Blog Admin November 19th, 2013

Some Thoughts On Constitutional Amendment

Estimated reading time: 5 minutes

Ian Cram

Ian Cram, a Professor of Comparative Constitutional Law, writes about the flexibility of a constitution and the effect this may have on amending a constitutional text. He goes on to discuss the advantages and disadvantages of the lack of formal procedure in the UK Constitution.

How changeable ought constitutions to be? A strange question perhaps for a UK constitutional lawyer to pose given the relative ease by which political majorities in this jurisdiction can swiftly effect far-reaching constitutional revision. The prompt for this blog came whilst in Athens recently for a conference on constitutional reform, The conference had been timed to coincide with the ending of a five year moratorium on constitutional amendment laid down in the Greek Constitution. For Greeks, this has proved to be a case of especially bad timing. Since the start of the financial

crisis in 2007-8, the mandatory time lapse between constitutional revision meant that no amendment to the Constitution was possible before May 2013. In the current period, any successful revision will require special majorities via complex amending formulas that necessitate an unlikely degree of consensus across Greece's polarized political class (elections in June 2012 saw seven political parties elected to Parliament including, for the first time, the far-right, ultra-nationalist *Golden Dawn* with 18 MPs out of a total of 300 MPs). Unsurprisingly, one of the options being discussed is an amendment to relax the stringency of existing amendment procedures (discussed here). The flip side of avoiding rash constitutional change by a narrow majority of MPs acting for party political gain is now unfortunately plain to see – a fragmented political elite unable to coalesce around an agreed set of reform proposals as large sections of the Greek people continue to suffer severe financial hardship.

The ease with which constitutional amendment can occur is typically described as lying on a point somewhere on a spectrum at whose polarities lie 'rigid' and 'flexible'. The more 'rigid' a constitution is said to be, the harder it will be to amend the constitutional text. For example, a constitution which constrains the actions of legislatures or state officials via procedurally entrenched foundational norms or basic constitutional commitments will be deemed 'rigid'. This might be considered attractive from the perspective of establishing a set of underpinning commitments or values such as core democratic norms (eg the regular holding of free and fair elections, the protection of individual rights to vote, expression, association etc.) but how desirable is it for the commitment strategy of an earlier set of framers and their electorate to bind the hands of the current generation? And what of the yet more rigid position of putting certain constitutional provisions beyond amendment altogether as occurs in Germanywhere neither the federal system of government nor the basic principles of Article 1 (human dignity) or Article 20 (state order) may be amended? Can an absolute bar on amendment at any time in the future ever be justified? Or is there an optimal design of constitutional amendment that maximises (or, less ambitiously, accommodates satisfactorily) both (i) a set of core commitments and (ii) the freedom of the present-day electorate to participate in the re-making of their own constitution? Presumably a defence of entrenched core commitments need not entail putting *all* provisions of the constitution beyond the reach of ordinary majorities in the legislature.

In the UK, the lack of formal procedures requiring special majorities points up the ease of constitutional amendment. The obvious advantage in such a system is that it allows a democratically elected majority in the legislature to act swiftly to address

unanticipated external threats as well as updating/amending laws to reflect changed social/moral attitudes. The obverse is that constitutional revision can occur in a hurried and partisan fashion, without adequate consultation among all affected/interested individuals and groups where change is forced through in an unprincipled fashion using the governing party's (or parties') parliamentary majority.

Take as a recent example of a major constitutional change the Fixed-term Parliaments Act 2011. The Act fixes the date of the next General Election for May 7, 2015 unless one of two triggers for an earlier election are satisfied – namely a two thirds majority of the total number of MPs in the House of Commons pass a motion for an early General Election or where a vote of no confidence is passed by the Commons, an alternative government that commands majority Commons support is not formed within 14 days. Whatever one thinks of the purposes behind and merits of the Act, the processes by which it was enacted (including the use of a three-line whip of MPs and peers) have been sharply criticised. Whilst understanding the need for progress on the matter, the Commons Political and Constitutional Reform Committee stated that, "bills of such legal and constitutional sensitivity should be published in draft for full pre-legislative scrutiny, rather than proceeded with in haste… we regret …the rushed timetable that the Government has unnecessarily adopted for the Bill, and the incremental and piecemeal approach to constitutional change that the Bill seems to represent." The House of Lords' Constitution Committee took an even more critical line that extended to the merits of the measure, commenting that "the origins and content of this Bill owe more to short-term considerations than to a mature assessment of enduring constitutional principles." It is hard to discern a sense of prevailing constitutional values or identity when constitutions are so readily alterable. Unless some version of common law constitutionalism is asserted, the UK Constitution may be thought to lack a capacity for commitment to deeper value norms.

By contrast, the formal amendment requirements of Article V of the US Constitution are said to make the US Constitution difficult to amend. Article V states that an amendment can be proposed by two thirds majorities of both the House of Representatives and Senate and ratified by three quarters of the state legislatures (38 state legislature ratifications would be needed today). Alternatively, Article V provides that two thirds of the state legislatures can request a constitutional convention to propose a constitutional amendment that in turn requires the ratification of conventions in three-quarters of the states. From a total of 27 successful amendments to the Constitution since 1787 (including ten in 1791), not a single constitutional amendment has been secured via the constitutional convention

route. The onerous special majority procedures allow just thirteen states to block constitutional reform and lend the degree of rigidity that is evidenced by the infrequency of constitutional revision. In truth however, where formal amendment is onerous, 'informal' amendment is more likely to occur through new judicial and legislative interpretations of constitutional text. The First Amendment may not have been amended since its ratification by three-quarters of the state legislatures in 1791. Nonetheless, the nature and scope of free speech protection has undergone a radical judicial transformation in the intervening years. The landmark Holmes and Brandeis dissents in *Abrams* (1919) and *Gitlow* (1925) for example are rightly credited with fashioning ultimately a much more powerful form of constitutional protection for dissenting speech against federal and state government regulation.

Conclusion

Thomas Jefferson famously rejected the power of a previous generation to bind the present, advocating a constitution that would lapse every nineteen years which would allow the next generation to author its own framework of laws. In a letter to James Madison, he stated:

"I set out on this ground which I suppose to be self-evident: "That the earth belongs in usufruct to the living;' that the dead have neither powers nor rights over it… We seem not to have perceived that by the law of nature, one generation is to another as one independent nation to another." (Letter to James Madison, Paris September 6, 1789.)

For Jefferson, constitutional amendment needed to be relatively simple to achieve. The responsiveness of constitutions to popular opinion was crucial. He would doubtless be amazed at the constitutional impasse in which Greek society now finds itself. At the same time however, it is not clear that his idea of fixed and relatively brief life spans for constitutions would offer the degree of stability that modern political and economic structures require. The search for an optimal constitutional amendment mechanism continues.

This article originally appeared on the UK Constitutional Law Group's blog on 12 November 2013 and is included here for informational purposes only. This post represents the views of the author and and does not give the position of ConstitutionUK or the London School of Economics. The UK Constitutional Law Group is the British section of the International Association of Constitutional Law.

Formed in 2003, the Group organises seminars and conferences. Ian Cram is Professor of Comparative Constitutional Law at the University of Leeds.

Related

Welcome to ConstitutionUK
September 25, 2013
In "General"

Subsidiarity
September 17, 2013
In "Subsidiarity"

Guarantee of Human Security
September 17, 2013
In "The Guarantee of Human Security"

About the author

Blog Admin

Posted In: General

3 Comments

Related Posts

General

A Right To Public Space?

MARCH 31ST, 2014

1

General

Voting is Open! Submit Your Proposals Now

DECEMBER 16TH, 2013

General

General Election 2015: the Emergent Sense of an English Identity

APRIL 27TH, 2015 3

General

A referendum on Britain's EU membership is a sure fire way to encourage the breakup of the UK

MARCH 4TH, 2015

Blogroll

UCL Constitution Unit Blog

UK Constitutional Law Blog

Head of Legal Blog

The Constitution Society

Constitute Project

Useful Links

Log in

Entries RSS

Comments RSS