WRITTEN CONSTITUTION, READY OR NOT?

PLACING THE CITIZEN AT THE CENTRE

VTT Zoom Session 8

September 28, 2021

Confirmation and Intention

On May 26, 2021, VTT Zoom Session 6 discussed the viability of the UK adopting a written constitution. The pervading view was that there was a need, although with some reservations voiced. Essentially, three main themes were covered: how a written constitution should come about, the means for its operation, and its ability to adapt. In summing up, Kay Braine, Chair of Lib Dems France, suggested that we could prepare a motion advocating such a move for the Party's next Spring Conference in 2022. This met with the approval of those assembled and Zoom Session 8 is the first step in taking on the challenge. Initially, I had thought merely of a motion calling for the creation of a committee to come up with a Policy Paper which would subsequently be the subject of further debate within the Party including at a future federal conference.

The Autumn Conference made me think again. In the main this conference amounted to a reconfirmation – with one marked exception as far as I was concerned – albeit embellished by reference to recent developments of the standard LibDem credo. One motion was passed unanimously and others came very close. The exception was entitled "Democracy and Public Debate (Nature of Public Debate Policy Paper)", which among other things gave its support to the passing of a Digital Bill of Rights. The debate was a real clash of opinions with a relatively high level of expertise chiefly among young members. It spelt the future. Reflecting the sense of immediacy, moreover, the Policy Paper it was based on was deemed not acceptable and was referred back for further clarification of definitions.

When we contemplate the need for a written constitution, while it is with the idea of righting the perceived inadequacies of the current system, it is also of necessity future-oriented in a world which is moving very fast. The motion, therefore, needs to impart a sense of urgency which should be shared by LibDems in France, the LibDem Party in general, and indeed the nation as a whole. If the world is moving fast, we have to move fast with it. So the motion should be a prototype rather than a tentative suggestion. Taking that as the objective I would propose the following course of action. To be noted in passing is that in the first instance this is a politically-motivated endeavour subject at a later stage to commentary by constitutional lawyers and other specialists.

First, in this session, is the need to come to grips with the evolution of what is, probably accounting for why it has not been written down, the world's first modern constitution, together with the contributions of subsequent codified versions produced elsewhere. Second, is an attempt to look into a future dominated by artificial intelligence and the implications even now well advanced with regard to the fashion in which individuals and organizations communicate and conduct their affairs. Political behaviour is being transformed. Given the complexity to most of us, this would best be preceded by a session in which an expert –

perhaps one of the speakers at the recent Autumn Conference – could be invited to talk us through. Third, discussion segment by segment of the proposed motion.

Where We've Come From

The UK constitution is a walking history, a record of and reaction to the demands of a society as it moulded itself over centuries into a nation state and thereafter in stages through industrialization to what is regarded as a modern economy. Not being hamstrung by preordained principles it has been characterized by a predilection to seek practical, empirical solutions in rearranging its socioeconomic institutions and concomitant distribution of power and order to accommodate evolving circumstances. The constitution thus developed has never been codified in any single document. Rather it is a dispersed fusion of prerogatives, statutes, and conventions which together trace their origins to pre-feudal beliefs and practices onto which have been grafted regulatory frameworks consonant with demands as they arise. During getting on for a millennium, the general trend of this exercise has been towards greater democracy which could be interpreted as more power for the people. Society's emerging complexity called for devolution of powers and the complementary enrolment of an increasingly broader range of its citizenry into the decision-making processes.

Familiar signposts on the way are the following:

Magna Carta (1214) – no money exceeding regular payments to be paid by the King's feudal tenants, and no freeman punished except according to the laws of the land.

'Model Parliament' (1295) – the national parliament became the established means for negotiating payments to the Exchequer by the emerging merchant class.

Habeas Corpus Act (1679) – following the earlier Petition of Rights declaration directed at securing the liberty of the subject by denying arbitrary imprisonment, it laid down a specific procedure open to the detained person.

Bill of Rights (1689) – settled the legal sovereignty of Parliament; the age of the 'Divine Right of Kings' was over and the monarchy became constitutional and parliamentary.

Act of Settlement (1701) – judges removed from the control of the executive.

Reform Act (1832) – gave political sovereignty to the electorate by extending the party system from Parliament to the country while linking parties with the Cabinet system of government.

Reform Act (1867) – added some one million eligible voters, in so doing enfranchising the majority of the male working class in the urban areas.

Parliament Act (1911) – enabled the passing of any legislation ultimately without the approval of the House of Lords, while enhancing to legal status of the House of Commons' complete control over budgetary issues.

Representation of the People Act (1918) – votes for women over 30 subject to property stipulations.

Equal Franchise Act (1928) – votes for women on equal terms with men.

In the first instance it was representation, meaning the accommodation of certain forces as they become essential to the effective functioning of the country. But in time, inserted within this as the industrializing society developed, was a concern with government efficiency. This concern found a partner in the two-party, first-past-the-post formula. Two opposing parties presented to the electorate contrasting options and the winning party once in office could implement the program it was voted in for. Time and energy was not wasted on forging and running testy and unpredictable coalitions. This over time though, as hinted at by the growth of influence of the Cabinet as early as the nineteenth century and emphatically underlined by the mounting predominance of the Prime Minister through to the present, has been the centralization of power. Reacting to this, and armed with the facilities of the communications revolution, there is now a demand for redefinitions. There is a tension between presumed effective government on the one hand and adequate representation on the other.

Where We Want to Go

But to backtrack to the codifiers. When philosopher and jurist Montesquieu lived in England from 1729 to 1731, he was struck by the high degree of freedom which contrasted so sharply with the absolute monarchies in Europe, not least that of Louis XIV in his native France. He attributed this to the separation of powers. And these powers of government were of three kinds – legislative, executive and judicial. In making this observation he was diagnosing functions every bit as much as he was institutions. Actually they overlapped in England then as they do in the UK now. For the critics this lack of clarity demands rectification, for the supporters it affords flexibility.

Around three decades on or so from the publication of Montesquieu's *Esprit de Lois* the American written constitution had institutionalized the separation of powers: Articles I, II and III vested all legislative powers in Congress, executive power in the President, and judicial power in the supreme court respectively. Since then the written constitution has become *de rigueur* for any self-respecting nation state. Its principal purpose is to describe the main political institutions, while it may well also include the guarantee of certain rights and a general statement on basic attitudes. Furthermore, awareness of the citizen's cause as an individual deserving of respect has progressed. Less than a decade after the Americans, the French constitution was proclaiming the universal rights of man, while to bring things right up to date the European constitution bespeaks integration and global consciousness beyond narrow-minded nationalism. In fact, the better intentioned constitutions have been instrumental in shaping the liberalism in the broader sense of British Society.

Which begs the question. Are written and unwritten constitutions that far apart? Traditionally the British have used the word constitution to refer generally to legal and non-legal rules which regulate their government. Others refer to a single brief document. But the simple truth of the matter is that no such document in itself can describe all the rules and principles through which a government operates. In the traditional British understanding, the mass of their constitutions lies outside the primary codification. Conversely, the UK is approaching a point where loose and irresponsible abuse of its system is getting out of control. Trust is at a premium, the executive needs its wings clipped, and the citizen's rights must be defined. This

is not a defeat. It is a challenge to creating a “modernized” cross-fertilization of written and unwritten with functions stressed, flexibility sustained and citizen representation effectively filtered into the equation.

The Citizen Returns

VTT’s Chris Platts gets to the nub of the issue by citing from the book *Democracy and Its Crisis* by A.C. Grayling. He summarises thus: Grayling points out that all states have a constitution whether written or unwritten. He states that the benefit of a written constitution is that the processes and relationships between the institutions of state and their powers and roles are codified and clear in terms of how they are to be implemented, whereas unwritten constitutions are managed by custom and tradition, though flexibility is hailed as a virtue. But, as has been happening recently in the UK, an unwritten constitution is vulnerable to changes in interpretation and the addition of laws imposed by an executive to restrict freedoms. It also means that there is no significant means by which a Supreme Court can necessarily prevent a government encroaching on civil liberties. A written constitution means that a government is subject to it and has to comply with its procedures and rules. Grayling does raise the issue that written constitution can be too rigid, and he quotes the fact that the American Constitution can often be treated as gospel and is seen as inflexible and not easily changed. He says that to ensure that this does not happen there needs to be a process within the constitution to ensure that a Constitutional or Supreme Court can be used to ensure there is no abuse of power by the executive and that the protection of civil liberties as people's rights are protected from power grabs.

In the UK’s case then, a newly minted written constitution can be regarded as the first step in realigning the power structure pivoted on the citizen. This is what we intend to work on and we welcome your participation and suggestions.

Ferguson Evans