseas Territories Act 2002 had two main effects. First, it altered the name of 14 British Dependent Territories citizens to British Overseas Territories citizens. Second, the act provided these citizens with a right of abode in the UK.
- The Nationality, Immigration and Asylum Act 2002 amended the British Nationality Act 1981. It had the effect that British subjects, British Overseas Citizens and British Protected Persons who did not have other nationality could become British citizens and therefore enter the UK and live there. The Act also removed previously existing distinctions between legitimate and illegitimate children in the acquisition of citizenship (Goldsmith, 2008; Barnett, 2011).

For residents who cannot access citizenship through birth or parental origins, as is the case with the overwhelming majority of new migrants to the UK, citizenship must be acquired through naturalisation. The home secretary may grant naturalisation to any person of full age and meeting various requirements as to residence, character, language and future intentions. An applicant must also demonstrate a sufficient proficiency in English and knowledge of British culture by passing the ‘Life in the UK’ test, introduced in 2005. Statistics show that nearly a third of applicants failed their citizenship test in 2009 (BBC, 27 May 2010). That being said, the number of people granted citizenship in 2009 was at its highest level since the test was introduced in 2005 (Home Office, 2010). Figure 1.1a provides an overview of the nationalities of the individuals who received UK citizenship in 2009. The concern is that some nationalities are prejudiced by the framework and aims of the test, including applicants from Afghanistan, Zimbabwe and Iraq, who despite being the top countries of origin for asylum seekers and refugees, rank far further down the scale when it comes to the percentage of citizenship grants. The difficulty of the test and the obscurity of some questions raise concerns as to whether it is an accurate measure of an individual’s commitment to contribute to British social and economic life.

Figure 1.1a: Nationalities receiving British citizenship in 2009.
While the home secretary has some discretion in matters relating to naturalisation, any judgment must be exercised without regard to the race, colour or religion of the person involved. Up until 2002, the British Nationality Act 1981 excluded the need for the home secretary to give reasons for discretionary decisions and restricted judicial review (though he or she was still required to act fairly). This arrangement arguably created the possibility for a less inclusive approach to citizenship to go unchecked. Through the Nationality, Immigration and Asylum Act 2002, this shortcoming was rectified. The home secretary may also by order deprive a person of citizenship status - except where it would make them stateless - if satisfied that to do so is ‘conducive to the public good’. Appeals are possible, unless the home secretary certifies that the information on which the decision was based ought not to be made public on ‘public interest’ grounds (Bradley and Ewing, 2011). Again, this arrangement is suggestive of a discretionary power that could potentially be exercised to the detriment of inclusive citizenship.

Once British citizenship is attained, individuals are automatically citizens of the European Union by way of the 1992 Maastricht Treaty, which grants every European citizen a right to move and reside freely within the EU states. EU citizenship complements national citizenship without replacing it. Because it remains dependent on attaining national citizenship first, there is unequal access to European citizenship. As such, the Charter of Fundamental Rights and Freedoms cannot be enjoyed by non-EU citizens, although the European Convention on Human Rights can be. So, whilst refugees can be long-term residents of EU member states they remain excluded from the benefits of EU citizenship, such as free movement, because of their lack of national citizenship.

**Voting Rights**

The right to vote is one way in which citizenship is realised. UK adult citizens, together with all Irish and Commonwealth citizens resident in the UK, are entitled to vote in general elections (see Section 2.1.2 for details of the franchise). However, the right to vote is removed from convicted and sentenced prisoners. Successive governments have held the view that prisoners convicted of serious crimes do not have the moral authority to vote. The denial of voting rights to prisoners was identified by Democratic Audit as an area of concern in the first 1996 Audit (Klug et al., 1996). It was noted that minority ethnic groups were, as they still are, disproportionately affected by the disenfranchisement of prisoners. According to recent figures, black males are eight times more likely to be barred from voting than their white counterparts due to their disproportionate representation in the prison population (Liberty, 2007).

Prisoner voting rights are approached in a variety of different ways across Europe. Table 1.1a shows that the most common approaches are either to allow prisoners as a whole to vote (which applies in 14 countries including all the Nordic states, except Norway), or to grant the vote to prisoners in particular categories (as is the case in 14 further countries, including the six consensual democracies used as comparators in this study). In its blanket ban, the UK is in a group largely composed of new democracies and is the only one of the EU-15 to deny all prisoners the right to vote.

Table 1.1a: Prisoners’ voting rights in Council of Europe member states

<table>
<thead>
<tr>
<th>Prisoner voting rights</th>
<th>No. of cases</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prisoners able to vote</td>
<td>14</td>
<td>Albania, Croatia, Cyprus, Denmark, Finland, Iceland, Ireland, Macedonia,</td>
</tr>
</tbody>
</table>
In *Hirst v UK* (2005), the European Court of Human Rights found that restricting prisoners' right to vote breached the ECHR (article 3, protocol 1 - right to fair and free elections). The last Labour government failed to implement the ruling, though it held two policy consultations on the issue in 2006 and 2009. The UK came under increased pressure from the Council of Europe to lift the blanket ban. In November 2010, the new Conservative prime minister, David Cameron, explained to the House of Commons that, although the idea of granting voting rights to any prisoner made him feel 'physically sick', he felt that it would be necessary to bow to the court (White, 2011, p. 6). In December 2010, the government announced that it intended to make it possible for prisoners serving custodial sentences of under four years to vote, but only in European and UK parliamentary elections. Judges, in passing sentence, would be able to specify that a particular offender, though serving less than four years, could not vote. The general position of the government was that it did not agree with these changes, but that it was legally obliged to act; and that the apparent alternative of paying compensation to prisoners was less desirable. No specific timeframe was announced. Initially a deadline was imposed by the grand chamber of the European Court that would expire six months from April 2011. But in August 2011 the government announced that it had achieved a further extension to this deadline, that would run for six months after another case before the European Court of Human Rights in which it was intervening. As yet the position remains unresolved, with pressure on the UK government to resist the ECHR ruling intensifying following a vote of the House of Commons in favour of a blanket ban on prisoners' voting rights, by 234 votes to 22 (Guardian, 2011).

**Integration of immigrants**

An important aspect of inclusiveness, as assessed in this section, concerns the integration and civic participation of those who are not - or not yet - full citizens. The Migration Integration Policy Index (MIPEX) uses 148 different policy indicators to measure the extent to which public policies promote the integration of legal migrants in a range of countries internationally (currently 33). The Index uses European and international agreements and regulations as a basis for setting standards, which are then scored on the basis of expert normative judgements collected via surveys. There are now seven broad policy areas: ‘Labour Market Mobility’; ‘Family Reunion for Third Country Nationals’; ‘Education’; ‘Political Participation’; ‘Long Term Residence’; ‘Access to Nationality’; ‘Anti-Discrimination’. Each of these seven areas is divided into four ‘dimension scores’ that are arrived at by scoring the various policy indicators which fall within that ‘dimension’ on a scale of one to three (with three meaning adherence to the highest standards of equality of treatment). The scores within each dimension are averaged and converted into percentages; and then each of the dimensions is averaged to produce scores for each of the seven policy areas. Finally, an overall score for each country is generated through averaging the scores of the seven policy areas.

The forerunner of MIPEX, the European Civic Citizenship and Inclusion Index, was compiled in 2005 for the countries making up the EU-15 (Geddes et al, 2005). In its original form, the study produced separate indices for five policy areas, with no aggregate score, with each country scored against an EU-15 average of 100. Direct comparisons between the 2005 study and subsequent indices is therefore difficult, although it is possible to identify, in broad terms, how the UK’s ranking within the EU-15 had changed. In the 2005 study, the UK’s scores ranked just below the EU-15 average in four policy areas, and significantly above average in a fifth (‘access to nationality’). In 2007, the UK’s relative position appeared to improve, with its ranking in three of the six policy areas significantly above the EU-15 average and three just below average. However, in 2010, the UK’s rankings appeared to slip back slightly, with its scores in four policy area below, two above, and one closely in line with, the average for the EU-15. Of the five policy areas to be maintained in all three studies, the UK has consistently been ranked below the EU-15 average in two: labour market mobility and family reunion.

More systematic comparisons are possible between the 2007 and 2010 indices. Figure 1.1b shows the overall scores achieved by the UK in the 2007 and 2010 MIPEX indices compared to the averages for the consensual democracies, the Nordic countries and the EU-15. In both studies, a country’s maximum score was measured as a percentage and the methodology used was consistent enough to allow comparison between 2007 and 2010 (although there is a minor difference in the policy areas considered - see the note under Figure 1.1b). As the chart shows, while the average scores in the three groups of comparators were either static (in the case of the consensual democracies and the EU-15) or rose (in the case of the Nordic countries), the UK’s aggregate score fell by six percentage points, from 63 to 57. As a result, the UK’s scores fell well below the average for the Nordic countries from 2007 to 2010, with the UK also dropping from just above to just below the EU-15 average. This shift in the UK’s score ratings, and its relative ranking, between 2007 and 2010 seems to have
come about almost entirely as a consequence of policies aimed at greater management of inward migration, including the citizenship test discussed above. However, the decline in the UK’s position was offset to a limited extent by legislative change through the Equality Act 2010 (Niessen et al., 2007, p. 3; Huddleston and Niessen, 2010, pp. 202-5) (see also Section 1.1.2).

Figure 1.1b: Migrant integration index score (aggregate of policy areas), UK and Comparators, 2007 and 2010

![Migrant integration index score graph]

Note: The scores for 2007 were derived from six policy areas (labour market mobility; family reunion for third country nationals; political participation; long term residence; access to nationality; and anti-discrimination). A seventh policy area, education, was introduced for the 2010 survey.

Source: Niessen et al. (2007, p. 3); Huddleston and Niessen (2010, p. 11).

We are pleased to note that some of the discriminatory features of citizenship laws were corrected during the period under examination. However, we are also concerned by a number of developments identified in this current Audit. First, it would appear that the citizenship test which has been introduced may have a discriminatory effect. Second, we are particularly worried about the resistance that successive UK governments have displayed towards lifting the blanket ban on prisoner voting. This issue is important because it suggests a view of democratic citizenship as something that can be entirely stripped from an individual. Moreover, it suggests a denigration of a system of supranational protection for human rights in which the UK has been a participant for half a century and which has an important role to play in the upholding of such standards throughout the continent (see Introduction to Section 1.2). We believe this stance should be reversed promptly without further delay; and that the new system introduced should exceed minimum requirements, taking into account European best practice. Finally, we noted an apparent deterioration in the quality of the UK’s arrangements for the integration of immigrants, and urge that the reasons for this change should be given more detailed consideration by UK policy-makers.

1.1.2 Cultural differences and minority groups

How far are cultural differences acknowledged, and how well are minorities and vulnerable social groups protected?

It is necessary within a democracy that majority rule is prevented from entailing discrimination against minority groups; and that cultural diversity is recognised and protected. In the 1996 and 2002 Audits, it was noted that the European Convention on Human Rights (ECHR) - as incorporated into UK law under the Human Rights Act 1998 - EU law and a number of domestic innovations had gone some way
towards the advancement of a rights framework in the UK. Nevertheless, it was also observed that a general principle of non-discrimination was lacking. Article 14 of the ECHR only prohibits discrimination in so far as it protects the enjoyment of other Convention rights, rather than being a freestanding protection against discrimination in itself. Moreover, we noted that piecemeal reforms had failed to create a body of law which comprehensively protects all individuals from discrimination (Klug et al., 1996; Beetham et al., 2002. See also Section 1.2.2). Since 2002, a number of developments have helped to rectify this situation. They have created new protections for groups that were previously not encompassed by anti-discrimination law. They have also advanced more generally the principle of entrenching equality.

In this section, we summarise the key legislative changes over the past decade which have provided for greater protection for minorities and vulnerable social groups. We also consider the extent to which there is evidence of discrimination in the UK associated with race, religion, sexual orientation, disability, age and gender. Other sections of the Audit consider the particular circumstances of asylum seekers (see Section 1.1.6) and also the forms of social protection for those on low incomes (see Section 1.4.1).

**Legislative change**

During the present Audit cycle, there has been a plethora of legislation aimed at protecting minority and vulnerable groups. Probably the most important of all was the Equality Act 2010, which consolidated provisions for the protection of equality which had previously been piecemeal (Equality and Human Rights Commission, 2010a (see also Sections 1.3.3 and 1.4.1). Case Study 1.1a provides an overview of the principal antidiscrimination legislation leading up to the 2010 Act from 2002 onwards.

### Case Study 1.1a Anti-discrimination legislation 2002-2007

- **Flexible working regulations introduced in 2002** established the right for parents with young or disabled children to request flexible working hours.

- **The Adoption and Children Act 2002** made it possible for same-sex partners to adopt children.

- **Employment equality regulations introduced in 2003** banned workplace discrimination against individuals on the basis of their sexual orientation, religion, or belief.

- **The Civil Partnership Act 2004** created an official status for relationships between same-sex partners.

- **The Gender Recognition Act 2004** established transgender rights.

- **The Disability Discrimination Act 2005** established a new requirement for public authorities to promote disability equality.

- **The Employment Equality (Age) Regulations 2006** banned age discrimination both in employment and vocational training.

- **The Equality Act 2006** prohibited discrimination on grounds of religious belief in various areas; established a duty for public authorities to promote gender equality; and established the Equality and Human Rights Commission.

- **The Racial and Religious Hatred Act 2006** created a new offence of inciting hatred on the basis of religion.

- **The Equality Act Sexual Orientation Regulations 2007** banned discrimination in various areas on grounds of sexual orientation.

**Sources:** Derived from tables in Equality and Human Rights Commission (2010a, pp. 20-21) (see also Sections 1.2.2, 1.3.3 and 1.4.1).

**Enforcement and monitoring bodies**

Legislation prohibiting discrimination against minorities and other vulnerable groups would mean little, in practice, without the existence of watchdog bodies to punish those individuals, employers or service providers which break the law. In the UK, the responsibility for this job was previously split between three separate agencies: the Commission for Racial Equality (CRE), the Equal Opportunities Commission (EOC) and the Disability Rights Commission (DRC). Following the Equality Act 2006, however, the responsibilities of these anti-discrimination commissions were combined in a new body - the Equality and Human Rights Commission (EHRC) - which was also
charged with preventing discrimination on the ‘new’ legal grounds of age, sexual orientation and religious belief. The decision to create a single commission covering all of the discrimination ‘strands’ was prompted by the expansion of anti-discrimination legislation into these hitherto uncharted areas, and reflected the government’s conviction that a single body responsible for enforcing anti-discrimination law and promoting equality would be more effective than a diffuse collection of smaller agencies (O’Cinneide, 2007).

In the past, the EHRC’s predecessor bodies had been criticised by some for being overly timid in the application of their enforcement powers (see PIRU, 2006). However, it is not at all clear that the EHRC has performed any better in this respect. Indeed, some observers have been highly critical of the commission for doing too little to enforce anti-discrimination laws - particularly against private sector employers (see Squires, 2009). The apparent lack of empirical evidence relating to the EHRC’s performance in enforcing anti-discrimination law makes these arguments difficult to substantiate; but it would probably not come as any surprise to find that they had some merit. The enforcement powers of the EHRC are largely consistent with those of its stymied predecessors (Hepple, 2011), and its governance and leadership under Trevor Phillips have been subject to consistent criticism (see e.g. JCHR, 2010). In addition, there is now an acknowledged risk that coalition funding cuts and plans to ‘substantially reform’ the commission (HM Government, 2011) will severely damage its operational independence and freedom of action (see Liberty, 2011; BIHR, 2011; Justice, 2011), and thus potentially diminish the commission’s enforcement capabilities still further.

**Public attitudes about discrimination**

Despite legal and institutional reforms during the past decade, statistical evidence continues to cause concern about the extent of discrimination against vulnerable groups in the UK. The Citizenship Survey, for example, continues to find that black and minority ethnic groups believe they suffer from racial discrimination in applying for jobs and promotion (DCLG, 2008). And despite EU-wide efforts to reduce gender inequality in the workplace, women in the UK are worse off in terms of pay and employment than men when compared to their counterparts in many other EU member states (for minorities and women in the employment market, see Section 1.4.1). The same is true for people with disabilities, who can face serious challenges in finding and retaining paid work.

According to the results of the Eurobarometer survey set out in Figure 1.1b, age, ethnic origin and disability are perceived as the three most common bases of discrimination in both the UK and in the EU as a whole. The survey found that discrimination on the basis of gender, age and religion was perceived to be more common in the UK than the average for the EU 27, although perceived discrimination based on disability, ethnicity and sexual orientation were all lower than the EU average.

Figure 1.1c: Perceptions of discrimination as either ‘very’ or ‘fairly widespread’, 2009 (EU27 and UK compared).

![Perceptions of discrimination as either ‘very’ or ‘fairly widespread’, 2009 (EU27 and UK compared).](image-url)
Race and Religion

Despite the progress that has been made in protecting individuals from racial and religious discrimination, it remains a concern in certain occupations such as the judiciary, construction industry and the police force (see also Section 1.2.5). The coalition agreement stated that it would promote more opportunities for black, Asian and minority ethnic communities, including by providing internships for under-represented minorities in every Whitehall department. The general sentiment of the Equality and Human Rights Commission is that the police and other institutions need to work harder to keep up with an 'Obama generation', which is moving forward in its recognition and support of diversity.

A climate of inter-faith tension developed following the 9/11 attacks in the US and the July 2005 bombings in London (which encouraged the introduction of the Racial and Religious Hatred Act 2006, creating for the first time the offence of 'inciting religious hatred'). Muslims have come under significant pressure in recent years owing to the growing support for the British National Party and the English Defence League. Bradford, Burnley and Oldham, for example, faced 'race riots' in 2001 after the BNP gained significant support in these areas. The violence was targeted toward the South Asian community, which is predominantly Muslim.

Such religious and ethnic tensions exist within a broader environment which is to some extent determined by perceptions encouraged by the media. Previous research by Oborne and Jones (2008) for Democratic Audit has found a tendency in some media coverage towards distorted and misleading portrayals of the Muslim communities in the UK; and a lack of effective accountability to encourage more balanced representations (see also Sections 3.1.2 and 3.1.5).

There are also grounds for concern about possible discrimination against ethnic minority groups in the criminal justice system, such as in the application of stop and search powers by the police (see Section 1.2.5).

Sexual Orientation

As a result of the Civil Partnership Act 2004, same sex partners now have the same rights as heterosexual married couples. This granting of rights to same sex couples is comparable to similar reforms in New Zealand and Canada, although countries like Australia and the US still fail to legally recognise same sex partnerships. While perpetrators of racially and religiously motivated violence can be charged with specific offences such as racially or religiously aggravated harassment or assault, the same is not true of homophobic hate crime. Instead perpetrators of homophobic hate crimes are charged with existing offences, such as assault, and the hostility of the crime is only taken into account during sentencing, as per section 146 of the Criminal Justice Act (England and Wales) 2003. Nonetheless, a recent study has found that among the 56 member states of the Organisation of Security and Cooperation in Europe (OSCE), the UK is one of only 12 to meet human rights legislation that allows for bias based on sexual orientation to be treated as an aggravating circumstance in the commission of a crime, and one of only four to be consistently proactive in the prompt implementation of appropriate monitoring measures (Human Rights First, 2008).

Organisations like Stonewall (the lesbian, gay and bisexual rights organisation) recommend improvements in how homophobic hate crime is reported, investigated and recorded, believing that such changes would encourage more victims to come forward as well as increase convictions. Stonewall's research suggests that ‘only a quarter of homophobic hate crimes and incidents are reported to the police’ (Dick, 2009, p. 11).

Disability

In our 2002 Audit, we took the view that the effective impact of the Disability Discrimination Act 1995 was limited, largely because the scope of the legislation was restricted to specific instances of direct discrimination and victimisation. The Disability Discrimination Act 2005 went some way to addressing these concerns by placing a statutory duty on public bodies to promote disability equality and by placing specific requirements on providers of public transport and education with regard to accessibility and inclusion. The Equality Act 2010, replacing large parts of the Disability Discrimination Act, widened the protection for disabled individuals further. In addition, by signing the UN Convention on The Rights of Persons with Disabilities in 2009, the UK has made significant progress in improving protection for the rights of disabled individuals. The UK government has come a long way since its ‘ineffective’ Disabled Person (Employment) Act 1944 (Klug et al., 1996).

However, despite this undoubted progress, there remain some areas where the treatment of disabled people falls short of the ideal. The Equality and Human Rights Commission (2011) reported that the response of public authorities to harassment of disabled people was often lacking, with tendencies to ignore incidents and blame the victims. Responses such as these have long been considered
unacceptable with other types of discrimination.

Disability organisations have expressed concern about the impact on disabled people of government policies on benefits and tax credits, which are important because many disabled people cannot participate in the labour market or face practical or financial disadvantage in doing so. One third of disabled people are below the poverty line. The system of medical testing for claimants introduced in 2007, now planned to be more stringent, and changes in the Welfare Reform Bill in 2011, have all been controversial (Disability Alliance, 2011).

Age

Mandatory retirement has been one of the main debates in the concern over age discrimination in the UK. Article 6(1) of the Equality Directive prohibits discrimination based on age unless it can be objectively and reasonably justified by a legitimate aim. The Directive however refrains from establishing any EU-wide standards for retirement, respecting the fact that national law and practice varies greatly on the issue. Organisations like Age UK have argued for many years that mandatory retirement is a form of ageism that fails to consider the changes in demographics and lifestyle that allow older employees to work longer than before. In July 2010 the government announced that it would abolish the default retirement age, thereby removing the ability of firms compulsorily to retire staff at a certain age. Under the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, the default retirement age was phased out and then fully abolished from 1 October 2011. Employees can no longer be required to retire at age 65, and their decision about whether to continue to work does not affect their entitlement to receive a state pension at the qualifying age. Of course, in times of high unemployment, the indirect consequence of such a change may be to create more employment difficulties for younger people.

Gender

In April 2009, the UN Committee on Economic, Social and Cultural Rights held that the UK needed to carry out a ‘comprehensive review of its policies to overcome gender inequalities’ while also addressing the gender pay gap, the disadvantages faced by women in terms of pension provision and the low conviction rate for rape. The gender pay gap in the UK, which is higher than the EU27 average, is considered elsewhere in this Audit (see Section 1.4.1). Concerns about the low, and apparently declining, rate of convictions for rape in the UK has been a serious concern for some time (Regan and Kelly, 2003). The Stern Review of how rape complaints are handled by public authorities in England and Wales found that as few as 11 per cent of rape cases are typically reported to police and that only six per cent of allegations which are reported to police eventually result in a conviction for rape (Stern, 2010).

We consider elsewhere in this Audit the effectiveness of redress mechanisms (see Section 2.3.4) and the availability of legal aid (see Section 1.2.4), both of which are important in ensuring that individuals from vulnerable and minority groups can make use of the legal protections that have been created.

In conclusion to this section, Democratic Audit welcomes the substantial progress towards legal recognition of cultural differences and protection of minority rights that has been made over the last decade. The consolidation of various individual measures into the Equality Act 2010 may prove to be a particularly significant moment in this process. However, while we do not necessarily oppose the establishment of a single Equality and Human Rights Commission provided for in law in 2006, we note concerns about its effectiveness as a body. There is also continuing evidence that members of the public see discrimination as a problem, particularly in such areas as gender, age and religion. In an era of concerns about changed forms of international terrorism, there has been a potential for an overlapping of racial and faith-based discrimination, possibly aggravated by some media coverage. Finally, we believe there is scope for improvement in the official handling of homophobic hate crime; and of rape cases.

1.1.3 Constitutional and territorial consensus

How much consensus is there on state boundaries and constitutional arrangements?

A key feature of democracy is that it allows for the existence of competing viewpoints on a range of different issues. However it can be detrimental to the functioning of this system if there is excessive disagreement over the fundamental framework within which discourse and decision-making takes place. Problems of this nature can arise if particular groups within a given state do not regard themselves as legitimately included within that state, and may even wish to secede; or if there is a serious lack of consensus around core features of the established constitution. In the UK there are particular disagreements about the status of some territorial portions of the UK; and a range of specific features of the UK constitution.

The territorial structure of the United Kingdom

The UK is a multinational state, comprising at present England, Northern Ireland, Scotland and Wales. Wales was the subject of military conquest by England during the middle ages. England and Wales were united via an act of parliament of 1536, with Wales given...
representation in the English parliament. England and Scotland were united into Great Britain by the Treaty of Union of 1706, which was given legislative expression by the subsequent Acts of Union passed by the parliaments of both nations, creating a new British parliament. A similar Union between Great Britain and Ireland was affected in 1800, creating the United Kingdom. The UK in effect recognised the independence of southern Ireland with the Anglo-Irish Treaty of 1922; though it did not do so formally until the Ireland Act of 1949 (Bradley and Ewing, 2011). Within the UK, England is clearly dominant. England has the largest population (over 80 per cent of the total) and therefore receives the greatest representation in the House of Commons (532 seats of 649 in the present House). England is also dominant economically, partly because of the size of the English population, but also due to the disproportionate influence of London and South East England on the UK's economic affairs.

Traditionally, the UK has been regarded as a unitary state with a single, central source of supreme legislative authority. This position is associated with the doctrine of parliamentary sovereignty, which holds that parliament is legally unlimited in its legislative powers and cannot be bound, even by a written constitution or itself (Barnett, 2011). But the reality has always been more complex than the label 'unitary' might imply, with, for instance, the existence of different legal systems across the UK for England and Wales; Northern Ireland; and Scotland. It has been suggested that the term 'union state' might be more appropriate than 'unitary state' (see Introduction to Section 1.2). Nonetheless, the UK has certainly resembled a unitary state more than a federal state, in which sovereignty is shared between a central federal tier of government and sub-federal 'state' level governments. In this sense, the UK's political system has contrasted markedly with other nation-states with multinational characteristics - such as Belgium, Spain and to some extent Canada - all of which have adopted federal structures.

Adherence to the doctrine of parliamentary sovereignty is a barrier to the establishment of a federal UK, since a federal constitution would imply parliament ceasing to be supreme and, almost certainly, becoming subject to a written constitution, alongside whatever institutions were established at the sub-UK level. Another block on the introduction of a federal-type system is the relative size of England within the UK, which it is often judged might lead to inherent instability, with England - if it were included as a single component in the UK - able to dominate all the others (Turpin and Tomkins, 2011). Yet within the existing, now semi-unitary structure, England is also sometimes perceived as excessively powerful, partially giving rise to some of the problems discussed below. At various points the idea of a federal UK has been seriously considered, including shortly before the First World War as a means of dealing with tensions over Ireland (Bogdanor, 2001).

Throughout its history, various forms of resistance to the traditional composition of the UK state have been evident. There has been opposition both to the unitary style of government; and to inclusion within the UK at all. In Ireland there has been a long history of resistance to membership of the UK; and an associated violent struggle between those who wish to secede (and since the 1920s, join with the south, later the Republic) and those who wish to remain part of the UK (known as 'unionists'). This division came to be bound up with a religious split between Roman Catholics (on the republican side) and Protestants (on the unionist side). Nationalist movements also developed in Scotland and Wales during the twentieth century, becoming increasingly political in nature, forming into parties which began to promote the idea of independence from the UK. In Wales, nationalism has had a strong cultural and linguistic dimension, with Welsh being the most widely spoken minority indigenous language in the UK. In Scotland, separatism has been mainly national and cultural in nature. In neither of these countries did religion play the same part that it did in Northern Ireland. Beyond the separatist movements in Scotland and Wales, there was growing support for the view, particularly in Scotland, that a greater degree of autonomy from Westminster/Whitehall was required. This sense was strengthened by the economic and industrial policies pursued by the Conservative governments of 1979-97, which had only limited electoral support in Scotland and Wales, and were perceived as greatly damaging by many within these nations (Bogdanor, 2001).

The key response to these tendencies in recent times has been the introduction of devolution. Precedent was provided for such an approach by the creation of a devolved assembly for Northern Ireland under the Government of Ireland Act 1920 which operated until it was suspended in 1972. An attempt was made to introduce devolution to Scotland and Wales in the 1970s, but neither of the referendums held in March 1979 delivered sufficient support for devolution to be introduced under the relevant legislation (in Scotland there was a majority for 'yes', but the turnout requirement was not met. In Wales there was an overwhelming 'no'). The Labour government elected in 1997 introduced devolved governance to Northern Ireland, Scotland and Wales, subject to approval from referendums in the areas concerned, which was obtained in each case (there were no turnout requirements this time) (Barnett, 2011; see also Sections 1.1.5 and 3.3.1).

The effectiveness of devolution as a means of addressing the societal divisions inherent to the territorial structure of the UK is considered in more detail in Section 1.1.4. It can be noted for now that, while levels of political violence associated with the status of Northern Ireland have reduced substantially (see Section 2.5.4), devolution has certainly not eradicated either secessionism or the desire amongst some for greater autonomy still. Moreover, devolution has more generally served to create imbalances which have, in turn, prompted further disagreement about UK constitutional arrangements - particularly with regard to the so-called 'West Lothian question' (see below).

Devolution is asymmetrical in two senses. First, where it has been introduced, it has been configured in different ways - thus, the Scottish parliament has more extensive powers than the Welsh assembly. Second, devolution has not been introduced at all to England, outside
Greater London. Initially the Labour government intended that devolved, directly elected assemblies would be introduced into the regions of England. However, the overwhelming defeat of the proposal for a North East regional assembly at a referendum in November 2004 led to this idea being dropped. Consequently England outside of Greater London has been left behind by devolution (Hazell, 2006; for details of referendums, see Section 1.1.5).

Various complaints have emanated about this imbalance. The so-called ‘West Lothian question’ was first raised by Tam Dalyell when MP for West Lothian, when devolution was proposed in the 1970s. It involves the dilemma of how it can be appropriate for Scottish MPs in Westminster to debate and vote on issues which have been devolved to Scotland, when English MPs cannot debate and vote on those same issues in relation to Scotland. Solutions that have been vaunted include the idea of Scottish MPs having restricted involvement in issues devolved to Scotland, but any such proposal would entail complications. The coalition has established a non-partisan committee to investigate possible solutions. Composed of six experts, its chair is Sir William McKay, a former clerk of the House of Commons. Beginning work in February 2012, it is scheduled to report in the next parliamentary session. It will consider arrangements applying not only to Scotland, but devolved territories as a whole.

Another possible solution to the issues raised by the ‘West Lothian question’, assuming regional devolution within England remains off the agenda, is to introduce an English parliament and executive. There is some evidence of growing support for this idea in England (Currie, 2010), but it has yet to be taken up by any of the main three parties in England. Parties running specifically on this issue, notably the English Democrats, have had very limited electoral impact. Furthermore, as noted above, a federal UK within which England was a single component might prove structurally unstable. The precedents for such imbalanced federations - such as the West Indies Federation of the 1950s and 1960s, within which Jamaica was by far the largest nation - may not be encouraging, since they have tended to break up. An English parliament would provide few of the benefits of bringing decision-making closer to people associated with other instances of devolution, because of the sheer size of England. The coalition policy of introducing directly elected mayors to the largest English cities (subject to referendums) may offset the impact of asymmetrical devolution, but only to a limited extent (see Section 3.3). It should also be noted that, within England, support exists within some areas - in particular Cornwall - for the introduction of devolved arrangements of some kind.

Further disquiet about constitutional arrangements developing within England involves the idea that Scotland, in particular, is somehow being over-subsidised by English tax payers. A specially formed House of Lords Committee inquired into the existing method for determining levels of finance within the UK, known as the ‘Barnett formula’. It called for a new formula based on needs (Select Committee on the Barnett Formula, 2009).

Democratic Audit does not take a position on the precise degree of regional and national autonomy that should be provided for within the UK; or ultimately on whether particular components of the UK should or should not secede. However, we support the principle of self-determination; and note that the unitary tradition of the UK has become increasingly strained by attempts to respond to calls for self-government and separatism in parts of the UK. We welcome the introduction of devolution in so far as it helped fulfil some of the democratic aspirations of those in the areas concerned, particularly within the context of the traditionally extreme centralisation of the UK state (see Section 3.3.1). Yet it seems that devolution has not fully dealt with all of the problems it sought to address and may have exacerbated some of them. Moreover, the uneven way in which devolution has been introduced has produced new instability within the structure of the UK constitution, involving the position of England, particular outside Greater London, where there is no devolution.

**Other areas of constitutional controversy**

Disagreement exists about other fundamental features of the UK constitution. The introduction of devolution is one of a number of measures that have caused questions to be raised about the practical and legal viability of a doctrine traditionally held by many to be central to the UK constitution: parliamentary sovereignty. Further challenges to the doctrine have arisen from UK membership of the European Union (EU); the incorporation of the European Convention on Human Rights (ECHR) into UK law through the Human Rights Act (HRA) 1998 (see Section 1.2.2); and the increased use of referendums as political decision making devices (see Section 1.1.5). Some observers now argue that the doctrine, at least as traditionally understood, has seriously been compromised. Within the judiciary there are signs of a growing adherence to the idea that the courts might at some point displace parliamentary sovereignty, to uphold the rule of law or protect fundamental constitutional legislation (see Introduction to Section 1.2). Some commentators maintain that the doctrine continues to apply, though not as traditionally interpreted (Goldsworthy, 2010). The government continues to assert that parliament is sovereign and glosses over the possible difficulties with the doctrine (Blick and Hennessy, 2011).

For those who argue that parliamentary sovereignty has either become outmoded, was never viable, or is simply undesirable, the most obvious solution is the introduction of a written constitution for the UK (Bogdanor, 2009; Gordon, 2010). Such commentators note that there are exceptional difficulties in defining the precise contents of the UK constitution, because of the role played by vague arrangements such as conventions. The unwritten constitution, it is further held, is difficult to enforce and excessively easy to amend (see Section 1.1.5). It has never been made subject to a holistic design process, or fully democratically approved. Various draft written UK constitutions have been
Separatism in Wales has at its fringes been associated to a limited extent with terrorism; but the Welsh and Scottish nationalist movements involving both sides - and in some cases questionable actions by the security forces - and many civilian casualties (see Section 2.5.4). The UK has certainly experienced such problems, in their most extreme form in relation to Northern Ireland, with violent acts taking place under a democratic constitution, particularly where some groups within a society see their demands as 'non-negotiable', making compromise effectively impossible. In the worst cases, conflicts can arise which lead to a major democratic breakdown and descent into violent conflict. The UK has certainly experienced such problems, in their most extreme form in relation to Northern Ireland, with violent acts involving both sides - and in some cases questionable actions by the security forces - and many civilian casualties (see Section 2.5.4). Separatism in Wales has at its fringes been associated to a limited extent with terrorism; but the Welsh and Scottish nationalist movements
use democratic political means to advance their respective causes (for the constitutional background see Section 1.1.3).

Federalism and consociationalism

When faced with divisions involving various combinations of national, cultural, religious and linguistic identity, two main approaches can be taken to achieve moderation or reconciliation. The first is to adopt federal models. This technique has been used in states such as Spain, Belgium and Canada. It involves the sharing of political and legal authority between a federal tier of governance at the centre and a number of semi-autonomous states operating as a sub-federal tier. Federalism is particularly appropriate when ethnic or other social divisions accord with geographical boundaries, creating greater homogeneity in particular areas. Its value as a means of reconciling societal divisions within an existing nation-state is that it can allow for some degree of autonomous expression of national/regional identity at the sub-federal level while retaining overall coherence at the centre. Under some federal arrangements, such as the Spanish constitution of 1978, it is possible for different components within the state to be permitted varied degrees of autonomy according to their particular characteristics and levels of demand for autonomy; and for greater autonomy to develop over time. Typically the types of function reserved to federal level involve such matters as foreign policy, security and intelligence and macro-economic policy; and all institutions of governance, both federal and sub-federal, are subject to a constitution enforced by a supreme court (Turpin and Tomkins, 2011).

The second approach to accommodating potential social conflicts within a democracy is consociationalism. Models of consociational democracy tend to involve guaranteeing levels of representation for different groups in a society, and often forms of ‘power-sharing’, which are used to ensure both elite cooperation across the main societal divide(s) and the binding of the social groups in question into the political system (Lijphart, 1968; 1977). The methods by which such participation can be guaranteed include specially selected electoral systems and the allocation of places within the executive in a strict proportionate relationship to representation within legislatures (Noel, 2005). Consociational models can be particularly appropriate in instances where social cleavages are not associated with a clear geographic distribution of different social groups, as was the case with the Netherlands in the twentieth century.

Somewhat unusually, constitutional reforms in the UK since 1997 have adopted some characteristics of both federalism and consociationalism. The introduction of devolution to Scotland and Wales can be interpreted, in part, as the application of semi-federal principles to moderate or reconcile a societal division, in that it involved the establishment of sub-UK tiers of governance to provide greater autonomy for those nations. The approach to Northern Ireland contains elements of federalism and consociationalism. As for Scotland and Wales, a sub-UK tier of governance has been introduced in the province, comparable to a ‘state’ government in a federal system. But devolution in this case should be seen as a facet of a broader peace settlement, as embodied in the Belfast or ‘Good Friday’ Agreement of 1998. The electoral system adopted, the Single Transferable Vote, was chosen to prevent any one group being able to dominate; and power-sharing within the Northern Ireland Executive is required. Provision is included in the Agreement for Northern Ireland to separate from the UK, subject to a referendum in the province. The Republic of Ireland has a clear role in the agreement which establishes mechanisms for liaison between Westminster and Dublin (Wicks, 2006; see Sections 3.3.1 and 3.3.2).

These approaches to the modification and reconciliation of divisions represent a profound break with longer-established constitutional principles in the UK for a number of reasons. First, for what has long been regarded as an exceptionally centralised state, devolution has meant a significant transfer of powers away from the centre. Moreover, in every case devolution has either been extended, or has legislative processes underway that, if passed, will lead to it being extended further. Second, given the delegation of law-making powers which it has seen, devolution amounts to a challenge to the doctrine of parliamentary sovereignty (see Section 1.1.3). Third, each devolved legislature is elected using an electoral system different to the ‘first-past-the-post’ system used in Westminster elections. The political models which have developed under devolution tend to be less adversarial as a result; devolved government has involved the establishment of coalitions forced to work through consensus (although ironically a coalition at Westminster now faces a majority Scottish National Party government in Edinburgh). Fourth, the UK supreme court, established under the Constitutional Reform Act 2005, is responsible for handling disputes involving the respective powers of devolved and central governance, in a role akin to that of a federal constitutional court, which is not a familiar concept to the UK (see Section 1.2.3). Finally, as part of the peace process, an extremely novel approach to national sovereignty has been taken in Northern Ireland, with its population afforded the right of self-determination as to which state they will be a part of in future. This arrangement has been guaranteed not only in UK legislation, but an international treaty (Wicks, 2006).

Despite these significant modifications to traditional UK constitutional practice, certain key features of the UK constitution have been retained. Fundamentally, the UK parliament and government continue to assert the existence of the doctrine of parliamentary sovereignty (see Section 1.1.3). The implication of this position for the management of societal divisions is that there remains a legal imbalance between the powers of the UK parliament and of its devolved counterparts. Legal limitations are imposed on the powers of the devolved parliaments and assemblies. They cannot act without their prescribed fields of operation; or contrary to the European Convention on Human Rights, as incorporated under the Human Rights Act 1998. The UK parliament, on the other hand, remains in theory legally unlimited in its powers, and could unilaterally legislate directly for devolved matters - or indeed to alter or abolish devolved institutions, though at a high political cost. This kind of interference is prohibited only by a constitutional convention - which is by definition not directly
legally enforceable - to the effect that Westminster does not legislate for devolved matters without the consent of the devolved assembly/parliament concerned through a 'legislative consent motion'. Other agreements covering the interaction between devolved and central government - for instance providing the devolved areas with a role in European policy impacting upon them - are also ultimately founded in convention (Barnett, 2011).

**Northern Ireland**

How effective, then, are the mechanisms for dealing with UK societal divisions? In Northern Ireland, it could be held that the Belfast Agreement has encouraged nationalists, numerically the smaller group in Northern Ireland, to follow a long-term strategy of waiting for demographic changes to make the winning of a referendum possible at some point in the future. At the same time it has provided unionists with a guarantee that Ireland will not be reunited without a referendum being held. Power sharing has given the different groups some kind of stake in the process.

The level of violence in Northern Ireland has clearly decreased (see Section 2.5.4). Yet devolved government has been suspended on multiple occasions, prompted by difficulties with the peace process - a reminder of the persistence of the supremacy of the UK parliament. However, Table 1.1b shows that there is some evidence of cross community support for the devolution arrangement. The level of support is greater amongst the Protestant than Catholic community. It is clearly the favoured option amongst Protestants, while for Catholics reunifying with the Irish Republic is preferred. However, between 2007 and 2008 support for devolution dropped significantly amongst Protestants, from 72 to 64 per cent, while it rose marginally amongst Catholics, from 35 to 36 per cent.

| Table 1.1b: Northern Ireland constitutional preferences by religious denomination 2007 and 2008 (%) |
|-------------------------------------------------------|-------------------------------------------------------|
| Protestants                                           | 2007 | 2008 |
| To remain part of the UK with direct rule            | 17   | 25   |
| To remain part of the UK with devolved government     | 72   | 64   |
| To reunify with the rest of Ireland                   | 3    | 4    |
| Independent state                                     | 4    | 3    |
| Other answer                                          | 1    | 1    |
| Don’t know                                            | 3    | 2    |
| Catholics                                             | 2007 | 2008 |
| To remain part of the UK with direct rule            | 4    | 7    |
| To remain part of the UK with devolved government     | 35   | 36   |
| To reunify with the rest of Ireland                   | 47   | 39   |
| Independent state                                     | 6    | 8    |
| Other answer                                          | 1    | 3    |
| Don’t know                                            | 7    | 7    |


**Scotland**

In Scotland, there has been a Scottish National Party (SNP) government since 2007; at first a minority government within the parliament, then from 2011 with a majority. In a sense, this development suggests clear movement towards possible secession for Scotland. It is now accepted in both Edinburgh and Westminster that the Scottish government has a mandate for the holding of an independence referendum, even amongst the three main, pro-union, parties of the UK. However, it should not be assumed that electoral support for the SNP is synonymous with support for independence. Up to a point, the electorate may be engaged in sophisticated activity, backing different parties at different times for purposes such as expressing disapproval at a Westminster government, or resisting a particularly disliked party. Figure 1.1d shows responses to an opinion poll question about a possible referendum at various points between August 2007 and August 2011.
While the phrasing of opinion poll questions about Scottish independence vary, with notable implications for the results, the figures presented in the graph show responses to an identical question, phrased in terms of whether the Scottish government should negotiate with the UK government for Scotland to become an independent state. Support for this position has fluctuated between 35 and 40 per cent, except for on two occasions. In March/April 2008, support rose to 41 per cent; and in May 2011, the month when the SNP won an outright majority in the Scottish parliament, it surged to 45 per cent, before dropping back to 39 per cent in August 2011. Owing to the fact that up to a quarter of those polled provide no answer to the question, or respond with ‘don’t know’, Figure 1.1d shows that ‘yes’ has led ‘no’ on four occasions, including in the three most recent polls.

This polling assumes there is a straight choice between separation and continued membership of the Union. There has, however, been discussion of a third option involving greater autonomy for Scotland, extending beyond that currently envisaged in the Scotland Bill. The ‘Full Fact’ website recently conducted analysis of opinion polling on independence, remaining within the Union and, where available, this third option, sometimes labelled ‘devolution max’. This latter option would involve an extension of autonomy greater than that contemplated by the UK government in the present Scotland Bill, but falling short of full independence. Full Fact noted that in October 2011, TNS-BMRB put forward three options, with 28 per cent of respondents supporting independence; 33 per cent ‘devolution max’; and 29 per cent no further constitutional change. Ipsos MORI research in 2009 also included a ‘devolution max’-type option. This survey showed that 20 per cent wanted independence, 46 per cent increased powers, and 32 per cent no change. The same options were used by Ipsos MORI in 2010 and produced similar figures of 22 per cent, 44 per cent and 32 per cent respectively.

On this evidence, it is clear that a significant proportion of Scots do not wish to be part of the Union, despite the introduction of devolution. Many are also willing to vote for the SNP in Scottish parliamentary elections, either because of, despite of, or regardless of its position on independence. Devolution, then, has seemingly provided the independence movement with political opportunities. Yet, it would also appear that the most popular option for the future of Scotland is an extension of devolution of some kind. It could be argued that this tendency demonstrates that devolution has been a success - at least from the point of view of those who seek to preserve the Union - in that it is seen by some within Scotland as an effective means of obtaining autonomy without separation from the Union. However, the SNP regards ‘devolution max’ as a staging post towards full independence, even if it is not achievable in the short-to-medium-term. The position is muddied further because it may not be entirely clear what ‘devolution max’ entails; and if the Scotland Bill becomes law the Scottish parliament will have already had its fiscal powers extended to some extent.

Aside from the views of the Scottish public on independence, an issue relevant to the effectiveness of mechanisms for dealing with
divisions is how the question of secession might actually be decided. The legal position is unclear. Unlike for Northern Ireland, there is no defined ‘exit clause’ from the Union for Scotland (nor for Wales). It is not currently certain that the Scottish government possesses formal powers allowing it to hold a referendum on independence. Consequently, to make the position absolutely certain, the Westminster parliament may have to transfer powers to Scotland (Secretary of State for Scotland, 2012). But there are divergences between Edinburgh and London about the timing of the referendum and whether it should include a third, ‘devolution max’ option, which the SNP desires because of its perceived popularity, but which the UK government opposes for the same reason. The importance of constitutional conventions to the handling of relations between devolved and central governance has been noted. While it may be the case that these loose and not directly legally enforceable modes of operating have been effective to date, they are clearly becoming strained. For instance, it is not clear that consent will be secured from the Scottish parliament to the Scotland Bill. Whether conventions about mutual consent between the Scottish and UK governments will work when the high stakes of independence are involved is highly uncertain. How then might resolution be reached? The matter may be considered by the courts at some point. Or the UK parliament may seek to deploy the ‘nuclear option’ and use its sovereignty to override the Scottish parliament - which the latter may not accept as a legitimate act.

Wales

During the era of devolution, Plaid Cymru, the Welsh nationalist party, has modified its position, downplaying independence as an objective, and participating in the Welsh administration alongside Labour from 2007 to 2011. It is possible that Plaid will become more overt in its support for secession once again in the future. Nonetheless it could be held that, in so far as it was intended to achieve greater consensus about Welsh membership of the UK, devolution has in this sense achieved a degree of success for the time being.

Figure 1.1e suggests a majority of the public in Wales support devolved governance of some kind, but with opinion split between a wide variety of different options, including over the kind of independence that might be wanted. Between 2009 and 2010, support for both possible independence options (within and without the EU) remained at around 5 per cent each, indicating far lower levels of support for independence than are found in Scotland. However, support for the strongest form of devolution – a parliament with law-making and taxation powers - rose from 34 to 40 per cent from 2009 to 2010. Meanwhile, opposition to any kind of devolution or independence fell from 18 to 13 per cent.

Figure 1.1e: Welsh constitutional preferences, 2009 and 2010

Sources: Jones and Scully (2009); BBC Wales (2010)

The 2011 referendum on full legislative powers for the assembly provided some further evidence of support for the idea of devolution. The referendum held on the initial establishment of the assembly in 1997 was won by only 50.3 per cent to 49.7 per cent; whereas the 2011 referendum on full legislative powers for the Welsh assembly was won by 63.5 per cent to 35.5 per cent. This shift could also be read as...
indicator of a rise in support for devolution since it was introduced. However the turnout in 2011 was only 35.4 per cent, which does not suggest immense enthusiasm for (or indeed against) the project. The turnout in 1997, which saw a much closer result, was significantly higher, at 50.1 per cent, but again suggested a relatively high level of indifference about how Wales is governed.

**National identity**

One means of measuring the impact of attempts at reconciling or moderating societal divisions could be the extent to which people regard themselves as belonging to their particular national group, or a larger whole. Table 1.1c contains data on this subject applying to Great Britain (that is, excluding Northern Ireland). In England, the percentage of people describing themselves as English rose from 31 per cent in 1992, to 40 per cent in 2005; while those describing themselves as British fell from 63 to 48 per cent over the same period. In Scotland, there has been a far stronger rise in national identity over a longer period. The percentage of people describing themselves as Scottish has grown from 65 per cent in 1974 to 79 per cent in 2005; while the percentage citing a British identity has fallen from 31 per cent in 1974 to 14 per cent in 2005. In Wales, national identity has been more stable, being chosen by 57 per cent in 1979 and 60 per cent in 2003; while those regarding themselves as British fell from 33 per cent and 27 per cent over the same period.

**Table 1.1c: Trends in ‘forced choice’ national identity, 1974–2005: percentage responses**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>English identity</td>
<td>n/a</td>
<td>n/a</td>
<td>31</td>
<td>34</td>
<td>44</td>
<td>43</td>
<td>38</td>
<td>40</td>
</tr>
<tr>
<td>British identity</td>
<td>n/a</td>
<td>n/a</td>
<td>63</td>
<td>59</td>
<td>44</td>
<td>44</td>
<td>48</td>
<td>48</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Scottish identity</td>
<td>65</td>
<td>56</td>
<td>72</td>
<td>72</td>
<td>77</td>
<td>77</td>
<td>72</td>
<td>79</td>
</tr>
<tr>
<td>British identity</td>
<td>31</td>
<td>38</td>
<td>25</td>
<td>20</td>
<td>17</td>
<td>16</td>
<td>20</td>
<td>14</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Welsh identity</td>
<td>n/a</td>
<td>57</td>
<td>n/a</td>
<td>63</td>
<td>57</td>
<td>57</td>
<td>60</td>
<td>n/a</td>
</tr>
<tr>
<td>British identity</td>
<td>n/a</td>
<td>33</td>
<td>n/a</td>
<td>26</td>
<td>31</td>
<td>31</td>
<td>27</td>
<td>n/a</td>
</tr>
</tbody>
</table>

Source: [Cruse (2008, p. 14)](#).

However, in none of these cases were the trends in national identity entirely smooth. Table 1.1c certainly shows, amongst other things, that a British identity declined in significance relative to an English one between 1992 and 2005. Yet, Figure 1.1f, which provides an annual time-series for national identity among residents of England, shows that this decline became most acute during the second half of the 1990s - just as the impact of devolution was being felt (Curtice, 2010, p. 5).

**Figure 1.1f: Trends in ‘forced choice’ national identity among UK citizens resident in England, 1996-2009 (%)**
Analysis of a Yougov poll from late 2011 showed that in Britain as a whole, only 19 per cent viewed themselves as 'British'; and 63 per cent as 'English' (Kellner, 2011). In Section 1.1.3, we noted how devolution has produced a pronounced disequilibrium between those parts of the UK subject to devolution and those that are not (that is England outside Greater London). It is conceivable that attempts to address societal divisions outside England may have helped to encourage a new societal division between England and the rest of the UK. Indeed, the same Yougov poll provided evidence of a distinct political outlook amongst those identifying themselves as 'English' on a divisive constitutional issue. While 58 per cent of the 'English' favoured leaving the European Union (with 26 wishing to remain inside), only 37 per cent of 'British' identifiers wished to leave, with 46 per cent supporting continued membership (the question was predicated on how they would vote in a referendum on the issue) (Kellner, 2011). If the English identifiers became a more politically self-aware group, such a trend would pose difficult constitutional and democratic questions for the country as a whole, given their numerical supremacy within the UK.

Democratic Audit believes that devolution has merit as a device for political decentralisation in the over-centralised UK state (see Section 3.3.1). Devolution also has potential as a device for reconciling or moderating societal divisions. As an important component in the Northern Ireland peace processes, it can be seen as contributing to some of the progress that has been achieved in securing the peace in Northern Ireland, although it has not been without its difficulties. The impact that has been made in Wales is difficult to assess. There is some evidence that devolution has more support now than it did when first introduced, and that during the devolution era Plaid Cymru has been to some extent integrated into the existing system. In Scotland, it would be difficult to argue that devolution has not advanced the cause of the SNP and helped independence seem a far more realistic proposition, though whether the Scottish public would vote for separation in a referendum remains unclear. It may be that methods designed to deal with divisions have contributed to a new fissure, between those who regard themselves as 'English' and the rest, that could pose enormous problems for the stability of the Union in future. Evidence of significant support for the idea of 'devolution max', not only in Scotland but Wales also, may provide the basis for a short-term solution. Yet, granting further autonomy to Scotland may equally become a staging post towards independence. Meanwhile, a more autonomous Scotland will only serve to make the anomaly of the English case even more apparent.

A more general point should also be made about the manner in which recent constitutional change has sought to accommodate demands for greater autonomy in the 'Celtic nations' of the UK. Devolution has posed a major challenge to various long-established features of the UK constitution. At the same time, the reforms which have been enacted have not fully supplanted this earlier model. In some respects a quasi-federal system is now in place, but it is very much a 'halfway-house'. At the centre, there remains an attempt to assert the continued viability of parliamentary sovereignty and other such traditional doctrines and methods. This confusion - and indeed clash - between political realities and theoretical legal authorities creates the potential for a major constitutional crisis. If such a crisis is to be avoided, there must be clarity about how decisions relating to the position of the different components of the UK's multinational state should be made (at present, except perhaps for Northern Ireland, such clarity is clearly absent). Moreover, any such mechanism must accord the residents of Scotland and Wales with a prominent role. As a point of principle, the centre should not claim exclusive legal ownership over the process.

1.1.5 Procedures for constitutional amendment

How impartial and inclusive are the procedures for amending the constitution?

Fundamental constitutional rules, as generally provided for in written constitutions (though not in the UK), are crucial to the way in which a democracy operates. They often set out many of the key ground rules, such as the composition of institutions, the relationships between them, and the rights of those within the territory. For this reason, changes to the rules can have a significant impact - positive or negative - upon democracy. Indeed it could well be argued that the most important feature of any constitution is the way in which it can be changed, since through this means its entire content can be controlled. Amendment procedures should therefore prevent the subordination of change to sectional interests; and should themselves be democratically satisfactory, securing wide involvement amongst those within the society which they will impact upon. Internationally, written constitutions often stipulate that their alteration involves the meeting of requirements
more rigorous than those of the regular legislative process. For instance, legislative super-majorities of two thirds or possibly higher may be stipulated, or referendums required. In a federal constitution, there may be a specified role for the states of which the federation is composed. By these means the constitution of a country is treated as higher law, owned by the whole of society - the alteration of which is more than a simple legislative act (Finer et al., 1995).

**Procedures for amending an unwritten constitution**

In the UK there has never been a clear, comprehensive procedure or procedures for amending the constitution. This omission has come about because there is no written constitution to specify definitively and with authority what the procedure is; and because, even to the extent that procedures exist, the lack of an agreed definition of the constitution makes it difficult to agree whether or not it is being changed in any given circumstance, and consequently whether the procedures should be used.

The UK constitution, rather than being codified in a document or group of documents, is derived from many sources, including statute; conventions; doctrines; and the royal prerogative (see Section 2.4.3). Even the views of constitutional observers can be regarded as a constitutional source (Barnett, 2011). Moreover, the nature of each of these different sources changes in different ways over time (Select Committee on the Constitution, 2002).

Probably the most prominent means by which constitutional change comes about is through legislation in the UK parliament. According to traditional accounts of the doctrine of parliamentary sovereignty, any act of parliament, whether fundamental to the constitutional settlement or relatively trivial, can be overturned by the same legislative process; and no binding procedure can be applied to entrench constitutional law. There is no official category of constitutional legislation. But a new legal principle has begun to develop. Some constitutional enactments have come to be protected from implied repeal by subsequent acts of parliament. That is to say, parliament can only alter them if it expressly says that it intends to do so, rather than simply as an indirect consequence of legislation it produces. The clearest examples of legislation of this kind are the European Communities Act (ECA) 1972 and the Human Rights Act (HRA) 1998. Courts are willing to strike down legislation which by implication conflicts with European law as incorporated into UK law under the ECA, even if the offending legislation was passed after the ECA. If primary legislation conflicts with the European Convention on Human Rights as incorporated by the HRA, courts do not strike it down, but neither do they disapply the HRA. Instead they issue a ‘declaration of incompatibility’. The effect of these legal arrangements is that parliament can only repeal the ECA and HRA if it expressly states that this is its intention; which could be seen as a limited form of constitutional amendment procedure (Bogdanor, 2009; Goldsworthy, 2010).

Alongside this apparent legal change, certain regulations and practices exist within parliament and government in relation to legislative constitutional change. The Parliament Act 1911 removed the ultimate veto of the House of Lords when faced by a determined majority in the House of Commons, except in relation to extensions of the life of a parliament beyond five years, which the Lords remains able to block absolutely. In this sense, there is a special amendment procedure applied to the length of a parliament, which is thereby constitutionally entrenched.

In the post-Second World War period a convention has operated that bills of ‘first class constitutional importance’ should be sent to a committee of the whole house in the Commons. There is however no clarity about how such bills should be defined. Matthew Flinders has noted that it is puzzling, for instance, that the bills that became the Freedom of Information Act 2000, Regional Development Agencies Act 1998 and Bank of England Act 1998 were not treated as possessing ‘first class’ constitutional significance (Flinders, 2010, pp. 219-22).

A range of parliamentary committees can also play a part in considering legislative constitutional change. Relatively recent innovations in the period covered by this Audit include the House of Lords Select Committee on the Constitution, the Joint Committee on Human Rights and the House of Commons Political and Constitutional Reform Committee, which was established in 2010. Specially formed committees may consider constitutional legislation in draft form, such as the joint committee currently scrutinising the draft House of Lords Reform Bill. However, all of these committees work through influence rather than the possession of special powers within the legislative process.

The holding of referendums has come to play an increasingly important part in constitutional legislative change. Sometimes legislation is introduced after consultative referendums, as with devolution in the late 1990s. An emerging tendency is for legislation providing for referendums to specify that the results of these plebiscites will be binding. The referendums on the extension of the powers of the Welsh Assembly and on the proposed introduction of the alternative vote, both of which were held in 2011, were binding in this way. In addition, the European Union Act 2011 stipulates a detailed range of possible types of pooling of UK authority at European Union (EU) level that, under the act, would now require a binding referendum to be held.

Table 1.1d lists all the referendums which have been held at UK and sub-UK national/regional level. There have been 11 in total, all concerning constitutional issues, beginning in the 1970s. No referendums took place during the long period of Conservative office from 1979 to 1997.
Table 1.1d: UK national and regional-level referendums, 1973-2011.

<table>
<thead>
<tr>
<th>Date</th>
<th>Territory</th>
<th>Issue</th>
<th>Turnout (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>08 March 1973</td>
<td>Northern Ireland</td>
<td>Should Northern Ireland remain part of the UK? remain part of the UK</td>
<td>58.7</td>
</tr>
<tr>
<td>05 June 1975</td>
<td>UK</td>
<td>UK membership of the EEC</td>
<td>64.6</td>
</tr>
<tr>
<td>01 March 1979</td>
<td>Scotland</td>
<td>Devolution for Scotland</td>
<td>63</td>
</tr>
<tr>
<td>01 March 1979</td>
<td>Wales</td>
<td>Devolution for Wales</td>
<td>58.3</td>
</tr>
<tr>
<td>11 September 1997</td>
<td>Scotland</td>
<td>Establishment of Scottish Parliament; and its fiscal power</td>
<td>61.2</td>
</tr>
<tr>
<td>18 September 1997</td>
<td>Wales</td>
<td>Establishment of Welsh Assembly</td>
<td>50.6</td>
</tr>
<tr>
<td>07 May 1998</td>
<td>Greater London</td>
<td>Creation of Greater London Authority and Mayor of London</td>
<td>34.5</td>
</tr>
<tr>
<td>22 May 1998</td>
<td>Northern Ireland</td>
<td>Good Friday Agreement</td>
<td>81.1</td>
</tr>
<tr>
<td>04 November 2004</td>
<td>North East England</td>
<td>Establishment of regional Assembly</td>
<td>47.8</td>
</tr>
<tr>
<td>03 March 2011</td>
<td>Wales</td>
<td>Extension of legislative powers of Welsh Assembly</td>
<td>35.4</td>
</tr>
<tr>
<td>05 May 2011</td>
<td>UK</td>
<td>Introduction of the Alternative Vote for UK parliamentary elections</td>
<td>42</td>
</tr>
</tbody>
</table>


This list suggests that a constitutional convention is developing that referendums should be used for certain kinds of constitutional changes in the UK, involving devolution, the status of Northern Ireland, the Commons voting system, and Europe. The House of Lords Select Committee on the Constitution argued in 2010 that the most appropriate possible use of referendums is for the making of decisions of fundamental importance to the constitution. It noted that such issues could not clearly be defined, but that they would include abolition of the monarchy; leaving the EU; the secession of any part of the UK; the abolition of either the House of Commons or the House of Lords; a change in the parliamentary electoral system; and the introduction of a written constitution (House of Lords, 2010). As such, there are clearly significant constitutional reform issues that would not be expected to be subject to a referendum, although the principle of what changes should, or should not, be subject to popular approval is by no means clear. Thus, while the present government held a referendum on electoral reform, and has passed legislation to initiate referendums on elected mayors in the largest English cities, it did not hold referendums on fixed-term parliaments, the introduction of elected police commissioners or its European Union Bill; and does not intend to hold a referendum on its proposals for a mainly elected House of Lords. Where referendums do take place, moreover, they rarely show much evidence of generating public interest in matters of constitutional change. As Table 1.1d shows, only four referendums have achieved turnouts of over 60 per cent, while four recorded participation levels below 50 per cent. As such, the extent to which referendums constitute an inclusive procedure for constitutional amendment could be questioned.

The following case-study, which considers the AV referendum of 2011, casts light on the value of referendums as a means of impartial, inclusive decision-making.

Case Study 1.1b: The AV Referendum of 2011

The May 2011 referendum on the alternative vote (AV) electoral system for the House of Commons was the second UK-wide referendum in history. It is therefore important as a case study of the impartiality and inclusiveness of referendums as a mechanism of constitutional change in the UK.

In terms of the impartiality of the process, it is important to consider how the idea of a referendum on AV became part of the agenda in the first place. Proposals for a referendum on electoral reform were not new. In 1997 Labour had promised to set up a commission of inquiry into the electoral system and offer a referendum choice between the commission’s proposed system and the status quo (first-past-the-post or FPTP). The Independent Commission on the Voting System, chaired by Lord (Roy) Jenkins, reported in 1998, recommending a new system: AV with a proportional top-up element (known as AV plus). However, the referendum did not take place and in further manifestos Labour promised only a review of electoral systems, stating that ‘a referendum remains the right way to agree any change for Westminster’. The Review of Voting Systems was published in 2008 but contained no recommendations relating to Westminster.
Although a deliberative, if non-inclusive, process had taken place, it had no bearings for the eventual question asked in the referendum. In 2009 Labour Prime Minister Gordon Brown came out in favour of a referendum on AV, and this proposal passed the Commons in February 2010 (although it fell with the calling of the election). The move was widely perceived as tactical, though the pledge was repeated in the Labour manifesto. But the reality of an AV referendum emerged as a compromise between the pro-proportional representation Liberal Democrats and the pro-FPTP Conservatives in the rapid coalition negotiations after the election in May 2010. An AV referendum was therefore the preferred option of neither government party, while the party that had favoured it had been defeated in the election. The coming of the referendum was therefore itself an example of non-inclusive, non-transparent politics.

The legislative process for the referendum was also far from ideal. The bill providing for it was in two parts. The one dealing with the referendum, whether from the coalition agreement (Lib Dem and Conservative) or from a manifesto (Labour) should have been a matter of consensus. The other part of the bill dealt with boundary changes and the size of the House of Commons and was highly controversial. Implementation of AV, in the event of a ‘yes’ vote, was to be contingent on the implementation of the boundary changes for which there had been no public mandate or body of evidence. Arguments about the latter portion of the bill meant that Royal Assent was delayed to February 2011, not long before the actual referendum campaign was due to begin. The referendum was not ideal from the point of view of electoral administration, in that changes were being made to the process long after the closure period of 6 months before the poll recommended by the Gould review of the 2007 Scottish elections. It also exposed some tensions within the electoral administration system, although the clear responsibility for delivering the result taken by the Electoral Commission means that there was probably an unprecedented degree of public accountability for the actual running of an electoral event. The public information campaign run by the Commission tried hard to be impartial, but the task of presenting information neutrally to the public proved to be an inherently fraught assignment.

The campaign itself was not preceded by any extended public discussion, and the general understanding of the meaning and purpose of the proposed change was low. The Yes and No campaigns, in response to the lack of interest and understanding, ended up running misleading campaigns. ‘Yes’ often attempted to harness anti-politics emotion, while ‘No’ made dubious claims about the cost and implications of AV, and exploited the unpopularity of the Liberal Democrats. Turnout in the referendum was 42 per cent, more than many had expected during the campaign, but a sign that neither side of the argument had aroused public enthusiasm (turnout on well-understood issues such as Europe in 1975 and Scottish devolution in 1997 was much higher).

In conclusion, the AV referendum demonstrates how the options that are available for constitutional reform are drawn up in a far from impartial and inclusive way. Alternative arrangements are available. The original idea of putting the Jenkins report to a referendum at least involved a measure of independent involvement in drawing up the question. More radical democratic options are available too, including the Citizens Assembly model pioneered in Canada and the New Zealand system of offering several alternative electoral systems to the public as well as a change/no change option. While control of the agenda was probably the least satisfactory element of the AV referendum, it also illustrated that a deliberative element is often lacking in the public involvement that does take place in the process of constitutional reform in the UK.

Principal source: Baston and Ritchie (2011)

As noted above, legislation is not the only component of the constitution, and legislative change is not the only form of constitutional amendment. Procedures applying to changes to these other portions of the constitution are even harder to discern and often less stringent than those involving legislative alteration. Changes can come about through judicial decisions, for instance when a court determines whether or not a particular royal prerogative power exists, or interprets constitutional legislation (Bradley and Ewing, 2011). Conventions - which are often vaguely defined rules and not directly legally enforceable - can seemingly be changed by precedents, that is actions by constitutional players in response to particular circumstances. These precedents can either develop the understanding of a particular convention, or render it redundant. Increasingly, conventions are being written down in official but non-statutory, publicly available codes. It may be that the act of producing these documents not only defines but alters constitutional conventions (Blick and Hennessy, 2011).

Finally, it is not entirely clear how constitutional doctrines such as parliamentary sovereignty can fundamentally be changed at all (Brazier, 2008).

Constitutional flexibility, impartiality and inclusiveness

Though some parts of the UK constitution may not be easily changeable at all, much of it can be changed swiftly and radically. As part of a comparative study of the systems of government of 36 countries, Arend Lijphart produced an index of ‘constitutional rigidity’, measuring the difficulties involved in securing alterations to the fundamental rules of the political system. The UK had the joint lowest score, alongside Iceland, Israel and New Zealand, of 1.0 on a scale of 1.0 to 4.0. It should not be a surprise that three of these countries - the UK, Israel and...
New Zealand - are the main democracies not to possess written constitutions (Lijphart, 1999, p. 220). In his recent updating of Lijphart’s work as it applies to the UK, Flinders found that this earlier assessment of the flexibility of the UK constitution still holds following the period of Labour government from 1997 (Flinders, 2010). The torrent of constitutional reform since 1997, continued by the coalition government from May 2010, provides confirmation of the persistence of this flexibility. It includes devolution (see Sections 1.1.3, 1.1.4, 3.3.1 and 3.3.2); the Human Rights Act 1998 (see Section 1.2.2); the Constitutional Reform Act 2005 (see Section 1.2.3); the Constitutional Reform and Governance Act 2010 (see Sections 1.2.2, 2.3.2 and 4.2.4); and the Freedom of Information Act 2000 (see Section 2.3.5). It could be argued that some of this legislation, though permitted by constitutional flexibility, might reduce the level of flexibility in future. The Constitutional Reform and Governance Act might make it harder for governments to alter the configuration of the civil service; and the European Union Act 2011 will create difficulties for any government seeking to enhance UK participation in the EU. At the same time, other parts of this programme of change, particularly devolution, have created a momentum for more change still (see Sections 1.1.3 and 1.1.4).

As previously noted by the Audit, the flexibility of the UK constitution has in practice afforded considerable discretion to the UK-level executive (Weir and Beetham, 1999). Through its position of strength within parliament, the executive can secure legislative alterations to the constitution. For this reason, the impact of the various parliamentary procedures relating to constitutional change is weaker than it might be in a less executive-dominated chamber. Indeed, because the electoral system for the Commons produces disproportionately large vote shares for certain parties, constitutional change becomes a more exclusive process still (Flinders, 2010). Potentially, significant constitutional change can be driven through by the executive with minimal consultation, as was recently the case with the Parliamentary Voting System and Constituencies Act 2011 and the Fixed-term Parliaments Act 2011. Both these measures could be seen as partial, in that they were driven largely by the necessities of the coalition agreement.

Moreover, the executive can issue codes which seek to define important features of the non-statutory portions of the UK constitution, such as conventions and doctrines, virtually unilaterally. The production of the cabinet manual, published in final form in 2011, is an example of such a process (Cabinet Office, 2011). Though consultation took place, the final decisions about content rested with the executive. The manual defined important constitutional arrangements, such as procedures to be followed when no party has an overall Commons majority. At the same time it presented a partial view of controversial issues, including the doctrine of parliamentary sovereignty. It was silent on questions such as whether the devolution settlements are in practice entrenched by the referendums held before they were introduced (Blick and Hennessy, 2011).

By contrast, those outside the London-based executive find it difficult to achieve constitutional change. For example, the long-term and large-scale campaign for a Scottish parliament was dependent upon the election of a Labour government in 1997 to be put into effect (Bogdanor, 2001); as were the campaigns for a Freedom of Information Act and the incorporation of the European Convention on Human Rights into UK law. Similarly, the attempt to introduce a Bill of Rights for Northern Ireland, based on the recommendations of the Northern Ireland Human Rights Commission, was dependent upon time being found in the timetable of the UK parliament (see Section 1.2.2). However, the drive for the extension of devolution, particularly within Scotland, has since been driven from the areas involved themselves, not from Whitehall. As has been noted above, the Scottish government, following the outright victory of the Scottish National Party in the Scottish elections of 2011, is widely accepted as having a mandate to hold an independence referendum; although it is by no means clear whether it has the legal powers to do so (see Section 1.1.4). In this sense, some of the initiative for triggering constitutional amendment has been wrested from the UK executive, though the ultimate outcome is not yet known.

The House of Lords Constitution Committee recently set out some proposed guidelines on the introduction of legislation bearing on constitutional change that could, if adhered to, bring about greater impartiality and inclusivity; although their impact would be limited by the vague nature of the unwritten UK constitution. The committee argued that in future governments should give more consideration to the possible difference their plans would make to the constitution; scrutinise them carefully within government and consult widely and thoroughly outside government and with parliament (Select Committee on the Constitution, 2011).

Democratic Audit believes that certain core and interrelated features of the UK constitution make alterations to the constitution of an impartial and inclusive nature difficult to achieve. First of all, as there is no written constitution, there are no precise amendment procedures and no ways to determine whether constitutional change is actually taking place at any given time. Second, the doctrine of parliamentary sovereignty, which is in turn closely associated with executive dominance, means that UK governments can - and often do - drive the process of constitutional change in a manner which is both partial and exclusive. Dominance by the UK executive is beginning to be challenged by events in Scotland, although not in the sense that a clear and improved new system is being established. Third, the flexibility of the UK constitution has lately facilitated a rapid pace of change. While many of the changes from 1997 have in principle been desirable, the rapidity of their introduction, combined with their piecemeal nature, surely makes it difficult to ensure that they are enacted in an inclusive, impartial fashion. Referendums, which are increasingly a feature of UK constitutional change, may to some extent increase the involvement of the public, but they bring with them significant problems of their own. We believe that the clearest means by which these various flaws in the constitutional amendment procedures of the UK could be corrected is through the introduction of a written constitution with a clearly defined amendment procedure contained within it.
1.1.6 International obligations towards migrants

How far does the government respect its international obligations in its treatment of refugees and asylum seekers, and how free from arbitrary discrimination is its immigration policy?

Citizens are those who have fully been admitted into the political community and thereby have rights as full participants in democracy. But democracy also requires the appropriate treatment of those within the territory who are not full citizens; and that the state behaves in a responsible fashion in the context of the international community, upholding the obligations it has undertaken in fulfillment of wider democratic values. To this end, it is important that those arriving in the country claiming they are in danger of persecution or other improper treatment in the states from which they have fled are treated fairly; and that immigrants are not dealt with in an arbitrary, discriminatory fashion.

Asylum seekers

International law stipulates that states can control who enters and leaves their territory. But a range of different international obligations apply to the way in which asylum seekers are treated. The central conventions are the 1951 United Nations Convention on the Status of Refugees and its Protocol of 1967. Also of importance are the United Nations International Convention on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) as incorporated under the Human Rights Act (HRA). These instruments have a wide scope. They prohibit discrimination against asylum seekers in their enjoyment of their rights. They forbid inhuman or degrading treatment of asylum seekers, and other less severe forms of neglect or ill-treatment; and mean that asylum seekers should not be made severely destitute. The existence of housing rights is stipulated, alongside property rights, healthcare rights and the right to a family life. A right to liberty of the person is established for asylum seekers; and to a fair trial or to a fair hearing. A European Union Council Directive of 2003 set out that asylum seekers from vulnerable groups should be specially catered for. Children who are asylum seekers have special rights under the Convention on the Rights of the Child of 1989. However, the UK has entered reservations about this Convention in relation to asylum seekers; and it has reserved the right to detain children in adult centres (Joint Committee on Human Rights, 2007).

In theory, therefore, asylum seekers possess a wide range of protections. However, attempts to ensure the fulfillment of these human rights takes place in an environment in which states, including the UK, are often determined to exert more direct control over asylum policy and not be restricted, as they see it, by international obligations (Schuster, 2003). Concerns about UK compliance with its human rights obligations with respect to asylum seekers have focussed on a number of issues, as noted by the parliamentary Joint Committee on Human Rights in a report of 2007. First, it recorded the complexity of support provided to asylum seekers, and the ineffectiveness with which it was sometimes provided, leading in some cases to high degrees of destitution. Second, the committee found that the policy that had been introduced of charging people visiting from overseas for some healthcare services lacked justificiation. Third, there was no basis for the reservation entered by the government to the UN Convention on the Rights of the Child. Fourth, there were concerns about an increase in the detention of asylum seekers, including those from vulnerable groups such as children, torture victims, women who were pregnant and people with health problems, both mental and physical. Fifth, the Committee noted that the media played an often unhelpful role, through distorted coverage of the issue of asylum seekers (Joint Committee on Human Rights, 2007). The coalition government which took office in 2010 signaled an important policy change in this area when it committed to end the detention of child asylum seekers. However, the implementation of this policy has been delayed, and the precise form it will take is unclear.

Immigration

The Immigration Act 1971 is the central piece of legislation determining the conduct of immigration policy. It provides extensive powers to the Home Secretary and various officials. These powers take in the authority to permit or deny entry into the UK; to search people entering and leaving; to remove people; powers of detention; and numerous investigatory powers related to criminal offences under the act. While the broad framework of immigration powers exists in the 1971 act, it is the detail of how it is implemented that is important in practice. The Home Secretary sets out lengthy rules under the authority of the act. These rules are laid before parliament, which can disapprove them, and has done so twice, in 1972 and 1982. They stipulate, amongst other things, that the conduct of immigration policy should not discriminate on such grounds as race or religious faith and that the Hunman Rights Act must be complied with (Bradley and Ewing, 2011).

There is an inbuilt tendency in immigration policy for tensions to develop between, on the one hand, the executive seeking to pursue its political priorities and, on the other hand, the judiciary seeking to uphold legal standards. During the present Audit cycle, the government sought seriously to circumscribe the potential for judicial review of immigration decisions. When it was first introduced in bill form, the Asylum and Immigration (Treatement of Claimants, etc.) Act 2004 included what is termed an 'ouster clause' which:

'would have introduced a new section 108A into the Nationality, Immigration and Asylum Act 2002 with the effect of cutting off all appeals to, and judicial review by, the ordinary courts in immigration matters, and excluding habeas corpus applications in
immigration cases. Most importantly, it would have made section 7(1) of the Human Rights Act subordinate to the Nationality, Immigration and Asylum Act 2002, and thereby severely curtailed remedies for violations of Convention rights through the ordinary courts (Joint Committee on Human Rights, 2005, p. 25).

This proposal had serious implications for the rule of law. The ability of the judiciary to review the action of the executive for its legality is fundamental to democracy (see Section 1.2.2). Substantial political pressure was applied in the House of Lords and the ‘ouster clause’ was dropped. However, human rights concerns continued to be expressed about the clause included in its place. The Joint Committee on Human Rights raised concerns about discrimination, noting that the European Convention on Human Rights required that everyone within a jurisdiction should have equal means to achieve the protection of their Convention rights when they wished to challenge administrative action. It held that the bill risked breaching that right (Joint Committee on Human Rights, 2004).

A particular immigration power has long given cause for concern about the potential for abuse. The home secretary possesses a power to deport individuals on public interest grounds. It is another wide power. In 2003 the House of Lords found that it could legally be deployed even if the threat that the individual supposedly posed was to a foreign state, rather than directly to the UK. Appeals against such decisions are heard by the Special Immigration Appeals Commission (SIAC). SIAC can take evidence in secret, with special advocates representing those subject to deportation - another problematic arrangement from the point of view of democratic principle. The special advocates are entitled to see secret evidence which may form the basis for deportation. Once they have seen this evidence they can have no more contact with their clients, unless authorised to do so by SIAC (see also Section 1.2.4). The decisions of SIAC can only be reviewed on a basis of points of law, not the substance of the decision (Barnett, 2011).

The Anti-Terrorism, Crime and Security Act 2001 (ATCSA) turned the home secretary’s power to deport into what was in effect a detention power. Under article three of the European Convention on Human Rights, individuals cannot be deported if the destination country is likely to subject them to torture or other ill-treatment. ATCSA created a power to detain terrorist suspects who could not be deported because they were subject to this risk. For whatever reason, these terrorist suspects could not be put on trial, but they were nonetheless being detained. Putting this power into effect required a derogation from article 5 of the European Convention on Human Rights, on the grounds that there was an emergency threatening the life of the nation. Eventually, the House of Lords found by a majority of eight to one that, while there was a public emergency, because the power applied by definition to foreign nationals, discrimination was taking place in the deprivation of liberty. For these reasons, article 5 (the right to liberty) and article 14 (against discrimination in the enjoyment of rights) were being violated. ATCSA was declared incompatible with the European Convention on Human Rights. The order providing for the derogation from the European Convention on Human Rights was also quashed, on grounds of being discriminatory and disproportionate. The government responded by bringing forward a regime which applied to both foreign nationals and UK nationals (Bradley and Ewing, 2011; Barnett, 2011) (see Section 1.3.1).

Democratic Audit notes that the political and security policy temptations to override democratic concerns in asylum and immigration policies are considerable. Those most likely to suffer do not possess votes; and the balance of media pressure is usually likely to be in favour of more stringent measures. We are concerned that UK governments have not lived up to the spirit or the legal fact of their human rights obligations with regard to the treatment of asylum seekers, the most vulnerable of individuals. We also note the importance of the widely drawn immigration powers exercised by public authorities being subject to effective judicial review. Yet, the evidence of recent years is that government is concerned to circumscribe the ability of courts to oversee its exercise of these powers - a worrying anti-democratic urge. Here is a good example of how, for democracy to function meaningfully, majority rule must be subject to principles of legality. The 2004 judicial decision that the detention of foreign national terrorist suspects was incompatible with human rights demonstrates the value of the judiciary; and why its scope for action should not be reduced.

Conclusion

In this chapter, we have identified a number of areas of improvement in achieving common agreement over citizenship without discrimination. Legislation governing citizenship and, in particular, the legal framework for equality has been improved. Devolution has also been associated with some significant democratic improvements. It has helped ease violent tensions in Northern Ireland; and there is evidence that support has grown for devolution in Wales, with the Welsh Assembly recently acquiring greater powers following a referendum. In Scotland, where the Scottish parliament already has significant law-making competencies, devolution of additional powers also seems a popular option. More generally, we welcome devolution as a means of reducing the level of centralisation that has characterised the UK constitution. It also seems to enjoy a degree of practical entrenchment which is often lacking from important features of the UK system of government.

However, the unintended consequences of devolution have created great democratic difficulties. First, in none of the territories in which it has been introduced is there an overwhelming consensus that devolution has served to eradicate the grievances or problems which encouraged its introduction in the first place. Significant numbers of protesters and, to a still greater extent, roman catholics in Northern Ireland prefer other options. In Wales, there seems to be more consensus about remaining within the UK, although an independence
movement still exists. In Scotland, devolution has to some extent assisted the secessionists, providing them with a political opening. The idea of Scottish independence has made considerable advances since the advent of devolution. A further problem is associated with the asymmetrical nature of devolution, particularly the fact that it has not been applied to England outside Greater London. Yet at the same time, English identity, denied a formal political outlet, has strengthened. Indeed, throughout Britain, 'British' identity is broadly and in some cases severely in decline. Such a lack of cohesion could prove destabilising for the concept of the 'political nation'.

Second, devolution has challenged - but not wholly supplanted - earlier constitutional models. It is difficult to describe the UK as a unitary state any longer; but neither does the term 'federal' apply in any genuine sense. Parliamentary sovereignty is in practice undermined by devolution, but the UK executive seeks to assert that it remains unaltered. The longstanding assumptions of UK government have been questioned by other developments, such as UK membership of the European Union (EU) and the Human Rights Act 1998 (HRA), as we pass through a period of unparalleled constitutional change. While the constitution may seemingly be in a stage of transition, the end destination is not clear. There is disagreement about many issues, from EU membership and the HRA to the status of the monarchy, and whether or not the constitution itself should for the first time be codified in a single text. Disputes about such matters as whether prisoners should have voting rights of some kind often relate to broader disagreements about, for instance, the nature of citizenship and whether systems for the supranational enforcement of rights should apply in the UK. Moreover, the ability of the executive to violate human rights obligations with respect to asylum seekers, or restrain judicial scrutiny of immigration policy - both issues identified in this chapter - might be reduced under a codified constitution. We believe that the simultaneous existence of several fundamental constitutional disagreements creates an impression of genuine democratic instability.

Third, it is not clear how these issues can be resolved satisfactorily. The UK constitution, unwritten as it is, has no defined amendment procedures and has often been altered virtually on the whims of the executive. It is not always agreed even that a constitutional alteration is taking place. Once again, the position in Scotland highlights this problem. While the right to self-determination of the Scottish people is widely accepted, the means by which it can be achieved is not known and has itself become part of the contest between opposing sides in the dispute over the future of Scotland. While we recognise that disagreement is part of the essence of democracy, the lack of an effective constitutional framework within which disputes can be played out is deeply unsatisfactory. A written constitution seems the most likely means of providing such a framework.

All of these issues engage some of the key themes identified in this Audit as a whole. First, it is clear from the discussion above that existing constitutional arrangements are unstable, that old models are under pressure, but new ones have yet fully to establish themselves. Second, the old institutions of democratic governance, in particular the UK parliament, have lost a degree of authority in at least parts of the UK. The European Union is subject to sustained criticism; and the Human Rights Act has been associated with a challenging of the authority of the judiciary. At the same time the precise future status of the newer, devolved institutions is unclear and regularly subject to change. Third, devolution has created an appetite for more change still, although it is by no means clear what the direction of change should be. While it is difficult to establish a clear consensus around any of the existing representative institutions, centralised or devolved, nor do methods of direct democratic decision-making, such as referendums, appear to generate mass enthusiasm. Finally, this chapter has also pointed to some initial, specific concerns about political inequality, with particular reference to prisoners, immigrants and asylum seekers. In subsequent chapters, we catalogue how broader forms of political inequality are becoming one of the most pervasive features of contemporary British democracy.

References


Blick, A. (2011) Codifying or not codifying the UK constitution: a literature review, London: King’s College London/House of Commons Political and Constitutional Reform Committee.

1.1 Nationhood and citizenship
Published: 11th May 2011
Updated: 24th Apr 2012


Commission on a Bill of Rights (2011) *Do we need a UK Bill of Rights?*, London: Ministry of Justice.


Democracy Audit


