



Political and Constitutional Reform Committee

Oral evidence: [The constitutional role of the judiciary if there were a codified constitution](#), HC 802

Thursday 9 January 2014

Ordered by the House of Commons to be published on 9 January 2014.

Written evidence from witnesses:

- [Professor John Bell](#)
- [Dr Patrick O'Brien](#)
- [Professor Dawn Oliver](#)

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Members present: Mr Graham Allen (Chair); Tracey Crouch; Mark Durkan; Paul Flynn; Fabian Hamilton

Questions 156-182

Witnesses: **Professor Dawn Oliver QC FBA**, Professional of Constitutional Law, University College London, **Dr Patrick O'Brien**, University College London, **Professor John Bell**, Director, Centre for Public Law, University of Cambridge, and **Dr Michèle Olivier**, Reader, Law School, University of Hull, gave evidence.

Chair: Welcome. We will be friendly—you are here to help us and we are not here to give you a hard time. We are here to pick your brains, really. As you probably know, we are in the middle of our inquiry on the constitutional role of the judiciary if there were to be a codified constitution. We are doing a very big piece of work which will culminate in the document, *A written constitution or not?* A very important part of that deals with the role of the judiciary. We hope to be able to produce something that will inspire a lot of debate, not least in the run-up to manifesto writing in 482 days' time—but who's counting?

Would anyone like to say something before we start questions?

All witnesses indicated dissent.

Chair: Okay, we will jump straight into questions. I will ask Mark to start us off, because, unfortunately, he has to leave by 10.30.

Q156 Mark Durkan: This is a wide question, and the answer may be wide and perhaps varied as well. How effective have those countries that have a written constitution been in retaining parliamentary sovereignty? Do you have any particular tips or models where it has been more successful or less successful?

Professor Oliver: Most countries with written or codified constitutions do have supreme courts that have power to strike down legislation or to refuse to give effect to legislation that they consider to be unconstitutional. On the other hand, some countries do not, or have very little of it, and that has worked quite well. The Nordic countries in particular, and especially Sweden and Finland, have very little in the way of judicial review in the American sense, yet they do not tend to pass unconstitutional legislation.

I think that is partly because, especially in Finland, there is very good intra-parliamentary scrutiny of Bills before they are passed by a very highly regarded Committee, perhaps a bit like the Constitution Committee in the House of Lords. It takes evidence, hears from lawyers and reports on whether a Bill is likely to be unconstitutional. That is almost always taken on board and the Government amend Bills so you do not get unconstitutional Bills.

Under the Netherlands constitution, the courts are specifically not permitted to strike down legislation on the grounds of unconstitutionality, but the point there is that the Netherlands is a monist country, which means that its international treaties, such as the European convention and so on, are directly effective; they have domestic effect. So if there is, let us say, an Act that looks a bit contrary to human rights, it is open to the courts there not to say, “It is unconstitutional,” and strike it down, but to say, “Well, it is incompatible with the European convention, and we won’t give effect to it.”

There are various different ways in which parliamentary sovereignty can be protected in a constitution; nevertheless, there are ways in which the Government and Parliament are inhibited from passing legislation that is incompatible. I hope that that helps.

Professor Bell: Often the reason for having a constitution is to protect Parliament against the Executive. In countries such as France and Germany, for example, one of the roles of the Constitutional Court is to protect procedure in Parliament from being railroaded by the Government, so when there are challenges to procedure, they are often challenges to the way the Executive has tried to railroad legislation, or tried to pass legislation without proper parliamentary scrutiny. To some extent, the success in, say, France or Germany has been in preserving Parliament against a dominant Executive. That is a slightly different function that might be played by constitutional review.

Q157 Mark Durkan: I was going to ask that in relation to Dawn’s comment about how these things work to inhibit the Government and Parliament, to draw the distinction as to where the burden of that inhibition rests. Sorry—I interrupted.

Dr Olivier: Not at all. I can only tell you about the South African experience, where we moved away from parliamentary sovereignty. We had a Westminster system in place—parliamentary sovereignty, where the British constitutional law is common law—but because it was not a proper democratic system and it entrenched minority power, there was a lack of legitimacy in Parliament and in the courts. That is one of the reasons to move away from political control to legal control, where you have a Constitutional Court guarding the constitution and Parliament. Even with the political legitimacy we have at the moment, we are still a plural country where various different

political components are battling it out, so we strive to have ultimate confidence in the Constitutional Court as a guardian of Parliament, all branches of Government and all governmental action.

With a written constitution we introduced elements of monism as well, so our allegiance lies more towards the UN international human rights system, whereas yours may lie towards the European convention. That forms the foundation of the constitutional Bill of Rights. It is a whole different model, but what is relevant and interesting is that our roots are similar due to what we received from the UK as our historical model.

Dr O'Brien: I cannot add much to that. In the Irish constitutional system, there has been no attempt to retain parliamentary sovereignty. Part of the purpose of creating an Irish constitution was to move to a system of popular sovereignty. That said, Irish parliamentary traditions are quite similar to British ones—a lot of the procedures and so on—and the court system is very similar.

I would make the general point that a written constitution can say whatever you want it to say. The Human Rights Act model here has been quite successful in preserving a balance between parliamentary sovereignty and individual rights through a court-based process. A written constitution could take a similar approach. I would also add that from my perspective culture is very important. British constitutional culture is very attracted and committed to the idea of parliamentary sovereignty. I would find it very surprising if that did not persist under a move to a written constitutional model, and there are certainly ways that that could be achieved. In the Irish model, popular sovereignty is much more attractive. There is very little upheaval if the Supreme Court strikes down a statute; that happens relatively regularly and it is accepted as part of the system, but it is a different system.

The system you get is the system that you operate and the system that you want. With the culture of parliamentary sovereignty being so strong here, I expect that to persist.

Professor Oliver: Can I come in again on that? I do think that focusing on what happens before a Bill either gets to Parliament or reaches Royal Assent can be very important in either absolutely preventing or severely inhibiting Government and Parliament from passing unconstitutional legislation.

It is not just about the role of parliamentary Committees, such as our Joint Committee on Human Rights, the Constitution Committee and the Justice Committee and so on. What is also very important is the role upstream in Government of the Attorney-General, departmental lawyers, the Treasury Solicitor and parliamentary counsel, all of whom will be thinking about whether something is compatible with the constitution, and probably advising Government and Members, “Just be careful,” or, “This would be an unwise thing to do,” even if, at the end of the day, they know that if the Act is passed it will not be struck down by the courts, if that is the system that we have. What happens during the preparatory stages is extremely important and works quite well for us now.

Q158 Mark Durkan: To come back to the language of inhibitions and the idea that a sense of inhibition might apply in the context of written constitutions, can you point to any evidence where that inhibition manifests itself as a real working tension, either for Government or Parliament? Many people here who question the idea of a written constitution fear that Parliament is going to find its role qualified, countermanded or overridden on a regular basis.

Professor Bell: Sometimes writing down what you want by way of procedures and so on actually clarifies—compare the mess of the French Fourth Republic and the order of the French fifth

republic. Getting procedures more clarified for Parliament actually enables Parliament to do its job more effectively.

As Dawn says, having pre-enactment scrutiny before a Bill is presented gets any of the inhibitions sorted out when they are out in the public domain. Often, what you are doing is giving time to ensure that the Parliament does its job effectively. That is probably more important than worrying too much about the judge who will come and quash. Even in countries like Germany the number of cases that go to the Constitutional Court on serious business in a year is less than 50, so you are not talking about huge numbers of cases. There are just a number that crop up and relatively few get struck down, so it does not in practice lead to a lot of inhibition. What it does is require you to think through a bit more carefully what the stages are and make sure that you comply with those at the right time.

Q159 Mark Durkan: So it is more highway code than heavy court-driven law?

Professor Bell indicated assent.

Dr O'Brien: But even in somewhere such as the US, the fraction of laws that have been struck down as a proportion of the total laws, just looking in numerical terms, is tiny. It is not as though they strike down every single thing. Most of the time the Senate goes about untrammelled.

Dr Olivier: That has definitely been the case in South Africa as well. The constitution has given clarity and confidence to Members of Parliament of the framework in which they need to work in order to act legitimately, as well as very valuable guidelines to governmental law advisers, to the public service. In drafting a Bill, these are the guidelines. We don't want to go the route of having it struck down, we want it to work right all the way through the preparatory stages, and Parliament also knows these are the guidelines.

We must also remember that a written constitution is only the framework; it does not go into detail. So a whole lot of enabling constitutional legislation was adopted afterwards, for instance on administrative justice, equality and labour relations. Receiving the direction from the constitution, they are then drafted on the guidelines of all the international requirements, but also the political considerations, with the constitutional principles in mind. It is really a guiding light—principles to direct the behaviour of parliamentarians and their actions.

Q160 Mark Durkan: Dawn, you mentioned in the Finnish situation the constitutional law commission working to check Bills for their compatibility; and, in turn, recommendations are then made. Is that to the Government or to Parliament?

Professor Oliver: To Parliament. They report to Parliament.

Q161 Mark Durkan: Do you think such a model could be translated into a UK situation? What would be the tweaks or differences that could be made? This isn't just to you, Dawn. Patrick, when you come in on it, could you compare that with how it works in the Irish constitutional model, where essentially the President has that consideration for referral role before signing?

Professor Oliver: I think our Constitution Committee is a bit close to what the Finns do, although it does it in a more formal way, and, in a way, what the Joint Committee on Human Rights does, though it has a smaller remit. What is special about Finland is that there is a fairly consensual

political system—there is certainly consensus around the constitution. As a result, the reports of the committee, which are very authoritative—with evidence being taken from lawyers and so on, although they are not all lawyers themselves—are highly regarded.

If we were considering having something like that in our system, its efficiency would very much depend upon the atmosphere in which it was operating. The House of Lords is relatively non-partisan and the principles that they have elaborated are not very controversial, really. I am not sure that it would work very well in the House of Commons, where there could well be quite sharp political disagreements. Everyone might agree that human rights are a jolly good thing, but there might be divisions between parties about whether this particular thing about human rights would be constitutional or not. That is very important. If you want to build on the sort of Finnish approach, you need to be sure it is happening in a relatively non-partisan chamber.

Professor Bell: It therefore becomes a question of where it happens. To some extent, it already happens in Cabinet Committees in this country—that is the other place where that scrutiny happens. Looking at legislation for its technical bits happens in some Cabinet Committees. You would be moving that to a more independent body. Quite often, countries such as Sweden, Finland and France would have, in effect, judges or lawyers performing that role on secondment. In terms of public scrutiny, if you go on to the Lagrådet website, you will see a series of Bills in December that it went through; they are fairly short reports.

This provision looks a bit problematic. It is not clear enough. It potentially leads to disproportionality of impact. You need to fix that when you come to do the legislation—it is that sort of point—or if you have perhaps missed a procedural step and you have failed to consult a particular interest and you need to do so before it goes through. To some extent, if the approach is non-technical and, as Dawn says, consensual, if the focus is by people who are not trying to run a particular political horse but are trying to make sure of the fidelity to the constitution, and can be seen to do that by their reports, it actually works quite well to avoid one of the problems—I put this in my report—that otherwise will come up, which is the potential for Members of Parliament thinking that there are procedural irregularities and so on. If you have already sorted that out at the pre-enactment stage, it is easier.

Dr O'Brien: In Ireland, pre-legislative scrutiny in the formal sense is run essentially as a court case—as a judicial review. Under article 26 of the constitution, there is a process whereby if the President, who in the Irish system plays the role played here by the Queen and so has to sign legislation into law, thinks that there is a potential issue regarding constitutionality of a statute or a portion of it, he or she can convene the Council of State, which is like the Privy Council. It will discuss the matter and then the President can choose to refer the matter to the Supreme Court as a judicial review reference. The Supreme Court will then consider the Bill as a whole—obviously, this is pre-legislative, so it is a Bill rather than an Act—and if it finds that the Bill is unconstitutional, the President is then deprived of the power to sign it into law, so it cannot be made law. Another provision of the constitution—article 34.3.3—says that if the Bill is found to be constitutional, it is immunised from scrutiny for ever thereafter.

I am not sure that a court-based process of that kind would be culturally suited to the British system. As I said at the beginning, the Irish model is popular sovereignty, rather than parliamentary sovereignty, and the authority of the courts to determine what is and is not constitutional is unchallenged politically or legally; they have unquestioned authority.

There are also practical problems with a process such as that, because it requires the courts to look at the Bill in abstract, which is something that courts are not very good at. In the ordinary course of affairs, courts will not take cases from imaginary plaintiffs. If you are a plaintiff who is complaining about, say, a road traffic accident, they will not allow you to invoke a mythical

person who might have had this particular problem in order to secure the objective that you want. They will take only real cases and real scenarios.

The article 26 procedure requires the Supreme Court to imagine how the statute might be implemented. If there is an obvious, glaring constitutional anomaly, it can be valuable to get that out of the way in advance, because otherwise that will be hanging over the Bill for years. In a system such as the Irish system, in which constitutionality is an important consideration and could invalidate, say, a tax statute that would have very far-reaching problems, that is valuable, but the hypothetical aspect to it can be very difficult. You can end up with bad statutes, or statutes that are good but are implemented badly, being immunised, and that's a problem.

Q162 Paul Flynn: In Finland, there is a Committee for the Future, whose job is to look at all legislation and judge it by the effects that it will have on people living in 25, 50 and 100 years' time. There is a similar one in Israel, I believe. Do you believe that, along with the constitutional law convention that the commission talked about, these are separate bodies? I know the Committee for the Future has another, rather longer name. Do you think this is a way forward for us to take a look beyond the immediate political priorities and to try to take a point of view that is based on what is likely to happen in the future? A key issue now is the intergenerational unfairness that we have in present government between excessive generosity to the old and terrible neglect of the young, in my view. This is probably done for political advantage, but do you think we can learn something from the Finnish example?

Professor Oliver: I do not know about that committee. John, do you know about it?

Professor Bell: Not that specific committee, but it looks like a different type of impact assessment procedure. It is quite often required now to have impact assessments—you are just going on a bit further with the intergenerational impact. Most of the time we assess that impact relatively short term. Your issue then would be what kind of evidence you can start putting together of what the impact is likely to be. I think most people have enough trouble trying to work out what the impact will be in five years, rather than in 25. The point is that no constitutional procedure I know gives standing or a voice to future generations, rather than the current generations. If you are looking to be innovative, that might be one area that you might wish to look at.

Q163 Paul Flynn: In the Swedish example that you quoted in your evidence, Professor Oliver, you say that Sweden has very limited strike-down powers. Could we change the system here? Do you think that system has any validity here, knowing the great differences there are between ourselves and the Swedes?

Professor Oliver: The Swedish system does very little because the only ground on which there can be strike-down is that the inconsistency is “obvious” or “apparent”. That is obviously an English translation and I do not think we would ever use those words in an Act—it would not be easy to operate. The culture in Sweden is, I think, very much against resort to the courts or even ordinary judicial review, so they find other ways, such as ombudsmen, to resolve their disputes. I am not suggesting that we could transplant the Swedish system over here; I am just saying that there are fairly well functioning liberal democracies where that sort of system is available, but they manage without using it. There are just other ways in which they try to make sure that government does not do bad things.

Professor Bell: But they do not have a particular constitutional judiciary there. The ordinary supreme court—the Högsta domstol—will deal with those problems. Therefore the same authority is not given to the judges to interfere, so there are very few cases where the manifest unconstitutionality is ever successful. For the most part, it is not manifest. It is within what one might describe as an area of discretion that it is up to the Parliament to sort out. There, as Dawn says, it is much more the pre-legislative scrutiny and the consultative procedure in which the judiciary plays a significant part already in the remiss process. So they do it much more at the pre-legislative stage and have judges chairing committees reviewing legislation before it is enacted. That way, the same problems do not arise.

Q164 Paul Flynn: I am fascinated by your description, Dr Olivier, of the South African situation. We know that it is wildly different from the situation here. Do you see a parallel in looking towards world standards in legislation and human rights to the situation here, where we currently have a spasm of little Englander nationalism on things of minute significance, such as prisoners' rights, that is dominating matters from an almost entirely nationalistic point of view and is losing sight of the great picture, which is improving human rights throughout the continent of Europe? Do you see a constitutional accord acting as some kind of conscience of Europe against petty politicians on the make?

Dr Olivier: Yes. I think the most recent South African constitution definitely introduced an impetus for law reform that the law commission was working on prior to that transition. Efforts were made to adhere to international agreements and treaties, but they were always blocked by politicians at various levels. After the constitution came into place, it gave an impetus to abolish the death penalty, to deal with matters such as corporal punishment and to kick-start the enforcement of social and economic rights, the making justiciable of which is a big problem in developing countries.

Judicial policy is now a much more important tool in creating pressure on the legislature, because all courts can declare a piece of legislation unconstitutional, but it remains up to Parliament to adjust it. It can adjust it, however, only in accordance with the guidelines, which is where our old common law principles become very widely used again, because we resort back to all those old constitutional liberties that have now, at face value, been abolished. We have a written constitution, but our history is very much alive in as far as it is constitutional and in line with modern trends. The constitution is really a tool to introduce modern trends of interpretation as far as human rights are concerned. For South Africa, that is very valuable, because, as I say, we look to the United Nations as a source. We do not have that strong regional body with supranational powers giving us directions on what our national law should be in the way that we experience it in the UK.

Q165 Paul Flynn: We have heard in previous evidence that the South African courts have their strike-down powers, coupled with the right to adjourn procedures so that Parliament and the Executive have time to fix the problem. Can you tell us a bit more about the process if legislation is held to be unconstitutional in South Africa?

Dr Olivier: Yes. All courts can make a finding on the constitutionality of certain actions of all organs of Government—all actions and all legislation. The Constitutional Court has powers only to look at Bills when it is referred in the pre-legislative process, and only the Constitutional Court can confirm the unconstitutionality of a particular Act. They will then find a particular provision unconstitutional and will make a ruling. We now use various methods of interpretation to avoid a legal vacuum. It is referred back to Parliament to make arrangements to bring the legislation in

line with the constitution within a period of six months or whatever. In the meantime, they will use what we called “reading in” to indicate how the provision should be interpreted in the meantime to regulate the situation in a way that will not violate the provisions of the constitution.

Q166 Paul Flynn: Could you or any of the other witnesses see such a system being of benefit here?

Professor Bell: That sort of approach is sometimes used in European law. Where the Court of Justice of the European Union decides that a directive or national implementation was invalid or some way or other, it then gives time for the correction to happen. That is often essential, particularly if you go for a process of post-enactment challenge, or if a lot of positions have changed and you really do need to protect vested interests that have developed over time. Giving time and some directions of how the Act might be interpreted in the meantime is probably a safe way forward. We have that with pensions, insurance and other things with the European Union; those are classic instances of where they had to do it that way, otherwise you would have caused immediate chaos, particularly if you had retrospective effect, which is the normal impact.

Q167 Paul Flynn: Our courts already have this declaration of incompatibility when deciding whether UK Acts are compatible with the Human Rights Act. If the UK were to adopt a codified constitution and a piece of legislation was held to be unconstitutional, would there be any benefits in using that South African model of adjourning proceedings with such a declaration of incompatibility? Would that work?

Professor Oliver: Obviously it would need to be tailored quite carefully, but it seems to me that would be a useful tool if the court finds that something is incompatible under the Human Rights Act. That does not strike down the law; it puts the ball back into the Government’s court and Parliament’s court, so that they can consider whether to alter the offending law or just leave it as it is. That is an important political choice—it is for politicians and not the courts to sort this out. Applying that sort of approach to possible unconstitutionality under a codified constitution could be helpful.

Paul Flynn: Thank you very much.

Q168 Fabian Hamilton: Professor Bell, in your written evidence you state: “Many continental courts have wished to retain the power to judge the EU against their own criteria for fundamental rights and would see the European Convention as lower in the legal hierarchy than the fundamental rights declared by a national constitution.” Do you know of any countries that have done that successfully?

Professor Bell: Of all those within the EU, I do not think there is one that would not make that claim. The basic point is: why is EU law national law? It is only as a result of the constitution, because there is a constitutional provision that makes it law. Therefore, from a national judge’s point of view, you have always got the national constitution that makes EU law part of national law, and should that constitution be changed, EU law would cease to be part of national law. From that point of view, the Germans, the Danes, the French and so on make those claims. However, there has never been a point at which anyone has pushed it. They usually do it to reserve very specific features that they think are fundamental in their constitution and that could not have been altered by the granting of powers to the European Union through the constitution. It is a natural hierarchy of norms that from their point of view there has not been such a transfer of

sovereignty that anything that is EU lies outside the constitution; it is all wrapped up within the constitution. Having taken that position, everyone tries to accommodate to ensure that there are no fundamental clashes.

Q169 Fabian Hamilton: Do you think it would be easier for the UK to do this if we had a codified constitution?

Professor Bell: We would make this point very clearly: given the way our constitution works, an Act of Parliament is sovereign and therefore EU law is only law by virtue of statutes passed by Parliament. Should Parliament change its mind, that is the end of it. We would simply be putting into writing what we take for granted and what everyone else takes for granted, too.

Q170 Fabian Hamilton: In the German case—forgive my pronunciation—Solange I, the German Federal Constitutional Court ruled that, in the hypothetical case of a conflict between Community law and the guarantee of fundamental rights under the German constitution, German constitutional rights prevailed over any conflicting European law. If the UK adopted a codified constitution, would we be able to take a similar position on Community law?

Professor Bell: I do not think there would be a difficulty at all.

Professor Oliver: What I think is interesting about the Solange case is that the response of the European Court has been, “You don’t need to worry: we all share the same values. It is not going to be a threat.” There is a sort of dialogue and repositioning going on between that court and the courts of the member states.

Q171 Fabian Hamilton: Professor Oliver, you indicated in your evidence that many top courts had been quite inventive in “discovering constitutional principles” that are not part of the implicit text of the constitution. If the UK were to adopt a codified constitution, would that increase clarity about judges’ roles and the limits to their power, now and in future?

Professor Oliver: It would depend on what it said. It could try to increase clarity about judges’ roles, but it is extremely difficult to formulate principles that either limit the jurisdiction of judges or explain what the jurisdiction is that are not subject to interpretation and development. It is probably part of the psychology of lawyers, including judges, that they are really interested in what is implicit in language and they will try to expand it. Of course, their clients pay barristers to do that for them day in, day out—it is what they are brought up to do.

I think it would be very difficult in the text of a constitution to prevent judges from discovering implicit principles. Of course, that need not be a bad thing, unless you had a really authoritarian Government that felt it was high time we stopped respecting individuals’ freedom and so on—that would be different. But most of the principles that the courts have discovered—I set out some examples in my paper—sound quite touchy-feely, but good. I do not think you can stop them doing it.

Professor Bell: Problems change over time. You end up with new problems, and you then have to ask, “Do they or do they not fall within it?” Most of the constitutional courts have ended up with issues about same-sex marriage and so on, where social ideas have changed and therefore you end up with a different view being taken by constitutional courts than they would have taken 50 years ago. Dawn made the point about that not necessarily being a bad thing—it is simply that problems

or social attitudes change. The question is whether you want the courts to simply turn around and say, “Oh, it isn’t in the text. You sort it out. Go and amend the constitution.” Or do you want them to have a go and if you do not like what they do, Parliament can always come round and amend the constitution and put it right?

Dr Olivier: That ties in well with the previous question on looking at the interests of future generations. There must be some flexibility, because a constitution is alive. It has to be applied by judges in touch with the present atmosphere that prevails in a democracy. In the South African constitution, we have an interpretation clause, directing courts to interpret the Bill of Rights and the rest of the constitutional text in line with the values of an open and democratic society. In 10 years’ time, that might be different from what we have now. We do not want to be in the position where we have a written constitution that is so rigid that it binds us into what is just and fair for now but will not be valid in future.

Q172 Fabian Hamilton: Does that mean that the rest of the world that has written constitutions—that is, excluding the UK, New Zealand and Israel—could take the South African constitution as an example to learn from? One of the arguments that are always given against the UK having a written constitution is that it is totally inflexible. For example, look at the United States or France: once it is there, it is cast in stone, you cannot amend it and there is no flexibility to account for changing social values. If you look back 10 years, the idea that same-sex marriage, for example, could be enacted by Parliament would have been unthinkable in the UK, even 10 years ago. Now, it is perfectly acceptable to the majority of the population. Is the South African example unique? Are there any comparable constitutions that you can think of?

Dr Olivier: I don’t think so. Since 1993, when we adopted the constitution, we have seen a vibrant and flexible developing political situation in South Africa. Despite that, we have seen very few constitutional amendments, but there is a definite trend in how the jurisprudence of the constitutional court has developed since then. They are taking on new challenges, specifically in the field of socio-economic rights where they—and this is perhaps unique to developing countries—are prepared to give more direct pointers to Government on how they should spend their social budgets on education and that kind of thing. That has challenged the traditional view of separation of powers, but now at least we have the safeguard of legal action. It is a legal interpretation of the constitution which prevails over a political view.

Constitutional reform is rife in Africa. We have many African countries currently in the process of constitution drafting—I think of the countries in the Arab spring uprising, where the new constitutions have to deal with very complex political situations. That is something we do not have in the UK. But the benefit is they have models and expertise on very modern constitutions and people with experience in constitution drafting in the current environment.

Q173 Fabian Hamilton: Professor Bell, you were shaking your head just then.

Professor Bell: I do not think that as many systems are as rigid as they might be. Certain bits, particularly procedural points, are often written in such form that they cannot be interpreted in any other way, but many of the fundamental rights that Professor Oliver has in her paper are sufficiently open-ended that you can then get a new position. We will see how the Germans, for example, operate in the same-sex case there. There are ways round in interpreting.

The other thing is, you were right to point to the American constitution or, indeed, the European Convention on Human Rights, as being very difficult to change. By contrast, the constitutional

amendment procedures in countries such as France, Germany, Italy, Ireland and so on, are relatively flexible and there are regular changes. One of the things that you quite rightly need to focus attention on is how difficult it is to change the structure, should opinion change. That alters who makes the changes. The more rigid a constitution, the more the judges have to do it. The less rigid the constitution—the more straightforward an amendment procedure—the more that debate can be left to Members of Parliament and the political community to come up with an appropriate decision.

Dr O'Brien: I was going to mention the Irish example. In Ireland we have referendums at the drop of a hat; that is the way of keeping things current. But rigidity and flexibility are also inevitable properties of languages. I do not think there is any way around the fact that plaintiffs, judges and lawyers are going to be innovative. That doesn't have to be a bad thing, but equally there is a phenomenon of judges and lawyers weighing in where politicians fear to tread. Sometimes Parliament prefers not to deal with something that the courts inevitably end up dealing with, such as right to die, same-sex marriage and things like that. There is a conflict there, but it can be an artificial conflict. Interpretation and innovation do not have to be a bad thing, but equally under something like the Human Rights Act model, it can be redressed. As Professor Bell said, if you are not happy, go back and change it—no big deal.

Q174 Fabian Hamilton: Professor Bell, you state in your written evidence—I will come back to that again—that the problem with pre-enactment reviews is: “parties in abstract review proceedings cannot always anticipate how the law will work in practice”. When looking at countries with pre-enactment review, what advantages and disadvantages have emerged in practice?

Professor Bell: The first thing is that there is a reduced number of people who can bring pre-enactment review. It is the same in this country in devolution legislation. There is a limited number of people who can challenge a piece of legislation before it comes to the Welsh Assembly—that is the first thing. By doing it that way, it becomes a major issue. They are able to get rid of procedural irregularity: something that has been passed as a money Bill that should not have been a money Bill, for example—that would be an obvious one—or something in money Bill that should not have been in a money Bill, so the wrong procedure is being adopted. That is something you can really clear and get rid of at the beginning, and it does not require being sorted out later.

You can, as Dawn Oliver was saying, get rid of the gross errors; it is the things you had not thought about that will inevitably come up later. That was what I was hinting. The French tried for many years to rely on pre-enactment review only, and that has not worked. The Germans have never tried it; the European Union does not try it. You need a balance of the two, but then, going back to the previous question, you then need to say, “Well, what remedies do you start putting in?”

The advantage of tight time limits for pre-signature—if the Bill has been passed—review is that you can get the thing sorted out, and if there is a real problem, Parliament can be made to do it—and do it fast—and then it is sorted out. Then people don't get into positions of having followed a bit of legislation for a number of years or changed all their practices, and so on. So there are advantages in having that option, and the European Union has that when member states can challenge a directive as being incompetent—outside the competence of the European Union—but then you need the other procedures that say “You haven't thought of it,” or, going back to your point, Dr Olivier, as circumstances change later, over time, you need a way of, as you were describing it, putting things back on the agenda. I suggest that balance is probably what is required.

Q175 Chair: I would like to move on to the question of appointment of judges and how you get that legitimacy, and the problem that there is, as there always will be, around these issues. We see in the States the rather lengthy pre-confirmation hearings. There are many other ways of doing this, but how can we ensure the independence and neutrality of the judiciary if we are working towards a written constitution? The other side of that coin is: how do we also then reassure the Executive and the legislature that we are not going to have just a judge-led constitution—that we will operate as three equal partners? That is a fairly lengthy question, which I anticipate may produce some fairly lengthy answers.

Professor Oliver: If we look at the United States system, I am not sure that it is really underpinned by the idea that the judges should be neutral. Rather, it is accepted that each President has patronage, really—subject, of course, to checks.

My own view is that it would be a very bad thing if we reached a position where each Government in turn felt that they were entitled to choose judges in the Supreme Court—whatever it is called—who would be sympathetic to their view of life. The trouble with that is that certainly in the culture here, I think, it would undermine the legitimacy of judges. People would think, “Oh dear; I am going to get an Obama-type judge,” or whatever. It would be very important to design an appointment process that would secure that the judges who were appointed were, first of all, very good, competent judges and all of that, were also neutral and then, once appointed, were able to be independent.

Q176 Chair: Isn’t there an assumption then that the current appointment of the judges is somehow non-political, when many might argue that it is highly political, even in terms of, if one looks at their socio-economic background, a “we can trust the chaps” argument—the white, male Oxbridge public school elite—to keep an eye on everybody else who may be contaminated by a ballot box?

Professor Oliver: I have heard members of the Judicial Appointments Commission talk about their processes and so on, and my strong impression is that they are extremely keen to attract applicants for judicial positions from all backgrounds—ethnic, gender and so on.

Q177 Chair: Do you feel that is reflected in the composition of the current Supreme Court bench?

Professor Oliver: First of all, one needs to talk about merit. I know that Michèle has something to say about diversity and merit because we were having a chat earlier. The composition of the current judiciary reflects the composition of people coming to the Bar or becoming solicitors 40 years ago, or however many years ago—a long time ago, anyway. The plain fact of the matter was that there were very few women going into practice at that time. That was partly because there were very few women offered places at Oxford and Cambridge. I was one of only three women in my year when I was at Cambridge, and there were 100-and-something men. We needn’t go into why that was, but—

Q178 Fabian Hamilton: Sorry, can I just interrupt for a second? My mother was one of the first women barristers, in the mid-60s, but she did not go to university at all.

Professor Oliver: You are quite right; you did not have to.

Fabian Hamilton: She left school at 15. It was felt only relatively recently that you needed a degree to go into the law.

Professor Bell: 1990.

Professor Oliver: You are absolutely right, and so that could have increased diversity.

Anyway, the reasons why there were very few women going into practice who are now of the age where they might go the Supreme Court are historical. Nowadays, at least 50% of the people called to the Bar each year are women. There is a bit of a fall-off, unfortunately, after about 10 years, because of combining that with families and so on. My point is that the lack of diversity at the top end of the judiciary now is partly for historical reasons.

The Judicial Appointments Commission and previous Lord Chancellors for many years have made enormous efforts to attract a diverse lot of applicants, and we all hope that more diversity will come about. I agree that it is unsatisfactory that we do not have a more diverse judiciary at the top, but there we are. I do not think it is for lack of attempts by those doing the appointments.

Professor Bell: I was just going to make the point that there are two different types of model. One is that you give the job of judging the constitution to the ordinary judges, who do commercial law, criminal law or whatever, and constitutional law is just another case that turns up on the day. Or you have a specialist constitutional court, which is not the common law tradition, nor that of the Danish, Swedish, Norwegian or Dutch. Going back to your point about politicisation and diversity, it is the specialist constitutional courts that have a much more political element within their appointment, and also achieve social diversity by not having the requirement to take people from the existing judiciary. They take people from other qualified professions—expertise in human rights or whatever—and make them do that.

One decision that you have to make at the beginning is whether you are going to stick with the common law tradition of using the ordinary judiciary, or whether you are going to go for a specialist judiciary. If you go for the ordinary judiciary, the points Dawn makes apply equally in other systems. For example, the intake in the French judiciary is 80% women, but you still do not get, at the top, a very large number of women. Sweden is over 50%, but then you end up with only three in Högsta domstolen. There is an endemic problem about that progression, which the Judicial Appointments Commission is very aware of, but which is very hard to crack, at least in my experience of looking at judiciaries across Europe.

Q179 Chair: I do not want to run down the alley of diversity, but it was an illustration of how the judiciary need to fit into a modern view. It is interesting that you could argue that the current judiciary are the product of people who came in 40 years ago; you may argue that about the Executive and the legislature also, in some regards.

I speak from a position of being very positive about the judicial role. I am an advocate of judicial review. Many colleagues throw their hands up in horror that judges are getting involved, but that is why they are there, and I see that as a perfectly legitimate thing to do. Of the three parts of the separation of powers, they are probably the most fit for purpose when one looks at the Executive and the legislature, so please do not misunderstand my remarks. It is more to do with how we confer that legitimacy, if we are bringing in some codification. I would be very keen, almost on behalf of the judiciary, to see that they were helping to make a written constitutional settlement work, rather than being damned as a conservative block on progress, so the transition is going to be quite important.

I want Michèle to talk to us a little bit, if she would, about the South African experience, because I am sure that will be instructive for us. Sorry for that rather long explanation, but I need you to understand where I and, I suspect, the Committee are coming from. Michèle, did you want to come in?

Dr Olivier: I just wanted to add to what has been said. South Africa had the opportunity to address the lack of legitimacy of the bench because it was associated with a distorted supreme Parliament. Now in the constitution there is indeed a direction that the judiciary need to reflect broadly the racial and gender composition of South Africa, so where judges and the bench are responsible only to the constitution and not to Parliament now, given that a cloak of being non-political has been applied, that has been balanced by the fact that the bench should reflect the composition of society.

What was the problem at that stage? It has been highlighted that very few people from previously disadvantaged backgrounds were in a position to be admitted to the bench with the necessary experience and qualifications. Those positions were opened up to get more women and more people from disadvantaged backgrounds. Now, in effect, a magistrate can become an appeal court judge. What has been the impact on the quality of our jurisprudence? It has suffered severely, I think, because judges do not have a similar background of merit—being the best drawn from practice.

At present it is very difficult for a white male to make the grade. It is easier for a woman with that kind of ambition to be admitted to the bench than for people from various other components of the legal profession. People who have come through the usual ranks are politically contaminated now, so we lose that experience, and we lose their knowledge and their institutional memory of jurisprudence in the past. Also, of course, in South Africa we have 11 official languages. English has become the official working language of government, but previously decisions were written in various other languages, and we now have the situation where judges cannot read previous authority.

Chair: But in terms of legitimacy, you are saying, specifically on South Africa—a problem that I hope we will not have—that because of the positive discrimination, there has been a weakening of the quality of the institution?

Professor Oliver: That is a potential. There are examples where we have seen problems in that respect.

Chair: That is of interest to me, but probably not of direct interest to the inquiry. Do you think there are things that we could read across and which we could do better, if and when we move towards a more codified constitution, in our own Supreme Court, for example?

Dr Olivier: I think having a representative bench is definitely something that every society should strive towards, but it should be done in a more planned way. The admission criteria should be opened up, there should be better training in place and people should be fast-tracked to make the bench representative, but we should guard against the bench being a politically representative body in the same way as we want Parliament to be.

Professor Bell: In some other constitutions, the way they get improved quality is by having them first as assistants and then coming back as members of the court, so they have a period of prior formation. You could think of that.

Dr O'Brien: I did not want to talk about diversity, because the original question was about political legitimacy. It is a staple of attack literature on judges that they are unelected. Although

diversity is an important concern and the JAC is a very independent, professional organisation, there is concern that politicians have retreated from judicial appointments entirely and now have no ownership of the process whatsoever. There is greater divergence between judges and politicians in terms of the process, although probably not socially—I imagine they are all still going to the same events and clubs, and so on.

One way of addressing this in a symbolic or formal way would be by involving Parliament in some way in the appointment process. That could be as simple as having a committee that shadows the work of the JAC or the judiciary more generally. There are various steps along the way, all the way up to an America-style confirmation process, which would probably be unacceptable to most people here, but it does have the advantage that judges who speak about it speak of a horrendous process that upends their life but, once they have been through it, they feel that they have a democratic stamp on them so they go forth and, on the American Supreme Court, feel free to be very strong and independent in challenging the Senate. Because they have been through the process, they have that democratic stamp on them.

To condense that, I suppose that politicians need to take a little more ownership of the process.

Q180 Paul Flynn: I think we are all predisposed to favour systems that have elected such brilliant MPs as we have at the moment. I am afraid that it tends to bias our view, and I am sure the same happens there. Some of the few elected judges with whom British MPs are involved are at the Council of Europe. That process has its strengths and failures, and it is far from ideal. I think most people would suggest that political and nationalistic factors come into play in choosing those judges, but the process has certainly had beneficial effects in ensuring that a growing number of women are appointed.

Chair: I think that was a comment, Paul.

Paul Flynn: I was just giving evidence to the witnesses.

Dr O'Brien: But there was some parliamentary involvement in, I think, the appointment of the most recent British Strasbourg judge or ECJ judge. Some MPs were involved in the selection of a shortlist.

Q181 Chair: I think we can frighten the horses by raising spectres about pre-appointment hearings, et cetera. That is an extreme position normally adopted by the Executive whenever Parliament wakes from its torpor and wants to be involved in any shape or form. Surely a second level would be to report quite formally that judges are in the process of being appointed to particular things and for that level of interaction to take place.

Dr O'Brien: Certainly. If there was a committee to whom the JAC were attached—the Lords Constitution Committee might be an obvious choice, or the Justice Committee in the Commons—that level of formality and involvement of Parliament, in addition to the Executive, would be a step in the right direction.

Q182 Chair: We are currently engaged with the Executive to try to get them even to report effectively that they have been to war. If you are locked up in the House of Commons, you may not know that we went to war. The idea that the Prime Minister should come and report in some shape or form is one that we are talking to the Executive about at the moment. I think that it is perfectly

possible even to report to the legislature about the result of a general election, rather than the Executive just assuming that they have a right to go to the palace. What I am reaching for is that if we have a genuine separation of powers and some sort of codification, the interaction at a level of partnership does not necessarily mean a veto or blackballing. It can mean proper relations between people who have the democracy at heart.

Dr O'Brien: I should perhaps add, on a small point, that I think the JAC does report on its selection exercises. I am just not sure where that report goes. Possibly it goes to the Lord Chancellor.

Chair: We are very keen to work with the judiciary on our project. We have been to see Lord Neuberger on a couple of occasions and will continue to see him and his colleagues informally to make this work. I think that it is quite important. I am talking about the process of transition, rather than what we want as a settled system in 50 years' time—how we get from where we are now, which is no written constitution, to a place where we are starting the process of a written constitution. That will require some care and delicacy, which is what we want to exercise.

Thank you so much for coming this morning. We do have a little time left. Before I declare the meeting closed, do you have any final comments? There must be things that we have overlooked or dealt with rather superficially. Are there any remarks in conclusion from anyone? Is everyone happy; has everyone said what they wanted to say?

All witnesses indicated assent.

Chair: Excellent. Well, you may feel that there are other things that you would like to contribute. I have in mind the brief conversation that we had about what was happening in Finland. If anyone wishes to examine that for us or with us, that would be one of the issues, but equally there may be other things. I am sure that you always walk out of a room and think, "Oh my goodness, if only I had said so-and-so; I never got over my killer point." Feel free to write to us. Patrick, Dawn, John and Michèle, thank you so much for your time this morning. It has been very illuminating and extremely helpful to the Select Committee.

Professor Oliver: It has been very interesting for us as well.

Chair: It's our pleasure; thank you. Colleagues, thank you.