

Constitution Unit

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Scotland, England and the Union

The Scottish independence referendum has launched an extraordinary flurry of constitutional activity. The three unionist parties have repeated their joint pledge to devolve further powers to Scotland, the Conservatives have revived their manifesto proposal of English votes on English laws, and the Labour Party have responded by proposing a constitutional convention in autumn 2015. All three sets of proposals are more complicated than at first sight might appear. Our first three articles discuss each in turn.

Further powers for Scotland

In 'The Vow' [published on 16 September](#) the three unionist parties repeated and strengthened their joint statements made in June and August to devolve further powers over tax and welfare to Scotland. The crossbench peer Lord Smith of Kelvin has been appointed to produce a unified set of proposals on a very tight timetable, with a white paper promised for November, and a draft bill in January. The hope is that all parties will then include similar manifesto commitments to grant further powers to Scotland.

Lord Smith's first challenge is to reconcile the positions of the three parties. While there is significant common ground, they disagree on how far to go with further fiscal devolution, and over devolution of welfare. Labour has been the most reluctant to devolve further control over income tax, while the Conservatives and Liberal Democrats would hand over all income tax, with the Treasury retaining control only over personal allowances. The Lib Dems would also be willing to devolve capital gains tax and inheritance tax. On welfare and benefits, the parties have separately proposed devolving housing benefit, attendance allowance and the Work Programme, as well power for the Scottish Parliament to pay cash benefits to supplement UK-level welfare; but again there is no agreed package.

The second challenge is how to manage expectations in Scotland, where people have been led to expect 'Devo Max'. Devo Max was never going to be possible, for several reasons.



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First, the original Scotland Act 1998 conferred generous legislative powers, giving Scotland complete control over health, education and other important public services. As a result the Scottish Parliament is already responsible for about 70 per cent of all public spending in Scotland. Second, room for further fiscal devolution is limited because the Scotland Act 2012 has already devolved control over ten points of income tax. However, this will not come into force until 2016 at the earliest, so most Scots are currently unaware of it. Third, tax devolution may prove as much a burden as a liberation for the Scottish government and for the people of Scotland if it leads to tax rises to maintain their more generous public services. The fourth and biggest difficulty is that it may not be possible to devolve significant further power over tax and welfare without starting to undermine the effectiveness and integrity of the existing tax and welfare systems, which are two key pillars of the Union state.

The third challenge is the need to gain SNP support for a cross-party package. This is not just politically desirable; it is necessary because under the '[legislative consent convention](#)' the Scottish Parliament must formally consent before Westminster legislates to change its powers. The SNP government can use this as a lever to demand more powers than the unionist parties are willing to concede, and to revive calls for full fiscal autonomy or Devo Max, even though it was never on the table. Although the SNP's new leader, Nicola Sturgeon, may prove less of a fundamentalist than Alex Salmond, the temptation to wrangle over the new powers on offer may prove hard to resist in the run up to the Westminster elections in 2015 and the Holyrood elections in 2016. In particular, the SNP may demand devolution of corporation tax, already under consideration for Northern Ireland.

The English Question

On 19 September David Cameron linked his promise of further powers to Scotland to further powers for England, saying 'the question of English votes for English laws – the so-called West Lothian Question – requires a decisive answer'. Leader of the House of Commons William Hague has been tasked with finding an answer, working through a Cabinet committee, if possible with cross-party support. The answer may prove elusive, however, not just because it goes so strongly against the interests of the Labour Party to restrict the voting rights of Scottish MPs, but also because there are so many different answers to the English Question.

These answers all tumbled out in the days following Cameron's announcement. They vary because they are responses to different versions of the English Question. If the aim is devolution to England – i.e. giving England a separate political voice in order to rebalance the louder political voices now accorded to the other Home Nations – then the solution will be English votes on English laws, or an English Parliament. But if the aim is devolution *within* England, breaking the excessive domination of the central government in London, then solutions include elected regional assemblies, city regions, stronger local

government and elected mayors. Conservatives tend to favour the former and Labour MPs the latter set of solutions, but there are exceptions on both sides. [As Constitution Unit research has shown](#) there is little public support for any of these solutions. Elected mayors have been rejected by all large cities except London, Liverpool and Bristol, while the elected regional assembly proposed for the North East was defeated in the 2004 referendum by four to one. Support for an English Parliament has seldom climbed above 20 per cent in the polls and few heavyweight politicians have come out in support.

The one exception is English votes on English laws, which polls suggest does command majority support, in Scotland as well as in England; but it has been a low salience issue, which garnered no extra votes for the Conservatives when they proposed it in their 2001, 2005 and 2010 manifestos. It has suddenly achieved much greater prominence. The risk is that what is presented as a small procedural change may morph into a big constitutional change: English MPs might become an English Parliament within the Westminster Parliament. This would be a huge change which deserves much wider consideration than is possible in the seven months before the next election, offering some justification for Ed Miliband's suggestion of a constitutional convention to consider this and other issues.

For more on the English Question, see Robert Hazell's recent blogposts [here](#) and [here](#).

A constitutional convention

The vigorous public debate engendered by the independence referendum in Scotland has led to calls for a constitutional convention to discuss all the unfinished business of devolution, with some seeking to widen the agenda to include items such as Lords reform, others [calling for a written constitution](#). It seems sensible and logical to pause and take stock in this way; but constitutional conventions need to be carefully planned and implemented if they are to have any chance of success.

As Alan Renwick [has shown](#) there is a range of different models to choose from, from expert commissions to citizens' assemblies, but one thing they have in common is a high failure rate. So there is a lot to learn from studying previous experience, in the UK and overseas, to try to ensure that a constitutional convention succeeds as an inclusive deliberative forum, and to maximise the chances of its recommendations being subsequently adopted and implemented.

This means thinking very carefully about who will establish a constitutional convention, how it will be funded, who will decide its agenda, membership, working methods and timetable, and how it will forge links with government and Parliament. Well-designed conventions can take six months to establish and significant funding to run properly, so although planning can start now it is unlikely that a convention can be established until the next Parliament.

For more on constitutional conventions, see the Unit's [blogpost here](#).

PARLIAMENT



Appointment of the new Commons Clerk

Anyone following UK (or indeed Australian) political news this summer cannot have missed the row over selection of the next House of Commons Clerk. That the appointment of a parliamentary official - even at this level of seniority - achieved such visibility was unusual, to say the least. Coverage resulted partly from the classic 'silly season' when there is little political news. However, it also reflected the seriousness of the questions surrounding governance of the Commons and the depth of some of the personal animosities involved - particularly surrounding Speaker John Bercow.

The vacancy resulted from retirement by Sir Robert Rogers as Clerk, announced in April. The Clerk is the Commons' most senior official, acting as both its chief procedural adviser and chief executive, heading a staff of roughly 1750. Rogers was appointed in 2011 following an advertisement open only to existing Westminster officials or officials from the devolved legislatures. In contrast, the appointment of his successor was, for the first time, an open competition. The selection panel was chaired by the Speaker, and included five other senior figures. In late July they passed the name of Carol Mills, a senior Australian parliamentary official, for approval as preferred candidate to Number 10. At this point briefing and counter-briefing began about the appropriateness of the process, and the candidate herself. Aside from personal clashes, arguments focused on the suitability of a non-clerk for the role, and the tensions between the procedural and managerial aspects of the job.

After much controversy, during which the Speaker's own role appeared to be under fire, matters were temporarily resolved in a [debate](#) on 10 September sponsored by Conservative backbencher Jesse Norman. Prior to the debate Bercow had [announced a 'pause'](#) in the appointment. The debate itself, facilitated by the Backbench Business Committee, agreed the establishment of a new select committee on House of Commons Governance - to be chaired by former Commons Leader and now Labour backbencher Jack Straw. This committee will review options for splitting the post, and potentially wider matters such as possibilities for greater shared services with the House of Lords. Notably in the Australian Parliament Carol Mills is responsible for administrative services (security, catering, etc.) across both chambers, each of which have their own Clerk. In the debate it was explained that the option for separating Clerk from Chief Executive roles had been considered before the advertisement, and to an extent by the panel itself. It has also previously been considered, and rejected, in three separate external reviews (Ibbs in 1990, Braithwaite in 1999 and Tebbit in 2007 - all usefully summarised [here](#)). Since Rogers retired at the end of August, former Clerk Assistant David Natzler is in effect acting as Clerk for the time being.

More pressures for reform of public bill committee membership

On 30 June John Bercow gave a Study of Parliament Group [lecture](#), drawing attention to the need to reform membership of Commons public bill committees. This suggestion closely mirrored recommendations from our 2013 Rowntree-funded report [Fitting the Bill](#). The stark contrast between membership rules for select committees (in the wake of the [Wright committee reforms](#)) and public bill committees was also illustrated in June by election of Conservative backbencher Sarah Wollaston as chair of the Health Select Committee. Wollaston (a former GP) was previously the textbook example of a subject expert denied membership of a bill committee by her whips.

For further analysis of these questions see the Unit blogpost [here](#).

Reshuffle leaves Lords Leader outside Cabinet

Controversies have also abounded in the Lords. July's Cabinet reshuffle saw Leader of the Lords Jonathan Hill depart to become EU Commissioner. It was soon revealed that his replacement, Tina Stowell, would not be paid a Cabinet salary, nor be a 'full' member of Cabinet, instead merely 'attending Cabinet'. The space vacated by Hill was effectively taken by William Hague, who became Leader of the Commons - the last two holders of this post (George Young and Andrew Lansley) served from outside Cabinet.

The decision caused consternation in the Lords, where members expressed concern that the chamber was being downgraded, and that peers' voices would no longer be adequately heard. The 2014 Cabinet is almost certainly the first in history without a single peer; until 2005 two peers were routinely included - the Lord Chancellor and Lords Leader. David Cameron was forced to assure peers that this situation was temporary, but did nothing to remedy it. The Lords Constitution Committee published a [report](#) on the matter on 25 July, and an ill-tempered debate in the Lords followed on 28 July, sponsored by former Commons Speaker Betty Boothroyd. This ended with peers voting overwhelmingly (by 177 votes to 29) for a motion asking Cameron to reconsider. Meg Russell and Robert Hazell [pointed out](#) that the argument demonstrated problems and uncertainties surrounding membership of Cabinet in general, and suggested that the Constitution Committee should conduct a wider inquiry.

For more on this issue see the Unit blogpost [here](#).

Yet more Lords appointments

Soon after the argument about its Leader, the Lords again featured in the headlines due to a new round of prime ministerial appointments. The formal announcement came on 8 August, which from the government's point of view conveniently avoided parliamentary debate due to the summer recess. In total 22 new peers were named: twelve Conservative, six Liberal Democrat, three Labour and one Democratic Unionist Party. This takes the total size of the Lords to almost 850 (including those on leave of absence, etc.): some 180 higher than in 1999. Under the coalition alone, the chamber's size has grown by approximately 120. Immediately before the announcement Lord Speaker Frances D' Souza spoke out (for the second time) in [The Times](#) about the detrimental effects for the chamber of ever-increasing size. Her plea for some peers to retire (using the new provisions of the House of Lords Reform Act 2014: see [Monitor 57](#)) is unfortunately due to have marginal effects at best. Instead an agreed formula for the number and party-political balance of future Lords appointments is urgently needed.

For further analysis see the [Unit blogpost here](#).

Church of England approves women bishops

In July the [General Synod of the Church of England](#) passed legislation to enable women to be consecrated as bishops. The draft [Bishops and Priests \(Consecration and Ordination of Women\)](#) Measure was backed by all three Houses of Synod (Bishops, Clergy and Laity), having earlier been approved by all of the Church's diocesan synods. A similar attempt to legislate for women bishops was [defeated in 2012](#), when the House of Laity fell just short of the required two-thirds majority.

The Measure must now be approved by Parliament. Shortly after the Synod vote, the [Ecclesiastical Committee](#), a cross-party committee of parliamentarians from both Houses that examines draft legislation from the General Synod, unanimously approved the legislation. The next step is for it to be considered by the Commons and the Lords, expected in October. If both approve, the legislation will receive Royal Assent. This would enable it to be formally enacted by the General Synod in November, at which point it would become legal to consecrate women bishops.

The Church of England has expressed a desire for the first women bishops to be fast-tracked to the House of Lords. At present [26 bishops](#) sit in the Lords: five by virtue of their diocese, with the remaining seats taken by the 21 longest-serving diocesan bishops. To prevent further delay in women bishops joining the Lords, the Church is seeking agreement with political parties on amending the eligibility criteria in the [Bishoprics Act 1878](#).

EXECUTIVE



Government reshuffle

David Cameron's reshuffle in July was notable for what was missing as well as what happened. There was no equivalent reshuffle of Liberal Democrat ministers. Reshuffles have been less frequent under Cameron because of the constraints of coalition, and the Civil Service has appreciated ministers staying in post for longer. Nick Clegg has reshuffled only when forced to do so; possibly because the Lib Dems have a smaller pool to draw upon, and fewer backbenchers eager for office.

A second missing item was the lack of a Cabinet minister's salary for the new Leader of the Lords, Baroness Stowell, which greatly upset the House of Lords. The reason was the statutory limit on the number of Cabinet-level salaries which can be paid. Cameron could have saved two Cabinet posts if he had combined the three territorial Secretaries of State into a single Minister for the Union, a proposal floated since the Scottish independence referendum, first [proposed by the Constitution Unit in 2001](#).

A third unremarked consequence was the impact on Special Advisers, whose jobs are linked to those of their minister. Some were taken on by their successors, but others lost their jobs. Special Advisers can experience high turnover, with no career structure or prospects for promotion. More than half the Special Advisers now working in Whitehall joined after the start of the coalition government. But a surprise finding from our [Special Advisers project](#) was that the turnover of senior civil servants can be even higher, so in some departments Special Advisers could claim a longer institutional memory than the permanent civil service.

Departure of Head of the Civil Service

The departure of Sir Bob Kerslake as Head of the Civil Service was announced on the same day as the Cabinet reshuffle. Cabinet Secretary Sir Jeremy Heywood has taken on the role, but a new CEO is to be appointed as the senior official for efficiency and reform, leading the commercial, procurement, digital, property, human resources, project management, and shared services functions co-ordinated by Cabinet Office. In a [valedictory lecture](#) at the Institute for Government on 26 September Sir Bob warned that Whitehall faced a further five years of spending cuts, which would require stronger central leadership, greater sharing of services, and potentially fewer departments.

DEVOLUTION



The Scottish referendum campaigns

All referendums are a tale of two campaigns. Those in the Scottish independence referendum could scarcely have been more different.

The Yes campaign benefitted from organisation based on the Scottish Nationalist Party's highly successful election machine, energetic activists, and a message based around a positive proposition. Its strategy was based on engaging with voters – particularly traditional Labour working-class voters in Glasgow and the West of Scotland – directly and at a grass-roots level. Its [chief strategist has written](#) about how its message was based on moving from 'could' to 'should' to 'must', as part of a process of helping voters' attitudes [develop toward independence](#).

The Yes side's chief shortcomings were threefold:

1. The inherent flaws in the Scottish government's plans for independence, notably over currency and the European Union.
2. The organisational rigidity, which led to the formal structures of the Yes campaign being bypassed by energetic, mostly left-wing activists later in the campaign when they saw the campaign failing to engage directly with issues they thought were vital. This appears to have underpinned the late 'Yes' surge.
3. A habit for Yes activists to believe that their own energy and enthusiasm were shared across the whole of Scottish society. Indeed, they appear to have [believed in victory until votes started coming in](#), even though their own private polling supported most published polling.

The No side had different problems. Differences between Labour, Conservatives and the Liberal Democrats meant that shared campaigning events or even platforms were problematic. The negative approach that characterised much of the campaign (dubbed 'project fear' by the Yes side) was effective, and something on which all No campaigners could agree. Attempts at positive messaging created greater difficulties. Emotional appeals about the Union and sharing with the rest of the UK had little resonance in the working class communities which formed the key battlegrounds. Propositions based around 'further devolution' (which a plurality if not majority of Scottish voters clearly wanted at the outset) were [a serious threat to the Yes side](#), but also created strong resistance, particularly from Labour. While all three parties did formulate schemes, the Labour and Conservative ones were very different and appeared relatively late in the day.

In Labour's case it was also both [modest and \(on tax\) convoluted](#). [Joint commitments](#) to deliver further devolution came even later and were attacked by the Yes side for being limited and clearly reactive. Even then, they did little to address the [aspiration for a different sort of society](#) that the Yes side had managed to ignite.

The No side benefitted from a number of factors, including a predisposition for undecided voters to [choose the status quo](#) in constitutional referendums. The noise of the Yes campaign and climate it generated meant that a significant number of No voters preferred to keep their preference quiet, further [wrong-footing the pollsters](#).

Ultimately, the pledges made by the No side may come to haunt them. The commitment to preserve [the Barnett formula](#), led by Gordon Brown, helped provoke a reaction from the Conservatives that opened up the English question and a much wider set of debates. The belief that the pro-Union parties have agreed to a form of 'Devo Max' – maximal home rule, [not a form of enhanced devolution](#) – may ramp up public expectations which will inevitably be dashed. 18 September was not just 'the day the UK was saved', but also the day that running the Union became a great deal more complicated.

Wales: responding to the referendum

On the constitutional front, much was put on hold regarding Wales pending the Scottish referendum. The Wales Bill [completed its passage](#) through the Commons quickly and relatively easily in June, and received its Lords second reading in July before the summer recess. The Committee stage is due in mid-October. But the key issue remains the 'lockstep' for devolved income tax powers (whether the same Welsh rate has to be set for all three tax bands or not). There were rumours that this would be addressed after a Scottish No vote, but nothing was announced in the immediate aftermath of the referendum. Worse, [declarations of support for the Barnett formula](#) by pro-Union parties in Scotland saw a chorus of dismay from Wales (which is poorly served by the formula) and attempts to reassure from Labour politicians, who have talked of a 'Barnett plus'.

The row about the income tax lockstep within the Conservative Party claimed one ministerial scalp, with the [removal of David Jones](#) as Secretary of State for Wales in the July UK Cabinet reshuffle. It falls to his successor, the former junior Wales Office minister Stephen Crabbe, to take the lead in any changes to the Wales bill. He will also lead on the UK government response to the Part 2 report of [the Silk Commission](#) that recommended devolution of further functions including policing, and of further powers regarding planning approval of energy schemes and transport. In order to cope with these expanded responsibilities, it also recommended increasing the size of the National Assembly.

The Welsh government has sought to pre-empt one objection to a larger National Assembly by reducing the number of local councils (from 22 to 10) and elected councillors. This follows the report of a [Commission on Public Service Governance and Delivery](#), chaired by Sir Paul Williams, and will require two pieces of primary legislation, one in the next session. Work within the Welsh government is to be led by Leighton Andrews, who returned to [the Cabinet as part of the reshuffle in September](#) which saw three departures and a reshaping of ministerial responsibilities.

The failure of the UK Prime Minister to address any of the outstanding Welsh issues as part of his immediate response to the Scottish referendum result has led to [repeated calls from First Minister Carwyn Jones](#) for a UK-wide constitutional convention, which have been [taken up by the Labour Party more generally](#). Given the UK government's focus on Scottish and English issues, such a response is natural from a part of the UK which is being overlooked in the new constitutional debate.

Political disharmony and fiscal crisis in Northern Ireland

The Scottish referendum inevitably polarised the electorate. It also polarised Northern Ireland.

What Enoch Powell described as the 'great simplicities' of in-out referendums clearly appealed to both David Cameron and Alex Salmond. But it seems neither gave thought to how it might pollute Northern Ireland's already fractious political atmosphere.

The last time the UK government instigated a poll on Northern Ireland's status was in 1973. The vote was so obviously a sectarian headcount that the [vast majority of Catholics refused to take part](#). At the time it was decided a referendum on the reunification of Northern Ireland with the rest of Ireland would be repeated every decade. This was a concession to loyalist paramilitaries rendered jittery by revelations of talks between the then-Northern Ireland secretary, William Whitelaw, and IRA leaders.

But Whitelaw's successor James Prior wisely decided otherwise in 1983 and by the time Peter Brooke was Secretary of State in the early 1990s the commitment to hold periodic referendums appears to have been forgotten. It therefore did not resurface until the Belfast Agreement of 1998.

However, the Agreement specified that a referendum on reunification would only take place when the Secretary of State deemed a majority in favour likely. This is unlikely to happen any time soon. Just 15 per cent supported a united Ireland as even a long-term goal in the [2013 Northern Ireland Life and Times Survey](#), compared with 66 per cent who favoured continued UK membership. Of these, 12 per cent favoured direct rule from Westminster while 54 per cent backed devolved government.

This has not stopped Northern Ireland's principal sectarian political leaders clashing over the issue. Soon after the Scottish No vote, Sinn Féin (SF) [demanded a referendum on the border](#) which was rejected by the Democratic Unionist Party (DUP). Other parties dismissed the idea as a 'distraction'.

Relations between SF and the DUP are currently dire. Deadlock on the implementation of the Conservatives' welfare 'reforms' (SF opposed, DUP in favour) is having the knock-on effect of deep cuts in public expenditure. This is on top of austerity cuts and those occasioned by the longstanding refusal of the Northern Ireland political class to face the challenge of paying for water.

In September the DUP First Minister, Peter Robinson, shuffled his ministerial pack, replacing ministers responsible for health and social housing. But the underlying fiscal crisis remains and the Stormont ship continues to head towards the political rocks.

COURTS AND THE JUDICIARY



New Law Officers

The Attorney General Dominic Grieve and the Solicitor General Oliver Heald were both dismissed in the government reshuffle in July, reflecting the Prime Minister's increasingly Eurosceptic stance in response to backbench and UKIP pressures.

Their successors are Jeremy Wright as Attorney and Robert Buckland as Solicitor General. With little experience of the law or politics, they had to be sworn in as QCs on the same day that they were sworn in as Law Officers. The judges had come to rely on Dominic Grieve as the last remaining protector of the rule of law within the government, and are privately concerned at the appointment of two people with no legal standing or reputation. Dominic Grieve has not gone quietly, expressing his dismay that the Conservatives might be contemplating leaving the ECHR. He is to give a public lecture at UCL on 3 December.

Changes to Courts Service Board

In July the Lord Chancellor announced changes to the Courts Service Framework Document to allow for an additional non-executive director, and temporary additional executive directors to drive through further big changes to the Courts Service. These will use the additional £75 million per annum allocated by the Treasury over the five years from 2015-16 to upgrade IT systems and rationalise the Courts Service estate.

Review of judicial diversity

In April the shadow Lord Chancellor Sadiq Khan invited Sir Geoffrey Bindman and Karon Monaghan QC to lead a review of how to improve diversity in the judiciary. They were encouraged to consider more radical measures such as positive discrimination and gender quotas. The Unit's Judicial Independence project organised a private seminar at Matrix Chambers on the legality and feasibility of gender quotas on 31 July. The recommendations from the review are expected in the autumn.

EUROPE



New President and new Commission in Europe

In November Jean-Claude Juncker succeeds José Manuel Barroso as President of the European Commission. Juncker's election is the first to follow the procedures set out in the Treaty of Lisbon. This requires the European Council to nominate a candidate taking into account the result of the EU parliamentary election. The nominee must then achieve a majority vote in the European Parliament (EP).

However, the Treaty does not specify the means and extent to which the Council shall take election results into account. For this reason, European political parties were urged to put forward a *Spitzenkandidat* (lead candidate) ahead of the EP elections. The Council could then choose to nominate the *Spitzenkandidat* of the most popular party following the elections. It was hoped that this process would create a link between the citizens' vote in the EP elections and the election of the President, in an [effort](#) to make procedures more democratic.

With the emergence of the European People's Party (EPP) as the largest group in the May elections, the question was whether the Council would nominate Juncker, the EPP's *Spitzenkandidat*. [Commentators](#) noted that if it did not, the transparency and democracy of EU procedures would be undermined. David Cameron strongly opposed the nomination, arguing that Juncker's involvement in seeking to increase the powers of the EU to date, made him the [wrong candidate to lead EU reform](#). However, Cameron was soundly defeated as EU leaders voted 26 to 2 in favour of the nomination on 27 June. The EP elected Juncker on 15 July.

Although in this case the *Spitzenkandidat* process did create a link between the citizens' vote and the elected President as intended, [EU leaders](#) have since reassured critics the process will be reviewed. With his election nevertheless unaffected, Juncker has announced his [new commissioners](#). If approved by the EP, the new Commission will take office on 1 November.

INTERNATIONAL



Drafting a new constitution for Libya

Following the ousting of Colonel Gaddafi amidst the Arab Spring revolution of 2011, Libya's political situation has been somewhat tumultuous. In the aftermath of the revolution, the National Transitional Council (NTC), a political body formed by the Gaddafi opposition who led the uprising against his regime, published an [interim constitution](#). The NTC named themselves as the interim executive under this charter, with a remit to govern until elections could be held and a permanent constitution put in place. Elections took place in 2012 and a temporary General National Congress (GNC) was appointed, which was replaced earlier this year by a newly established House of Representatives. However, Libya remains without a permanent constitution. Amidst challenges from opposition groups as to the authority of the current Parliament and a dramatic escalation in internal conflict within the country, the climate for constitution building is testing.

Despite the fragile political situation, steps have been taken to commence the drafting process. In February of this year, elections took place to appoint the members of a [Constitutional Drafting Assembly \(CDA\)](#). The Assembly was designed to have 60 members popularly elected from Libya's three regions, with representation from minority groups and women. Whilst turnout was low and violence and boycotts made elections impossible in some areas, 47 seats were originally filled, with a further 8 members later appointed. The CDA first convened in April, and was tasked with drafting a new constitution within 120 days. This was an over-ambitious remit given the multiple obstacles faced by the Assembly.

One particularly contentious issue is the role that [Sharia Law](#) will play in the constitution. The current chaos in the country is a product of a [multitude of factors and political players](#), yet a crucial element of existing tensions is undoubtedly the conflict between Islamic groups and Arab Nationalists. This raises questions as to the position in the hierarchy of laws that Sharia will take and how it will be interpreted. [Lawyers for Justice in Libya](#) have advised on the options available, from implementing Sharia as a foundational source of legislation (as in Iraq), to the recognition of the exclusive jurisdiction of Sharia only for certain issues (as in Jordan). The latter interpretation would be somewhat similar to the personal law/non-personal law distinction of the Gaddafi regime. Navigating the potential contradictions between religious law and international human rights norms is another difficult hurdle.

Deepening tribal rivalries and concerns of minority groups will also need to be addressed, as will demands for greater regional autonomy in the east. [Calls for restoration](#) of the country's post-independence constitution of 1951, fuelled by nostalgia for the pre-Gaddafi era, may further hamper their

efforts at finding a contemporary solution. Unrealistic deadlines aside, reaching a constitutional settlement which can achieve widespread popular support and have a chance of long-term survival will be no easy task.

Constitutional drafting in Tanzania suspended

Tanzania has been working on drafting a new constitution since its Parliament adopted the Constitutional Review Act in November 2011. The drafting has proceeded slowly. A 30-member drafting commission was selected in April 2012. This commission spent nearly a year collecting the views of the public during a nationwide public consultation process before producing a constitutional draft in June 2013. Each district in Tanzania was then given an opportunity to suggest changes to the commission's draft. The commission used these recommendations to create a second draft that was submitted to the President of Tanzania in December 2013.

The draft constitution now sits with Tanzania's National Constituent Assembly, which is composed of 640 members. The Constituent Assembly has been considering the draft on a chapter-by-chapter basis for the last six months. Each chapter needs to be approved by two-thirds of the members of the Assembly. It is unclear how many chapters have yet to be approved. Once the Constituent Assembly completes its work, the constitution will still need to be promulgated in a national referendum.

The President of Tanzania had promised a new constitution before the October 2015 elections but this now seems impossible. Recent [reports](#) suggest that the Constituent Assembly will have until 4 October to work on the draft, at which point drafting will be suspended until after the election. However, this does not mean there will be no constitutional changes in Tanzania before the election. Party leaders have suggested minor changes to enhance the fairness of the upcoming election, such as the creation of an independent electoral commission, provisions that allow presidential election results to be disputed in the courts and a requirement that the President must have the support of at least half of voters. These changes are likely to be made through a constitutional amendment in the coming months.

Judicial independence threatened in Bangladesh

Bangladesh's constitution was amended on 17 September 2014. The amendment restores the original text of article 96, which was previously amended in 1978. The 1978 amendment created a Supreme Judicial Council that consisted of the Chief Justice of the Supreme Court and two other judges. The primary responsibility of the new body was to investigate and discipline judges for misbehaviour and incapacity. The amendment effectively transferred the power to discipline judges from the Bangladeshi Parliament to the

judiciary, significantly enhancing the autonomy, and hence independence, of the judiciary.

The changes made to Bangladesh's constitution on 17 September abolish the Supreme Judicial Council, returning to Parliament the power to discipline judges. The impeachment of judges now requires the support of two-thirds of the total number of members of the Bangladeshi Parliament, giving it unilateral control over judicial discipline. The implications of this amendment are larger than they first appear because the constitution specifies that members of the Election Commission ([118.5](#)), the Auditor-General ([129.2](#)) and members of the Public Service Commissions ([139.2](#)) shall all be removed in the same manner as judges of the Supreme Court. Thus, the Bangladeshi Parliament now has the unilateral ability to remove members of all constitutionally established regulatory and oversight bodies. Although advocates of the recent amendment argue that these regulatory and oversight bodies need to be more accountable to elected officials, the concern is that Parliament has infringed the independence of these bodies. This is not an idle concern because the Awami League, a social democratic party, holds nearly 80 per cent of the seats in Parliament – 13 per cent more than is necessary to remove members of the judiciary and other independent regulatory agencies.

Will Nepal's Constituent Assembly meet its deadline?

Nepal has been drafting a new constitution for nearly six years. In 2007 it put an interim constitution into force, intended to be a short-term compromise between the seven major political parties that operate in Nepal. The interim constitution set up a procedure for selecting a Constituent Assembly that would draft a permanent constitution for the country. A Constituent Assembly was selected in 2008 but was unable to reach agreement and was disbanded in May 2012.

A new Constituent Assembly was elected in November 2013 and in January resumed the work of its predecessor. The new Assembly set a self-imposed one-year deadline to complete its work, so if it is successful, Nepal should have a draft constitution to consider by January 2015. However, it seems increasingly likely that the draft will not be ready.

As of August 2014, the Assembly was severely behind schedule. It still needed to reach agreement on several major issues, including the structure of the state (federal or not), the form of government, the electoral system, and the structure of the judiciary. The issue of federalism is extremely contentious. The 2007 interim constitution does provide for a federalist system which is strongly supported by Maoist parties but about which many members of the Constituent Assembly have reservations. If the Constituent Assembly is to meet its drafting deadline, then its members need to find some compromise on these major issues quickly. One possibility is to use the public consultation scheduled for mid-November to resolve the current impasse. Such a solution has the dual advantage

of allowing the Constituent Assembly to keep to its proposed timetable while also enabling it to see if there is a public consensus over any of the options under consideration.

Thailand's latest interim constitution

On 22 July 2014 King Bhumibol Adulyadej signed Thailand's newest interim constitution into law. This was enacted by the National Council of Peace and Order (NCPO), Thailand's new ruling military junta which staged the coup d'état against the caretaker government in May 2014. This constitution is the country's 18th in 82 years. It has major consequences: the suspension of parliamentary rule, the centralisation of power in the hands of the NCPO (and its Chairman, General Prayuth Chan-ocha), and the marginalisation of former politicians and political parties.

Section 6 of the new charter establishes a fully appointed legislative body, the National Legislative Assembly, which has subsequently been filled with army officers and pro-coup loyalists. This facilitated the unanimous vote for General Prayuth to become the new prime minister on 26 August. Certain clauses have granted the General unprecedented legal and political power; Section 44 in particular gives Prayuth authority above the executive, legislative and judicial branches. The interim constitution also allows for the NCPO to direct the drafting of the upcoming permanent constitution without the usual requirement of a public referendum.

Despite this show of legal and political consolidation, it remains uncertain that the NCPO will be able to push forward its preferred constitutional arrangement. Any constitution promulgated must face the court of domestic and international opinion, an arena in which the junta has less control.

For more detail on this topic, see the recent Unit blogpost [here](#).

Indigenous rights in the Commonwealth

Australia is edging closer towards a referendum over a constitutional change to recognise the rights of Aboriginal and Torres Strait Islander peoples. When originally promulgated in 1900, the Australian constitution explicitly discriminated against indigenous peoples. They were not counted as citizens in any census and the federal government had no power to legislate for them. Although this changed following [a 1967 referendum](#), the constitution continues to provide inadequate protection for Aboriginals in the eyes of many. Recent years have seen considerable progress towards reconciliation between the Australian state and Aboriginals. For example, in 2008 Prime Minister [Kevin Rudd apologised](#) for the mistreatment of the 'Stolen Generation'.

Cross-party support for constitutional reform has existed since 2007, and in early 2013 Parliament passed the [Aboriginal and Torres Strait Islander Peoples Recognition Act](#). With a sunset clause of two years, the Act aims to prompt a referendum by 2015. However, the process may not be straightforward. The

substance of the constitutional change has yet to be agreed, with proposals ranging from rewording of the preamble to a de facto Bill of Rights (which the Australian constitution currently lacks). Current Prime Minister Tony Abbot has expressed concern over the likely success of the latter.

New Zealand has a much better history when it comes to indigenous rights, largely due to the 1840 [Treaty of Waitangi](#). This agreement between the British Crown and Maori chiefs, which effectively created New Zealand, recognised Maori ownership of land and gave them the same rights as British subjects. In 1975 the [Waitangi Tribunal](#) was established to identify breaches to the Treaty and to recommend ways to redress violations. Its effectiveness is limited, however, because the Treaty is not a legally enforceable document. Similarly, New Zealand is now a signatory to the [UN Declaration on the Rights of Indigenous Peoples](#) although this too is unenforceable. While the [Bill of Rights Act](#) and the [Human Rights Act](#) safeguard rights more generally, fundamental law does not exist in New Zealand and the courts cannot invalidate incompatible laws. Entrenched protection of indigenous rights would require wider ranging changes to New Zealand's constitutional settlement. [A report](#) published by the Constitutional Advisory Panel in November 2013 suggests that this is unlikely to happen in the near future, although it does recommend that the Bill of Rights be entrenched in law and the role of the judiciary strengthened.

Elsewhere in the Commonwealth, Canada enshrines the rights of the Indian, Inuit and Métis peoples in its constitution. The [Constitution Act 1982](#) reaffirms all 'existing aboriginal and treaty rights of the aboriginal peoples of Canada', protecting their rights to land and any other rights and freedoms granted to them under the [Royal Proclamation of 1763](#). The constitution also provides for Aboriginal self-governance. [A UN report](#) published in July 2014 did not recommend any major constitutional changes and focussed instead on the need to address socio-economic issues in Aboriginal communities. Canada is therefore ahead of both Australia and New Zealand, but demonstrates that constitutional protection of indigenous rights is just one step towards eradicating inequality.

People on the move

In the July reshuffle, Leader of the Lords **Jonathan Hill** departed to become EU Commissioner and was replaced by **Baroness Stowell**. **William Hague** became Leader of the Commons while **Philip Hammond** succeeded him as Foreign Secretary. **Michael Gove** became Chief Whip, replacing **Sir George Young** who stood down from Cabinet. The reshuffle also saw **Ken Clarke** resign from Cabinet.

Jeremy Wright replaces **Dominic Grieve** as Attorney General, and **Robert Buckland** is the new Solicitor General.

In the Ministry of Justice, **Catherine Lee** is Director General, Law and Access to Justice Group; **Nick Goodwin** is Director of Judicial Policy, Pay and Pensions; **Helen Whitehouse** is Deputy Director for Judicial Policy.

Sir Bob Kerslake stepped down as Head of the Civil Service. **Lord Lexden**, **Baroness Wheatcroft**, **Lord Brennan**, **Baroness Dean of Thornton-le-Fylde** and **Baroness Taylor of Bolton** are now members of the Lords Constitution Committee. **Lord Lang of Monkton** is chair and **Antony Willott** is the new Clerk.

Constitution Unit news

Launch of Special Advisers book

On 11 September Robert Hazell and Ben Yong launched their new book *Special Advisers: Who they are, what they do, and why they matter at the Institute for Government*. With the help of David Laughrin, Peter Waller and Hilary Jackson they had interviewed 100 people in and around Whitehall to get a rounded picture of the work of Special Advisers; and with the help of a team of interns Ben Yong had compiled a database of the 626 'spads' who have worked in Whitehall since 1979. At the launch, Ben Yong presented the demographic data, and Robert Hazell then discussed ways in which spads could be made more effective. David Laughrin presented the handbook *Being a Special Adviser*, and other resource materials that the Unit has gathered together for new Special Advisers.

Three former Special Advisers, Jo Foster (Deputy Chief of Staff to Nick Clegg), Nick Hillman (who worked for David Willetts) and Stewart Wood (Adviser to Gordon Brown) then commented on the project's findings. They broadly welcomed the main recommendations, that Special Advisers are a mini profession in Whitehall who need to be more professionally managed in terms of their recruitment, support and supervision, and development of their professional skills.

Special Advisers: Who they are, what they do, and why they matter *is now available from Hart Publishing*. Monitor subscribers can get a 20% discount when [ordering online](#) by entering the code 'AF1' into the voucher field and clicking 'apply'.

To read more about the launch, see the event roundup blogpost [here](#).

New ESRC project: Representative Audit of Britain

The Unit's Dr Jennifer van Heerde-Hudson, along with Dr Rosie Campbell (Birkbeck) and Dr Wolfgang Rudig (Strathclyde), has won funding from the Economic and Social Research Council (ESRC) to study parliamentary candidates and MPs for the 2015 general election.

The Representative Audit of Britain (ES/L016508/1) brings together eight scholars, from seven British universities, to examine key questions relating to Britain's political class across key areas:

- Gender (Campbell, Prof Sarah Childs, Bristol & Prof Joni Lovenduski, Birkbeck)
- Electoral competition (vanHeerde-Hudson & Dr Caitlin Milazzo, Nottingham)
- Race/ethnicity (Dr Maria Sobolewska, Oxford & Campbell)
- Political careers (Campbell, Dr Peter Allen, Queen Mary & vanHeerde-Hudson)
- Candidates in comparative perspective (Rudig & vanHeerde-Hudson)

Against the backdrop of partisan dealignment and broader disengagement with politics, the project will combine biographical, socio-demographic, electoral and attitudinal data on candidates and MPs to address a range of topics, including: examining and comparing the career trajectories of British politicians; the professionalisation of the political class; the relationship between socio-demographics, routes into Parliament and career trajectory; the representation of working class and BME communities and wider debates on representation; understanding elite versus public attitudes on key issues such as taxation, immigration, Europe and the provision of public services; the role of gender and political recruitment; and socio-demographics, electoral competition and outcomes.

In addition to providing rigorous analyses of the 2015 general election cohort, the project extends the 1992 [British Candidate / British Representation studies](#) (1997-2010) and [Candidate Study](#) (2010) allowing comparisons over time, facilitates elite versus mass comparisons by linking with the [British](#)

[Election Study](#), and allows international comparison via the [Comparative Candidates Survey](#).

The 28-month project kicks off in January 2015. It sits alongside an existing project, [Parliamentary Candidates UK](#), providing analysis of parliamentary candidates from 1945 and timely analysis of the 2015 general election.

Staff updates

Farewell to Christine Stuart

Christine Stuart has been working with us on the [Constitute](#) website. Her work on Constitute has been invaluable. At some point over the last year, she has worked on more than half of the constitutions available on Constitute. She also solved some technical problems which originally prohibited us from uploading multi-document constitutions to the site (like those in force in Sweden and Israel). In her final months on the project, she used the protocol she developed to prepare the texts of New Zealand's and the United Kingdom's constitutions for inclusion on the site. These two documents will be uploaded soon.

Aside from her work on Constitute, Christine contributed regularly to the Monitor and the Constitution Unit blog. She is now working at the NatCen Social Research institute and writing a Constitution Unit report on the UK's constitution with James Melton. We wish Christine all the best in her future career.

Promotions

Two Unit staff received promotions over the summer: Meg Russell became a Professor and James Melton became a Senior Lecturer, effective from 1 October 2014. We would like to congratulate them both and wish them all the best in their new roles.

Interns

The Unit is grateful for the hard work and diligence of our interns. Thanks to the Summer 2014 interns Daniel Helen, Jam Kraprayoon, Katie O'Donoghue, Artemis Photiadou, Michelle Silongan and James Sharpe.

Unit events

To find out more about our events, visit the Constitution Unit [event](#) page.

Seminars are free and open to all. They are held in the Council Room, Rubin Building, 29-30 Tavistock Sq.

The Day After Judgement: Scotland and the UK after the referendum

Professors Iain McLean & Jim Gallagher

22 October 2014, 1pm

Due to high demand this event will take place in the Archaeology Lecture Theatre G6, 31-34 Gordon Square

[Register here](#)

Understanding the Re-emergence of the English Question

Professor Michael Kenny

8 December 2014, 1pm

[Register here](#)

Reforming Electoral Law

Nicholas Paines QC and Henni Ouahes

28 January 2015, 1pm

These seminars are funded by the family of Barbara Farbey, late of UCL, who greatly enjoyed them.

Watch our previous events online on our [Vimeo page](#).

Bulletin Board

Unit in the news

- Robert Hazell rejects possibility of Queen's abdication, following Spanish King's decision to step down ([AFP](#) 2 June)
- Meg Russell on the Lords Leader debate ([Politics.co.uk](#) 16 July)
- Meg Russell on unsustainable House of Lords appointments ([The Times: Paywall](#) 24 July, [BBC Westminster Hour](#) 27 July)
- Robert Hazell is interviewed on 'Scotland Votes: What's at Stake for the UK' ([BBC2 now available on iPlayer](#) 12 August)
- Robert Hazell comments on the Queen's silence over the Scotland debate ([FT](#) 9 September)
- Robert Hazell comments on what will happen to the Queen in the case of Scottish independence ([BBC news](#) 11 September, [Bloomberg](#) 16 September)
- Robert Hazell is quoted in 'Nine legal questions if Scotland votes yes' ([The Guardian](#) 11 September)
- Robert Hazell on the Conservative Party plea to Scotland ([CBC News](#) 11 September)
- Robert Hazell questions Alex Salmond's 18-month independence timetable ([The Wall Street Journal](#) 11 September, [CTC News](#) 14 September)
- Bob Morris discusses the role of the Queen in the event of Scottish independence ([South China Morning Post](#) 15 September)
- Alan Trench highlights there is 'no simple solution' to the West Lothian question ([Huffington Post](#) 19 September)
- Meg Russell on the constitutional fallout from the Scottish referendum ([Observer](#) 22 September, [BBC World Service](#) 22 September)
- Robert Hazell on Cameron's comments about the Queen after the No vote ([Daily Mail](#) 24 September)
- Robert Hazell on the English Question ([Economist](#) 27 September)

Unit publications

Robert Hazell *Special Advisers: Who they are, What they do, and Why they matter* (Hart Publishing 2014) order [online](#) and use voucher code 'AF1' for a 20% discount

James Melton 'Constitute: The World's Constitutions to Read, Search, and Compare' *Journal of Web Semantics* (2014, forthcoming) with Zachary Elkins, Tom Ginsburg, Robert Shaffer, Juan F. Sequeda and Daniel Miranker view [PDF](#)

James Melton 'Does De Jure Judicial Independence Really Matter? A Re-evaluation of Explanations for Judicial Independence' *Journal of Law and Courts* (2014) 2.2: 187-217 with Tom Ginsburg view [online](#)

James Melton 'Constitutions and the Management of Elections' (2014) in *Advancing Electoral Integrity* eds. Pippa Norris, Richard W. Frank & Ferran Martinez i Coma. Oxford: Oxford University Press, 94-117 with Svitlana Chernykh, Zachary Elkins and Tom Ginsburg view [online](#) | [Buy the Book](#)

Bob Morris 'Half-Opening Cans of Worms: The Present State of "High" Anglican Establishment', *Law and Justice* (2014) No. 172, 10-26

Publications to note

Phil Cowley and Mark Stuart *The Four Year Itch: Dissension amongst the Coalition's Parliamentary Parties, 2013-2014* (University of Nottingham, 2014) view [PDF](#)

John Hutton and Leigh Lewis *How to be a Minister: A 21st Century guide* (London: Biteback Publishing, 2014)

Lawrence McNamara and Daniella Lock *Closed Material Procedures Under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State* (Bingham Centre Working Paper, 2014) view [PDF](#)

Kenneth O. Morgan *Revolution to Devolution: Reflections on Welsh Democracy* (University of Wales Press, 2014)

Jim Gallagher *The Day After Judgement: Scotland and the UK after the referendum* (2014) view [online](#)



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