

2006

## Are We There Yet?: Measuring Success of Constitutional Reform

Maria Dakolias

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### Recommended Citation

Maria Dakolias, Are We There Yet?: Measuring Success of Constitutional Reform, 39 *Vanderbilt Law Review* 1117 (2021)

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# Are We There Yet?: Measuring Success of Constitutional Reform

*Maria Dakolias\**

## ABSTRACT

*Like many other countries in the world, the United Kingdom has been modernizing its constitutional arrangements. But unlike all other countries, there is no codified, written constitution. Since 1997, that unwritten constitution has undergone a radical overhaul. Taken together, the changes to systems and institutions represent the most sustained program of reform in the United Kingdom for a century. The main question is whether these reforms were successful. What does success mean? As is well known, implementation is the key to success. So evaluating the reforms and discussing successes and challenges are not only important for the U.K. internal dialogue but also for other countries. As regionalism and globalization continue, the world is less compartmentalized, less segmented, and more interdependent than ever before. Today the rule of law and good governance are very much part of the development agenda. This article assists in providing a public account of how the reforms have come thus far and explain what constitutional reform is in the United Kingdom.*

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## I. INTRODUCTION

Like many other countries in the world, the United Kingdom has been modernizing its constitutional arrangements. But, unlike all other countries except New Zealand and Israel,<sup>1</sup> there is no codified written constitution. Laws, regulations, and a network of codes and conventions make up the British constitution—documents that lay the foundation of the relationship between the state and the individual, as well as the structure and function of government.

Since 1997 that unwritten constitution has undergone a radical overhaul.<sup>2</sup> This program of constitutional reform has sought to modernize the electoral system, reform the House of Lords, enact human rights and information rights legislation, and bring about devolution for Scotland, Wales, and London. Taken together, the changes to systems and institutions as well as the establishment of

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1. Israel has eleven basic laws that make up the constitution. Basic Law: The Knesset, available at [http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_yesod1.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm) (last visited Sept. 2, 2006).

2. Venor Bogdanor, *Constitutional Reform in Britain: The Quiet Revolution*, 8 ANN. REV. OF POL. SCI. 73–89 (2005).

devolved administrations represent the most sustained program of constitutional reform in the United Kingdom for a century and have been described as a “quiet constitutional revolution.”<sup>3</sup>

Now the time has come to take stock of these reform efforts. To that end, the challenge is to examine what goals were initially established and ask to what extent the reform efforts have met them. Those goals included steps to renew democracy, rebuild trust, make government more transparent and accountable, decentralize power, and modernize institutions. Additionally, the Lord Chancellor identified another objective as “stripping away confusing traditions, introducing transparent, comprehensible systems of governance,” as well as putting to paper the principles of the constitutional democracy as it is and how it has evolved.<sup>4</sup> A constitution and its principles are the foundation of the state. The clarification of those principles for all citizens to see and understand is the crux of the challenge going forward. As a result, it is essential that each individual is able to understand his or her relationship with the government—what to expect from the government and what can be expected from the individual. Taken together, there is, in essence, one purpose for constitutional reform, and the single greatest consequence of that effort will be a modern and renewed democracy for the twenty-first century and by extension a modern and renewed United Kingdom.

It is paramount that lawmakers and citizens alike understand that this reform has not changed the “general principle” of the Westminster system.<sup>5</sup> Rather, this reform has modernized it, adapting and moving it forward into a new century. Consider the following points. First, parliamentary sovereignty continues, but now there is an increased role for the judiciary to determine whether laws are incompatible with the Human Rights Act.<sup>6</sup> And the impact of supranational bodies upon parliamentary sovereignty is a matter of live debate. Second, the principles or values of the constitution have not changed, but they are now more easily identified. Third, the principles of the rule of law and judicial independence are now included in legislation under the Constitutional Reform Act of 2005 for the first time.<sup>7</sup> But again, in keeping with the Westminster system, all of these reforms legally could be repealed by Parliament if

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3. *Id.*

4. Lord Falconer of Thoroton, Sec’y of State for Const. Affairs & L.C., Const. Reform Speech at Univ. Coll. London (Dec. 8, 2003), available at <http://www.dca.gov.uk/speeches/2003/lc081203.htm>.

5. Jackson & Others v. Her Majesty’s Attorney Gen. [2005] UKHL 56, available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051013/jack.pdf>.

6. *Id.* at 49.

7. Constitutional Reform Act, 2005, c. 4, §§ 1, 2 (Eng.), available at <http://www.opsi.gov.uk/ACTS/en2005/05en04-a.htm> [hereinafter Constitutional Reform Act].

it chooses. This preserves Parliament's constitutional sovereignty to make changes to meet future needs. This flexibility can also be seen as a risk that Parliament can turn back this modernization.

Grappling with issues of a national constitution and challenging reform is not unique to the United Kingdom—far from it. Whether a country has a written constitution or not makes no difference. Many countries have undertaken reform for the same reasons as the United Kingdom—to modernize and clarify its structure and principles. In fact, in the last twenty-five years, one hundred countries have reformed their constitutions. The United Kingdom is neither the first nor the last to undertake a modernization process. And given the United Kingdom's position on the world stage and its place in the timeline of human history, these reform efforts are historic and will likely serve as a template not just for others facing similar issues but for the United Kingdom itself as it grapples with new reform challenges in the future.

What is perhaps most challenging, however, in making constitutional modernization a reality are the United Kingdom's history, tradition, and custom. Many post-conflict or transition countries were able to undertake constitutional reform from a clean slate or because of revolution. And while there is plenty of literature that posits how transplanting laws is not a recipe for success, these countries had an opportunity to consider various models for their constitutional reform. Other countries have, with a change of government, taken the opportunity to modernize and change the principles governing society. South Africa, for example, underwent a ten-year process to reform its constitution to reflect a new environment.<sup>8</sup> The former Soviet Union countries reformed constitutions to adopt democracy and a market economy. These nations were changing the relationship between the individual and the state as well as the fundamental infrastructure of government itself. Just because the United Kingdom is working within an existing framework and without an external crisis does not mean that the reforms are any less challenging or historic. It is quite the opposite. The United Kingdom is doing what countries talk about doing but almost never do, namely taking a pragmatic and long view. And 54% of the voters think it is important that their political party has policies that will do well in the long-term.<sup>9</sup> It is much easier to respond to the issues of the day—to tackle what is urgent, forsaking what is important. What could be more important to the welfare and

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8. SOUTH AFRICA YEARBOOK 2004–05, POLICY CO-ORDINATION & ADVISORY SERV., available at <http://www.suedafrika.org/admin/media/yearbook/OVERVIEW.pdf>.

9. Peter Kellner, *Britain's Culture of Detachment*, 57 PARLIAMENTARY AFF. 830, 838 (2004).

advancement of a nation and its citizenry than a comprehensible constitution? In the process, the United Kingdom is not only setting out to establish new institutions but also to create a change in culture.

So what are these principles that undergird the constitution? As some international measures for constitutional processes indicate, these are principles of an independent common law judiciary, access to justice, due process, protection of basic rights, empowerment and representation of individuals and regions, free and fair elections, devolution, and a system of checks and balances of government. Inherent in these principles is fairness, balance, and transparency. Whether these are written or not, they have guided behavior of the government and the individual. With constitutional reform, many of these principles have been embedded in legislation. The focus of the attention of this Article will be based on two categories of the key principles: good governance<sup>10</sup> and the rule of law.<sup>11</sup>

Since good governance and rule of law have not been defined in legislation, it may be helpful to set out working definitions. There is no world consensus on the definitions, but some multilateral institutions define good governance, for example, through eight major characteristics. Good governance is: participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient,

10. With respect to the notion of "good governance,"

[t]he European Commission established its own concept of governance in the *White Paper on European Governance*, in which the term "European governance" refers to the rules, processes, and behavior that affect the way in which powers are exercised at the European level, particularly as regards openness, participation, accountability, effectiveness, and coherence. These five "principles of good governance" reinforce those of subsidiarity and proportionality.

European Commission, *Governance in the EU*, [http://ec.europa.eu/governance/index\\_en.htm](http://ec.europa.eu/governance/index_en.htm) (last visited September 13, 2006). See also *Commission White Paper on European Governance*, at 8 n.1, COM(2001) 428 final (July 25, 2001), available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0428en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf).

11. Albert Venn Dicey offered one of the most noteworthy accounts of the concept of the rule of law in 1985 in his *Law of the Constitution*:

When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions. We mean, in the first place, that no man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.

A.V. DICEY, *LAW OF THE CONSTITUTION* 187–88 (MacMillan 1956) (1888).

equitable and inclusive, and follows the rule of law.<sup>12</sup> Rule of law may be defined as a system (1) in which the government itself is bound by the law; (2) in which all in society are treated equally under the law; (3) where the government authorities, including the judiciary, protect citizens' aspirations for human dignity, and (4) which is accessible to its citizens.<sup>13</sup> Understanding these concepts is important because today the focus of constitutional reform in the United Kingdom is on reforming, sustaining, and explaining the constitution.<sup>14</sup> This focus requires analysis beyond institutional reform to consider ways to achieve broader social outcomes.

What kinds of outcomes does the public expect? Many countries around the world have undertaken programs to strengthen the rule of law, good governance, and democratic institutions, yet there have been few evaluations carried out of the programs. Today, there is interest in evaluating progress. The logical question is whether these reforms have been successful. What does success mean? Does it mean an increase in the respect for the rule of law or an increase in good governance? Or will it mean that there is greater understanding by the public of the constitutional principles that support democracy in the United Kingdom? One perhaps could argue that the first outcome that has been achieved—that the principles of good governance and the rule of law have been incorporated into the legal, social, and political framework. The next step is the communication of these principles to the public at large. It will be important to know whether the public understands the constitutional reforms and whether such reforms have an impact on individuals. For example, in Argentina 77% of the population knows nothing or very little about its constitution.<sup>15</sup> What does the population of the United Kingdom know about its constitution and the values and principles it stands for? This is especially important for the newest members of the population, given that 80% of the United Kingdom's population increase since 1999 is attributed to international migration,<sup>16</sup> and one

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12. U.N. Econ. & Soc. Comm'n for Asia & the Pac. [UNESCAP], Human Settlements, What is Good Governance?, <http://www.unescap.org/huset/gg/governance.htm> (last visited Sept. 6, 2006).

13. Definition adapted from a talk by U.S. Supreme Court Justice Kennedy, June 6, 2000, at a conference in Washington, D.C. [http://www.worldbank.org/wbi/governance/pdf/legal\\_agenda\\_june01.pdf](http://www.worldbank.org/wbi/governance/pdf/legal_agenda_june01.pdf). See also Initiatives in Legal and Judicial Reform (2004), available at [http://www4.worldbank.org/legal/publications/LJRInitiatives\\_2004.pdf](http://www4.worldbank.org/legal/publications/LJRInitiatives_2004.pdf).

14. DEPT' FOR CONST. AFFAIRS, DELIVERING JUSTICE, RIGHTS AND DEMOCRACY: DCA STRATEGY 2004-09—AT A GLANCE, No. 63/04 (2004).

15. *El 77 por ciento de los argentinos desconoce la Constitución*, LA NACION, July 11, 2005, <http://www.lanacion.com.ar/archivo/IndexDia.asp?fecha=11/07/2005>.

16. Nat'l Statistics Online, International Migration, Dec. 2005, <http://www.statistics.gov.uk/CCI/nugget.asp?ID=766&Pos=1&ColRank=1&Rank=374>.

in twelve residents of the United Kingdom was born overseas.<sup>17</sup> A further outcome may be that the government and the public are committed to the principles within the constitution. How can this be measured?

What follows in this Article are six parts: the first on the conceptual approach for this report, the second on the goal of democracy, the third on good governance, the fourth on rule of law, the fifth on the process of constitutional reform, and the sixth on the contribution the reforms are making on democracy. This Article describes the position at the end of 2005, except where the context makes it clear otherwise.

## II. CONCEPTUAL APPROACH

At a conceptual level, measuring the success of constitutional reforms requires attention to four elements: constitutional principles, values, institutions, and procedures.<sup>18</sup> The constitutional principles include a democratic system of government based on the rule of law, an independent judiciary, due process, access to justice, protection of basic rights, transparency and openness, free and fair elections, representation, and subsidiarity. Core U.K. values include equality, fairness, social justice, freedom, regional and cultural diversity, national identities, and Britishness. The institutions are those that support the checks and balances of democracy. The procedures include the process of decision-making and role of the government and the citizen in that procedure.

These four elements are inter-related and should be considered as a whole. The emphasis, however, in this report is on the constitutional principles—the first of the four elements listed above. Any discussion of these principles must necessarily take into account the others—issues related to institutions, procedures, and values. It should be noted that these principles may not be exhaustive, but they are important to an effective democracy.

This conceptual approach focuses on the following six issues. First, this Article is and remains a starting point for measuring success in constitutional reform. This Article provides a framework from which further work can and should be done because measuring intermediate outcomes and long-term impacts are necessary for any

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17. Of the U.K.'s population, 8.3% was born overseas. This is almost double the proportion since 1951. Office of Nat'l Statistics, People & Migration – Archived in December 2005, <http://www.statistics.gov.uk/cci/nugget.asp?id=767> (last visited Sept. 28, 2006).

18. Yash Ghai, *The Constitutional Reform Process: Comparative Perspectives* (Aug. 3–5, 2004) (on file with author).



reform. It allows monitoring of progress and the ability to know where more effort may be needed to achieve the desired result. This Article, therefore, is certainly neither an evaluation nor an audit or assessment. It proposes a strategic framework to promote greater dialogue about the expected outcomes of the reform process now underway in the United Kingdom. It is hoped that this dialogue will encourage review and eventual agreement on a set of indicators (and data behind these indicators) that need to be gathered presently and in the future to support the measurement of constitutional principles.<sup>19</sup> This Article posits that the analysis together with indicators and data will necessarily require long-term commitment in order to track these fundamental changes.

The second focus of this Article is creating a framework to assess the progress of reforms in achieving the overall constitutional goal of modernizing and renewing democracy in the twenty-first century in the United Kingdom. Reform is an on-going effort, and measuring progress is important for knowing whether the direction that democracy is headed is the desired direction. This Article provides a conceptual strategy, and part of what is developed with this strategy is a theory of change. Moving to outcomes and measuring intermediate benefits give evidence (or the lack thereof) of progress.

The third focus of the Article is the desired goals of the reforms. That is, how do the reforms advance the individual constitutional principles that support democracy? This means going beyond legislation that is passed and institutions that are established, and considering how the legislation or institution is expected to advance the goals of the reforms. For example, the reform related to the U.K. Supreme Court is not about creating an institution, but rather about creating greater constitutional clarity, which in turn supports judicial independence and the separation of powers.

The fourth focus is on outcomes that would allow intermediate measurement of progress towards the goals over time. While every effort was made to choose indicators that directly contribute to the desired outcomes and goals, it should be noted that some of the indicators might not be directly attributable to the reforms. In addition, in the area of constitutional reform, the causal relationship between indicators and the desired goals is also one that requires caution. For example, one expects that transparency makes institutions function better by rendering them publicly accountable. Accountability improves an institution's service delivery.

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19. An effort has just begun to reach agreement as to the future statistical requirements for the high court (and the methods of collection) to ensure that future consideration of high court resource needs can be based on agreed and complete statistics, which command the respect of officials and judiciary alike.

Transparency also helps institutions forge coalitions among broader government and civil society in support of their missions. Some research has shown that more transparent governments govern better. There is a strong correlation between countries that govern better and those that produce better information. However, there is no clear causation since it may be that governments that govern well over time also have been more likely to publish information. As a result, this Article is a preliminary step in building indicators and supporting them with data, but more research is needed for future work to clarify the relationship between indicators and reform goals.

The fifth focus of the Article is constructing outcome indicators that can be reasonably measured. The measurement approaches should include quantitative and qualitative data. Qualitative data through public perception is more subjective, but does provide a proxy.<sup>20</sup> Together, these measurements are meant to provide a basic picture of the outcomes. Again, the data is not exhaustive; "important measures are missing from each category."<sup>21</sup> As a result, over time new indicators should be constructed and tested. For example, judicial efficiency is not measured through the clearance rate, one of the elements of efficiency used internationally, because the United Kingdom does not gather the number of cases disposed but only the number of cases filed and the number of cases that are resolved through small claims, fast-track, and multi-track procedures.<sup>22</sup> The result is that the United Kingdom appears to have a clearance rate of 17% for civil cases.<sup>23</sup> In an international comparison, the United Kingdom (England and Wales) would be considered one of the lowest in the world and on the same level as Papua New Guinea.<sup>24</sup> A useful series of statistics showing changes in disposal rates will take time to develop because until 2005 the United Kingdom did not collect comprehensive information.<sup>25</sup> Another

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20. JODY ZALL KUSEK & RAY C. RIST, TEN STEPS TO A RESULTS-BASED MONITORING AND EVALUATION SYSTEM 69 (World Bank 2004), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2004/08/27/000160016\\_20040827154900/Rendered/PDF/296720PAPER0100steps.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2004/08/27/000160016_20040827154900/Rendered/PDF/296720PAPER0100steps.pdf).

21. MARIA DAKOLIAS, COURT PERFORMANCE AROUND THE WORLD: A COMPARATIVE PERSPECTIVE 8 (World Bank 1999).

22. See JUDICIARY OF ENGLAND & WALES, JUDICIAL STATISTICS ANNUAL REPORT 2003, 40 (Judicial Communications Office 2003), available at [http://www.judiciary.gov.uk/keyfacts/statistics/judicial\\_statistic\\_annual\\_reports/2003/index.htm](http://www.judiciary.gov.uk/keyfacts/statistics/judicial_statistic_annual_reports/2003/index.htm).

23. *Id.* at 39.

24. See The World Bank Group, Legal and Judicial Sector at a Glance Database, Demand and Caseload – Civil – Clearance Rate (World Bank 2000), available at <http://www4.worldbank.org/legal/database/Justice/Pages/jsIndicator1.htm>. See also *infra* Appendix 1a.

25. Judicial Statistics (Revised) England and Wales for the Year 2005, available at [www.official-documents.co.uk/document/cm69/6903/6903.pdf](http://www.official-documents.co.uk/document/cm69/6903/6903.pdf).

example where further data is necessary is the absence of data as to the knowledge base of citizens regarding their understanding of the constitution in the United Kingdom. Given that knowledge of the constitution is central, this data would have been useful.

Meaningful indicators require a baseline both in terms of data and an initial point in time. In this case, the baseline reference point is 1997, when the Labour Government in its manifesto committed to carry out constitutional reforms.<sup>26</sup> It should be noted, however, that while the reforms took place beginning in 1997, some have evolved over the last thirty-five years beginning with the Kilbrandon Report. At the time of this Article, the reform process is well underway, and therefore the emphasis is on first establishing initial baseline data. The object is to use what data exists today. The focus is to use as much data as possible that is already being gathered on a systematic basis that is accessible, valid, and reliable.

Finally, the sixth focus of this article is to supplement the indicators with a review of some international standards as a way to assess the reforms. Since there is a dearth of measurement on constitutional reforms around the world, the Article considers benchmarks for democracy, good governance, and the rule of law, which are more common. This includes both international governance and judicial indicators, but also principles and standards set by the United Nations, Council of Europe, European Union, and the Organization for Economic Cooperation and Development (OECD).<sup>27</sup>

### III. THE GOAL OF DEMOCRACY

The overall goal of the constitutional reforms since 1997 is to strengthen democracy in the United Kingdom by enhancing the representative and participatory components of a healthy, robust democracy. Critical to the vibrancy of these components are the long-standing ideas of responsive government, a commitment to human rights, the dignity and autonomy of individuals, and the rule of law.

First, it will be helpful to define the terms for the purposes of this Article:

Representative democracy means that parliament and other legislative or executive bodies are elected in regular and free elections, and their members—being representatives of the electorate

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26. UK General Election – Party Election Manifestos, Labour Party: New Labour Because Britain Deserves Better, 1997, <http://www.psr.keele.ac.uk/area/uk/man/lab97.htm> (last visited Sept. 16, 2006) [hereinafter *Britain Deserves Better*].

27. For example, the European Union “is based on the principles of democracy and the rule of law.” Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

and not delegates of the parties—are ultimately accountable to the voters. Coupled with the notion of accountability are the concepts of subsidiarity, decentralization, and localization. Scottish devolution as well as the London and Wales arrangements have advanced these concepts, but low turnout and poor representation for minority parties remain stumbling blocks toward greater advancement of these concepts.

Participatory democracy means that citizens have equal opportunity to contribute to the process, whether they stand for an elected position, work on a candidate's campaign, or advocate a constituent belief or position to a local representative. Regardless of the form taken, fostering trust and spurring civic engagement are paramount to greater participation.

There has been a change in how people participate in society, and this change has provided new opportunities for engagement. Transparency of office and access to those who hold office as well as good communication and dialogue between office holders and constituents are all part and parcel of the participatory variable of the democratic equation. In the end, the hope is that the dynamic between citizen and representative benefits, the electoral process provides a voice, and most importantly, the number of those participating increases.

As discussed earlier, the constitutional reforms undertaken promote the rule of law and good governance, which in tandem strengthen democracy. Research confirms what common sense tells us: the less people “join parties, the less they are likely to vote, and when they do both, the less governments can be held accountable, the less individual rights can be enforced, and the less individual and group demands can be represented in the policy process.”<sup>28</sup> The result is less legitimacy and less democratic governance. A lack of confidence and trust in political institutions creates a weak rule of law where rules and laws are ignored.<sup>29</sup> So, to flip the equation, the challenge is to create more where there is less: more accountability by government, better enforcement of individual rights, greater legitimacy, and so on.

Democracy is never in a state of stasis. It is moving and evolving, and as such is at the heart of the conversation of free people around the world. So is it any wonder that today so many more countries are talking about democracy and tackling the tough subjects that accompany such a conversation? Some are new democracies, such as those from the former communist countries that are experimenting

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28. Green Paper on The Future of Democracy: Trends, Analyses and Reforms 40 (2004) [hereinafter *Future of Democracy*].

29. *Id.* at 33.

with ways to achieve fundamental respect for the rule of law and reduce corruption by public officials. Adopting new constitutions and signing international treaties is meaningless without implementation, adherence, and enforcement. Others, such as those in Latin America, have weak democracies which if weakened further could result in a return to the well-known dictatorships of the past. Still, other countries in Africa are emerging from conflict and relying on a commitment to democracy to stabilize society. But there are many established democracies in Europe, Asia, and North America that are also searching for new ways to reinvigorate their democracies, searching for reasons behind lower voter turnouts, examining the distrust between the public and public officials, and attempting to understand why members of the populace feel that they cannot make a difference regardless of participation. All of this begs the question: is there a crisis in democracy? The answer is a qualified no. There are threats to democratic institutions that emanate from racism, poverty, xenophobia, disengagement, and terrorism—threats that either create marginalization and disenfranchisement or threats that originate from marginalization and disenfranchisement. Undoubtedly, there is cause for concern, but there is greater cause for action. Unfortunately, as history shows, it is often a crisis that causes people to participate. The solution is to spotlight these issues without causing a crisis, to foster civic engagement, and to develop clear goals for citizens and government to tackle.

Taking positive steps forward is more necessary today than ever before as people are confident that democracy and a market economy are irreversible in Europe.<sup>30</sup> Confidence without vigilance can lead to complacency, and that is something to avoid. So, it is good and positive that Europe as a whole is discussing how to enhance democracy within the European Union, and the Council of Europe is developing guidelines and policy on the democratic principles that they share. Many member countries are doing their own analysis of the state of their individual democratic institutions, identifying problem areas, and coming up with possible solutions.

European governments are taking the situation seriously, in some cases establishing special ministers or departments for democracy. In Sweden, a Minister for Democratic Issues was established in 1998,<sup>31</sup> and in the United Kingdom a Department for Constitutional Affairs (DCA) was established with a mission focused on justice, rights, and democracy. In Sweden, the government presented a Democracy Bill in 2002 that included a strategy to

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30. *Id.* at 31.

31. MINISTRY OF JUSTICE, DEMOCRACY POLICY, FACT SHEET, No. 04.18 (2004) (Swed.).

“safeguard[] and deepen[]” democracy based on participation in a representative democracy.<sup>32</sup> It included an evaluation of its democratic policy that establishes the importance of achieving outcomes and measuring and monitoring results, especially related to participation, elections, voter turnout, and channels of influence.<sup>33</sup> The U.K. government has developed several programs to increase democratic engagement.<sup>34</sup> Of course, democracy issues cut across many different parts and branches of government. One example of assessing challenges is the Finnish democratic audit that involved more than twenty-five thousand people and was carried out at the local level.<sup>35</sup> Its purpose was to construct indicators to measure local representation and citizen participation.<sup>36</sup> It concluded that people need personal interest in the issues as well as skills and knowledge that can have influence in order to participate.<sup>37</sup> Research shows that more knowledge and active participation has a positive impact on democratic quality.<sup>38</sup>

In the United Kingdom, there is an active non-governmental organization (NGO) community. Only Germany is ranked as more active in NGOs.<sup>39</sup> The United Kingdom’s effort to take on the tough issues of reform to re-energize its democracy and democratic

32. MINISTRY OF JUSTICE, DEMOCRACY IN THE NEW CENTURY, FACT SHEET, No. 02.02e (2002) (Swed.); Proposition [Prop.] 2001/02:08 Democracy in the New Century [government bill] (Swed.).

33. Proposition [Prop.] 2003/04:110 Policies for Democracy [government bill] (Swed.) [hereinafter Policies for Democracy].

34. A few of the several new initiatives taken by the government to invigorate citizens’ interest and participation in democracy are the London Civic Forum, Do Politics, Citizen Advocacy Information & Training, The Citizenship Foundation and the Economic and Social Research Council democracy and participation program. DEPT FOR COMMUNITIES & LOCAL GOV’T, CIVIL RENEWAL, TOGETHER WE CAN, [http://civilrenewal.communities.gov.uk/civil/reports-publications/publications/publications-civil-renewal/TogetherWeCan\\_48ppBro\\_prt1.pdf?view=Binary](http://civilrenewal.communities.gov.uk/civil/reports-publications/publications/publications-civil-renewal/TogetherWeCan_48ppBro_prt1.pdf?view=Binary) (last visited Sept. 16, 2006) [hereinafter TOGETHER WE CAN]; The Electoral Comm’n, Do Politics, <http://www.dopolitics.co.uk> (last visited Sept. 16, 2006).

35. MARIANNE PEKOLA-SJOBLOM, VOITTO HELANDER & STEFAN SJOBLOM, THE MANY ROLES OF A CITIZEN, FINNISH LOCAL GOVERNMENT STUDIES NO. 37 (2002).

36. *Id.* See generally TODD LANDMAN, UNIV. OF ESSEX – HUMAN RIGHTS CTR., MAP-MAKING AND ANALYSIS OF THE MAIN INTERNATIONAL INITIATIVES ON DEVELOPING INDICATORS ON DEMOCRACY AND GOOD GOVERNANCE (2003).

37. PEKOLA-SJOBLOM ET AL., *supra* note 35.

38. ORG. FOR ECON. CO-OPERATION & DEV. [OECD], INFORMATION POLICY AND DEMOCRATIC QUALITY, Doc. PUMA/MPM (98)2 (Aug. 24, 1998), at 8 [hereinafter INFORMATION POLICY].

39. In 2002, there were more than 6,000 international NGOs. See World Resources Institute, Environmental Governance and Institutions—Civil Society: International non-governmental organizations with membership, available at [http://earthtrends.wri.org/searchable\\_db/index.php?step=countries&ccID%5B%5D=0&allcountries=checkbox&theme=10&variable\\_ID=575&action=select\\_years](http://earthtrends.wri.org/searchable_db/index.php?step=countries&ccID%5B%5D=0&allcountries=checkbox&theme=10&variable_ID=575&action=select_years) (last visited Sept. 16, 2006), for a listing of international NGOs.

institutions is active and substantive. For example, the Democratic Audit has developed a set of principles by which to evaluate the state of democracy in the United Kingdom, which it has carried out twice since 1996.<sup>40</sup> In cooperation with the International Institute for Democracy and Electoral Assistance (IDEA), the methodology has been applied to several other countries.<sup>41</sup> The Democratic Audit assessment is done in a qualitative manner, and so it should be noted that these assessments are clearly judgmental, which makes international comparisons more difficult. As with many assessments, the Democratic Audit methodology's primary focus is to provide opportunities to stimulate dialogue within the country and to some extent to make limited international comparisons. Assessment is based on the principles of participation, authorization, representation, accountability, transparency, representation, and solidarity.<sup>42</sup> What is valuable is that the assessments are done over time in a particular country, and one is able to measure change. For example, the government in 2000 addressed the concern of large political contributions, both from domestic as well as international donors.<sup>43</sup> Today, international contributions are not permitted in line with what is considered best practice,<sup>44</sup> and donations over £5,000 to any political party must be disclosed.<sup>45</sup> As recently as 2002, the Democratic Audit recognized the need for change to the institution of Lord Chancellor to account for the principle of separation of powers.<sup>46</sup>

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40. The Democratic Audit, *Democratic Findings No. 7, Democratic Audit of the United Kingdom, Failing Democracy 1* (2005), available at <http://www.democraticaudit.com/download/Findings7.pdf> [hereinafter *Democratic Findings No. 7*].

41. The Democratic Audit, *Auditing Democracy*, [http://www.democraticaudit.com/auditing\\_democracy](http://www.democraticaudit.com/auditing_democracy) (last visited Sept. 16, 2006).

42. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE [IDEA], *THE STATE OF DEMOCRACY: DEMOCRACY ASSESSMENTS IN EIGHT NATIONS AROUND THE WORLD 12* (David Beetham et al. eds., Kluwer Law Int'l 2002).

43. See DAVID BEETHAM, IAIN BYRNE, PAULINE NGAN & STUART WEIR, *DEMOCRACY UNDER BLAIR: A DEMOCRATIC AUDIT OF THE UNITED KINGDOM 180* (Politico's Publishing 2002); see also *Political Parties, Elections & Referendums Act, 2000*, c. 41, § 5 (U.K.), available at <http://www.opsi.gov.uk/ACTS/acts2000/20000041.htm> [hereinafter *Political Parties*].

44. Council of Europe, Venice Commission, *Guidelines and Report on the Financing of Political Parties*, Doc. No. CDL-INF 8 (Mar. 23, 2001), available at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)008-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)008-e.asp); Council of Europe, Committee of Ministers, *Recommendation Rec(2003)4 of the Committee of Ministers to Member States on Common Rules against the Corruption in the Funding of Political Parties and Electoral Campaigns*, available at <https://wcd.coe.int/ViewDoc.jsp?id=2183&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>; Council of Europe, Congress of Local and Regional Authorities of Europe, *Recommendation 86 (2000) on the Financial Transparency of Political Parties and Their Democratic Functioning at the Regional Level*, 7th Sess., (May 23–25, 2000).

45. Any donation of £50 or more to an individual candidate must also be disclosed. *Political Parties, Elections & Referendums Act* § 5.

46. BEETHAM ET AL., *supra* note 43, at 27.

Today, the government has already taken action to remedy this conflict by clearly making the Lord Chancellor only a minister managing a government department and removing the office from the judiciary. The government also wished to see the Lord Chancellor cease to be the Speaker of the House of Lords. The House of Lords agreed, and its first elected Speaker took office on July 4, 2006.<sup>47</sup>

Europe as a whole is also evaluating the state of democracy and considering how best to spur civic engagement. The fact that voter turnout generally in Europe has gone from an average of 88% in 1980 to 70% in 2000 is a key impetus for this evaluation.<sup>48</sup> The chart in *infra* Appendix 1b shows that new European member states have experienced a greater decrease in voter turnout than the fifteen original member countries of the European Union. However, newer democracies have a more stable or growing membership in political parties.<sup>49</sup>

The Council of Europe, which includes forty-five member countries, has as its main objective the promotion of human rights, democracy, and the rule of law.<sup>50</sup> Its statute was signed based on shared values of freedom, political liberty, and the rule of law, which also form the basis of democracy.<sup>51</sup> As part of its aim to promote democracy, the Council has identified five core democratic principles, including parliamentary democracy, representation, transparency, sub-national democracy, and participation of civic society.<sup>52</sup>

These principles are not designed only for emerging democracies but also for well-established ones. There must be a “practice-what-we-preach” approach. France has recently examined its press law, which was not being enforced.<sup>53</sup> Similarly, the United Kingdom is changing its election law to permit international observers.<sup>54</sup> While

47. Constitutional Reform Act, *supra* note 7, at c. 4, § 15, scheds. 4 & 5.

48. Future of Democracy, *supra* note 28, at 26.

49. *Id.* at 40.

50. Council of Europe, About the Council of Europe, [http://www.coe.int/T/e/Com/about\\_coe](http://www.coe.int/T/e/Com/about_coe) (last visited Sept. 16, 2006).

51. “Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.” Statute of the Council of Europe, May 5, 1949, Europ. T.S. No. 1/6/7/8/11.

52. LAWRENCE PRATCHETT & VIVIEN LOWNDES, COUNCIL OF EUROPE, DEVELOPING DEMOCRACIES IN EUROPE, AN ANALYTICAL SUMMARY OF THE COUNCIL OF EUROPE’S ACQUIS 5, 6 (2004).

53. EUR. PARL. ASS., *Freedom of Expression in the Media in Europe*, 1ST SESS., Rec. 1589 ¶ 11 (2003), available at <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta03/FREC1589.htm>.

54. OFFICE FOR DEMOCRATIC INST. & HUMAN RIGHTS, UNITED KINGDOM OF GREAT BRITAIN & NORTH IRELAND GENERAL ELECTION 3 (2005), available at [http://www.osce.org/documents/odhr/2005/08/15921\\_en.pdf#search=%22united%20kingdom%20election%20law%20international%20observers%22](http://www.osce.org/documents/odhr/2005/08/15921_en.pdf#search=%22united%20kingdom%20election%20law%20international%20observers%22) [hereinafter UK GENERAL ELECTION].



the law had yet to be changed, in the May 2005 parliamentary elections, the United Kingdom invited international experts to observe the process.<sup>55</sup> Overall, the cooperation within Europe—with the European Union, the Council of Europe, and the OECD—has been positive for democracy. This cooperation has allowed for the sharing of knowledge, policy, and experience. It has also meant the development of European “norms of human rights, democracy and ‘good governance.’”<sup>56</sup> It not only allows member countries to understand each other better but also permits greater self-examination and scrutiny, which is essential for a healthy democracy.

Some of this examination has resulted in a general observation that parliaments have weakened over the years. One recent global survey shows that this critical democratic institution is the least trusted.<sup>57</sup> Some have tried to evaluate its performance.<sup>58</sup> However, there is clear support for parliamentary democracies as fundamental to Europe and the Council of Europe in that the “government must command the confidence of the Chamber elected by universal suffrage.”<sup>59</sup> Most well established democracies do follow the parliamentary system.<sup>60</sup> But the public is demanding greater accountability and transparency of government in its democratic institutions. Since 2000, there has been a decrease in satisfaction in the United Kingdom with how its democracy works.<sup>61</sup> One of the great challenges of any democracy is the inherent instability that comes from government openness and transparency and from representatives being voted in and voted out. Accountability and scrutiny are engines that drive a responsive democracy, but they can create change and instability that can be hard to weather. Well

55. *Id.*

56. Future of Democracy, *supra* note 28, at 19.

57. Out of seventeen institutions, parliament or congress is ranked last, just below companies. Press Release, Gallup Int'l, Voice of the People Trust Survey (Gallup Int'l 2002), available at <http://www.voice-of-the-people.net> [hereinafter Voice of the People].

58. See JOHN UHR, HOW DEMOCRATIC IS PARLIAMENT? A CASE STUDY IN AUDITING THE PERFORMANCE OF PARLIAMENTS 1 (2005), available at [http://democratic.audit.anu.edu.au/papers/20050630\\_uhr.pdf](http://democratic.audit.anu.edu.au/papers/20050630_uhr.pdf). This audit of performance uses four standards: political equality, popular control of government, civil liberties and human rights, and public deliberation. *Id.*

59. EUR. PARL. ASS., *Democratic Functioning of National Parliaments*, 2ND SESS., Res. 1154, ¶ 1 (1998), available at <http://assembly.coe.int/documents/adoptedtext/ta98/eres1154.htm>.

60. Arend Lijphart, *Constitutional Design for Divided Societies*, 73 J. OF DEMOCRACY 76, 103 (2004). Thirty of the thirty-six stable democracies reviewed had parliamentary systems. See generally AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999).

61. U.K. approval of how democracy works was at 84% in 2000 and 58% in 2004. EUR. COMM'N, EUROBAROMETER: PUBLIC OPINION IN THE EUROPEAN UNION, available at [http://europa.eu.int/comm/public\\_opinion/cf/index\\_en.cfm](http://europa.eu.int/comm/public_opinion/cf/index_en.cfm).

established democracies can sustain this change, but newer ones may have a tougher time of it. South Africa has come into democracy with a difficult history, and the process of democratic development has not been any easier. Other countries are deterred by this instability. In China there has been economic growth without democracy.<sup>62</sup> Democracy is complex and requires constant review and attention.

In the United Kingdom the degree of majority representation in Parliament that allows the government to move ahead with its agenda is the subject of much debate, including the degree with which an elected majority can move ahead with its agenda and with what degree of further direct participation by the population. The mechanisms to proceed have been described by the Council of Europe as numerical, deliberative, and based on negotiation.<sup>63</sup> That is, the process is based on the number of votes, the use of negotiation and trading based on interests, or persuasion before a decision is made.<sup>64</sup> Many democracies may use a mix of all three processes for decision-making, and there are certainly arguments to be made that one may be more important than another depending on the sensitivity of the issue or the degree of impact the decision may have.

The ways in which the population participates is changing from a system in which people meet to discuss and debate to one in which people convey their interests to representatives. While in Europe generally there is a clear decline in political party membership, this is not the case for volunteering, which has increased.<sup>65</sup> Given the number of stakeholders and actors in the democratic process, it is important that the rules of the process should be known. There are not only formal but also informal rules. It is said that "democracy is perceived to be particularly effective where both the formal and informal rules are widely understood and accepted across" the population.<sup>66</sup> Of course, there is no one-size-fits-all, and each country has its own culture and history from which democracy has evolved. As a result, a democratic country does not mean that a country must have a codified constitution. Regardless of a constitution, the challenge is to develop mechanisms for people to be engaged, especially mechanisms that do not require official assistance and that include the younger generation. The first challenge is to better understand what the obstacles are to participation and engagement in the political and democratic process.

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62. See generally KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006).

63. Future of Democracy, *supra* note 28, at 25, 83–84.

64. PRATCHETT & LOWNDES, *supra* note 52, at 75.

65. Future of Democracy, *supra* note 28, at 55.

66. PRATCHETT & LOWNDES, *supra* note 52, at 84.

The identity of the stakeholder base is also important. With Europe becoming more diverse as a result of intra-European migration as well as an infusion of new cultures due to immigration, the stakeholder base is changing in individual states.<sup>67</sup> This change often means stakeholders raise a greater diversity of issues that governments have to address. For example, discrimination is an obvious issue that takes on greater importance with increased immigration, and non-discrimination and protection of human rights are crucial for democracy. The dialogue that results from these demographic changes as well as possible legal changes should lead to change for the better. In the long run, it should mean a healthier democracy and a more tolerant society.<sup>68</sup> Again, democracy is an evolving idea that requires government's as well as society's commitment. Many of these values and principles can only be advanced in partnership.

The constitutional reforms aim to further many of these principles. As a result of the constitutional reforms undertaken since 1997, the United Kingdom should see long-term progress in democracy. Some of these expected outcomes would include an increase in voter turnout by all segments of the population, an increase in and greater diversity of those who stand for public office, and wider public participation to influence decision-making. These are long-term goals and ones that need to be measured over time to show impact. As a result, the biggest current challenge to countries is developing quantitative measures of democratic progress. This is difficult to do because there are so many factors that influence democracy, the rule of law, and good governance, and therefore, some people may argue that qualitative analysis may be perhaps more useful and accurate even though it is subjective. However, the need to show results and measure success must be addressed. This is why many governments around the world are emphasizing the need for data that can be used for comparison and benchmarking.

#### IV. GOOD GOVERNANCE

To have engagement and participation in the democratic process, citizens must be able to understand the governance system. Governance is very much a part of how democracy functions—how citizens participate in society; how they are represented in

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67. The highest proportion of foreigners relative to total population was Luxembourg in 2000. Future of Democracy, *supra* note 28, at 33–36; OECD Factbook 2006 – Economic, Environmental and Social Statistics, <http://titania.sourceoecd.org/vl=487233/cl=36/nw=1/rpsv/factbook/01-03-01-g01.htm>.

68. *Id.* at 20.

government through elections; how they participate in decision-making; how checks and balances protect individuals from state power; and how local, regional, and devolved governments provide greater opportunities for the state to respond to the needs of citizens. This complexity of governance creates challenges for accountability and transparency in decision-making. It is not always obvious who is in charge, who makes the decisions, who implements these decisions, and who should be accountable for decisions. Such questions are further complicated by the levels of local, regional, and devolved governments; national governments; and supranational governments (such as the European Union).<sup>69</sup>

One of the objectives of the constitutional reform process is to clarify and renew the relationship between the state and its citizens. This renewal is very much influenced by whether there is good governance—good governance positively contributes to the functioning of democracy and to the economy as a whole. Democracy is supported by good governance when there are effective checks and balances; free and fair elections; openness and transparency that allow individuals to participate effectively in decision-making and accessing public services; and effective mechanisms for citizens to participate, be represented, and make their voices heard. There is a public expectation of government accountability, which in turn is expected to ensure quality services. It is for this reason that a program for modernizing government was initiated in the United Kingdom to improve the way in which policies are developed, services are delivered, and functions are performed.<sup>70</sup> The economic effects are clear—studies show that in the long run better governance leads to higher income per capita.<sup>71</sup> That means higher levels of employment, more resources for education and health, and a better quality of life.

The question of governance is a worldwide issue and one which the European Union is also tackling due to the fact that E.U. citizens are less satisfied with the way democracy works at the E.U. level than at the national level.<sup>72</sup> As a result, the European Union is

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69. This is referred to as “multi-level governance.” *Id.* at 68.

70. See generally PRIME MINISTER AND THE MINISTER FOR THE CABINET OFFICE, MODERNIZING GOVERNMENT, 1999, Cm. 4310 (“Modernising Government is an important statement for the Government. It is a programme for reform for the future. And it is a series of new measures which the Government will implement now.”).

71. DANNY KAUFMANN, AART KRAAY & MASSIMO MASTRUZZI, GOVERNANCE MATTERS IV: GOVERNANCE INDICATORS FOR 1996–2004, 36 (2005), available at [http://info.worldbank.org/etools/docs/library/206973/GovMatters\\_IV\\_main.pdf](http://info.worldbank.org/etools/docs/library/206973/GovMatters_IV_main.pdf); DANNY KAUFMANN, GOVERNANCE REDUX: THE EMPIRICAL CHALLENGE 14 (2004), available at <http://www.worldbank.org/wbi/governance/pdf/govredux.pdf>.

72. At the national level, 53% are satisfied with the way democracy works, while only 49% are satisfied at the E.U. level. EUR. COMM’N, EUROBAROMETER, PUBLIC

proposing to have more mechanisms to involve citizens, more openness, better policies, regulation and delivery, better global governance, and a strategy to re-focus its institutions in order to improve good governance.<sup>73</sup> One factor that contributes to good governance is voice and accountability, and an improvement in voice means an improvement in the accountability of government.<sup>74</sup>

The inter-relationship requires information and openness by government. In short, it supports the legitimacy of government. This discussion also relates to trust, which is central to the development of good governance.<sup>75</sup>

A key issue of debate in the United Kingdom and in Europe generally, is what level of trust is there in government. Trust is also fast becoming a global issue.<sup>76</sup> The discussion of trust in government centers around public confidence—confidence in whether government functions effectively, makes decisions that are in the interest of citizens and the state, and provides quality services. Trust has been identified as an area for improvement in the European Union and for many member states. During the past thirty years, trust in the United Kingdom's government has declined from 38% to 18%.<sup>77</sup> In Europe generally, trust in E.U. institutions has also declined—confidence in the E.U. Commission and the E.U. Parliament has declined since 2002 and now stands at 46% and 52% respectively.<sup>78</sup> The public in the United Kingdom is even more critical of E.U. institutions<sup>79</sup> than their local Member of Parliament.<sup>80</sup> The OECD

OPINION IN THE EUROPEAN UNION, FIRST RESULTS REP. NO. 63, at 38, 40 (2005), available at [http://ec.europa.eu/public\\_opinion/archives/eb/eb63/eb63.4\\_en\\_first.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb63/eb63.4_en_first.pdf) [hereinafter EUR. COMM'N REP. NO. 63].

73. See *Commission White Paper on European Governance*, *supra* note 10, at 10 (defining good governance as five principles: openness, participation, accountability, effectiveness, and coherence).

74. See *infra* Appendix 1c.

75. See RISTO HARISALO & JARI STENVALL, TRUST AS A FOUNDATION OF CIVIL SOCIETY: CITIZENS' TRUST IN GOVERNMENT MINISTRIES 3 (2001); GERT BOUCKAERT, DERRY ORMOND & GUY PETERS, A POTENTIAL GOVERNANCE AGENDA FOR FINLAND 23 (2000).

76. There is a lack of trust worldwide in all institutions including democratic institutions, large companies, NGOs, and media. *Voice of the People*, *supra* note 57.

77. Political Action Survey; British Social Attitudes, 2000, available at <http://www.data-archive.ac.uk/findingData/snDescription.asp?sn=4486>. There has been a fall in political trust from 1974 and 2000. National Statistics, Society, Social Capital, available at [http://www.statistics.gov.uk/cci/nugget\\_print.asp?ID=286](http://www.statistics.gov.uk/cci/nugget_print.asp?ID=286).

78. While the long-term confidence level for the Commission has risen from 40% in 1999 to 46% in 2005, this is a decline from the 53% confidence level in 2002. EUR. COMM'N REP. NO. 63, *supra* note 72, at 19. The same is true for the confidence level for Parliament, which decreased from 59% in 2002 to 52% in 2005. *Id.* at 20.

79. In the United Kingdom, 35% of citizens tend to trust the European Parliament, and 31% of citizens tend to trust the European Commission. *Id.* at 21.

80. Of those surveyed, 47% said they trust their local Member of Parliament to tell the truth, but only 27% trust Members of Parliament generally to tell the truth.

has identified that lack of trust in government results in lost opportunities, increase in cost of governance, disequilibrium of government, and greater obstacles to reform.<sup>81</sup> In the last twenty years, the issue of trust was thought to be about bureaucracy and inefficiency, and there was an effort to improve performance management through targets and indicators.<sup>82</sup> Clearly now with an emphasis on more efficient and better delivery of services, the issue of trust has been shown to go beyond that.

Trust is more about the interaction of people. It is about creating an environment where power is not a barrier to interaction and where people are provided access to the information necessary to be able to interact and participate. If there is greater trust, there is a relationship of cooperation and participation, and this cooperation leads to an increase in information and better quality of decision-making. In this way, trust is very much about social capital.<sup>83</sup> Business relationships were based on the fact that two parties knew and trusted one another, and when the paradigm changed, the need for contracts and enforcement came into play. This sense of trust was more evident in some countries than others, and the United Kingdom is in a category of trust societies.<sup>84</sup> Similarly, trust is also an element of government decision-making and citizen participation. In addition, trust plays a role when political parties and governments have agreements with their constituents about their goals and objectives, which citizens endorse by voting. The accountability in this case is the vote. However, many voters do not believe that political parties are advancing their interests, and they are not turning out to vote. For example, in a study in Finland, 89% perceive that government ministries are not working in the public's best interest, and voter turnout declined.<sup>85</sup> Despite this decline in trust and voter turnout, people in the United Kingdom have remained consistently interested in politics since 1986,<sup>86</sup> though this interest has not always translated into higher percentages of those voting. It is for this

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SELECT COMMITTEE ON PARLIAMENTARY COMMISSIONER FOR STANDARDS, STRENGTHENING THE STANDARDS SYSTEM 1 (2004–05), available at [www.publications.parliament.uk/pa/cm200405/cmselect/cmstand/264/26403.htm](http://www.publications.parliament.uk/pa/cm200405/cmselect/cmstand/264/26403.htm).

81. HARISALO & STENVALL, *supra* note 75, at 4.

82. See OECD, POLICY BRIEF: PUBLIC SECTOR MODERNISATION: GOVERNING FOR PERFORMANCE 1 (2004).

83. ROBERT D. PUTNAM, LEWIS M. FELDSTEIN, & DON COHEN, BETTER TOGETHER: RESTORING THE AMERICAN COMMUNITY 9 (Simon & Schuster 2004). Social capital refers to norms and networks that enable collective action.

84. FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES & THE CREATION OF PROSPERITY (1995).

85. Voter turnout was about 50%. HARISALO & STENVALL, *supra* note 75, at 1.

86. CATHERINE BROMLEY, JOHN CURTICE, & BEN SEYD, IS BRITAIN FACING A CRISIS OF DEMOCRACY? 11 (Centre for Research into Elections and Social Trends 2004).

reason that greater understanding of the interrelationships that affect trust is needed, and the question that should be asked is: what specifically do people not trust? Further work needs to be done in this area, and social capital is very much a part of this research because bonding and bridging social capital contributes to trust, democracy, and diversity.<sup>87</sup> The outcome of such research could be to identify elements that governments could initiate to promote the development and growth of social capital.<sup>88</sup>

A. *Empowerment, Representation, Participation, Civil Society*

*The aim is that there is active civic engagement in society, there are effective mechanisms to have a say in how government works, and the population is confident in the democratic process.*

The ways in which the population engages are changing. While in Europe generally there is a clear decline in political party membership, volunteering has increased.<sup>89</sup> Good governance requires people to be represented, to have opportunities to participate in the democratic process, and to be empowered with skills and knowledge to effectively contribute to society. Many of the reforms aim to support these elements. In the long term, the aim is that there is active civic engagement in society, effective mechanisms to have a say in how government works, and confidence in the democratic process. There are several factors that contribute to achieving this goal. First, new ways are being devised to increase participation, taking into account technology and people's views and interests. Second, an emphasis is being placed on the young to build their skills and knowledge for the future. Third, new methods of voting encourage voices to be heard.

Civil engagement will be influenced by the ways in which people can participate in a democracy. Local authorities have increased the number of interactive websites and citizen panels.<sup>90</sup> Electronic means

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87. PUTNAM ET AL., *supra* note 83, at 279.

88. *Id.* See also World Bank Website, Measuring Social Capital, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTTOSOCIALCAPITAL/0,,contentMDK:20193059~menuPK:418220~pagePK:148956~piPK:216618~theSitePK:401015,00.html> (last visited Sept. 17, 2006).

89. Future of Democracy, *supra* note 28, at 55.

90. In 1997, there were 24% interactive websites compared with 52% in 2001, and there were 18% citizen panels, compared with 71% in 2001. OFFICE OF THE DEPUTY PRIME MINISTER, IMPROVING DELIVERY OF MAINSTREAM SERVICES IN DEPRIVED AREAS – THE ROLE OF COMMUNITY INVOLVEMENT 22 (2005), available at <http://www.neighbourhood.gov.uk/publications.asp?did=1561>.

can increase opportunities for younger people and the disabled. In addition, one borough in the United Kingdom successfully set up questionnaires, telephone and internet surveys, workshops, focus groups and online discussions to get feedback from residents.<sup>91</sup> This use of technology coupled with a steady interest by citizens for volunteering over the years can have a positive impact on participation. The United Kingdom has an excellent track record of people donating their time to make a contribution either to a specific cause or issue. Membership in voluntary associations is about 47%, and given the trend over the last thirty years this number is not expected to decrease in the future.<sup>92</sup> Other efforts include programs like Together We Can, which has three essential ingredients: active citizens, strengthened communities, and partnership with public bodies.<sup>93</sup> It aims to promote participation so that “communities and citizens of all ages and backgrounds are more confident, able and interested in understanding public policy issues and influencing the governance of public institutions and service.”<sup>94</sup> For example, a project related to safety and justice was established in Birmingham for the community to be involved in making the neighborhood safer. The results are clear—14% reduction in crime, 41% reduction in burglary, and 29% reduction in crime by young people.<sup>95</sup> What is also clear is that when people are interested, they are more likely to get involved. And greater engagement and participation results in better decisions and quality services.<sup>96</sup> This inter-governmental program is measuring factors like trust and satisfaction, which may shed greater light on what elements are in greatest need to address issues of trust.

Greater confidence in the democratic process will be influenced by a variety of factors. An increase in voter turnout is one way to demonstrate this. Voter turnout is important in that it shows participation and contributes to the legitimacy of government. However, it is important to note that voter turnout depends on many different factors and not just government policies. There has been a decline in voter turnout in the general elections since 1945; in the 2005 elections there was a 61% turnout.<sup>97</sup>

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91. TOGETHER WE CAN, *supra* note 34, at 12.

92. Future of Democracy, *supra* note 28, at 54.

93. TOGETHER WE CAN, *supra* note 34, at 7.

94. *Id.* at 32.

95. The results occurred over eighteen months from 2002, and the average reduction in other areas was 7%, 13%, and 12% respectively. *Id.* at 18.

96. See Finnish Democratic Audit, *available at* <http://www.vnk.fi/vn/liston/base.jsp?r=40242&k=en> (exhibiting a civil participation policy program).

97. In 1945 there was a 73% turnout, in 1997 there was a 72%, and in 2001 there was a 59% turnout. [http://www.idea.int/vt/country\\_view.cfm?CountryCode=GB](http://www.idea.int/vt/country_view.cfm?CountryCode=GB). See *infra* Appendix 1e.



In 2001, only 39% of young people voted.<sup>98</sup> Similarly, young people in Europe generally are not part of associations whose memberships are usually comprised of older members of society.<sup>99</sup> The emphasis on young people is central because they are less likely to be involved, less likely to vote, and consequently less likely to have confidence in the system. Therefore, the first step is getting them more involved, developing the skills needed to do so, and perhaps even creating a democratic habit. Active people tend to be active in all aspects of life.<sup>100</sup> An increase in the number of young registered voters would be positive since the aim is to reduce the gap between the young registered voters and the general population.<sup>101</sup> For example, there is a need for increased education about how to register. In the United States, which also has had a decline in voter turnout, there have been some positive examples of voter registration on election day.<sup>102</sup> In many countries, including the United Kingdom, those who vote at a young age are more likely to continue to vote. This is especially critical since Britons vote most often because they have a sense of duty to do so.

Other ways to encourage young people are through opportunities to participate in a variety of activities: mock elections, citizen councils, youth parliaments, and election-day administration. In Sweden, school elections were organized as part of democracy

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98. MATT HENN & MARK WEINSTEIN, DO YOU REMEMBER THE FIRST TIME?: FIRST TIME VOTERS IN THE 2001 GENERAL ELECTION 1 (2002), available at [http://www.gsr.ntu.ac.uk/docs/PSA%20paper%202002%20Apr%204\\_%203.pdf](http://www.gsr.ntu.ac.uk/docs/PSA%20paper%202002%20Apr%204_%203.pdf).

99. Future of Democracy, *supra* note 28, at 57; Council of Europe, Committee of Ministers, *Youth Participation and the Future of Civil Society Recommendation No. R (97)3*, available at <http://cm.coe.int/ta/rec/1997/97r3.html>; Council of Europe, Committee of Ministers, *Children's Participation in Family and Social Life Recommendation No. R (98)8*, available at <https://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=486270&SecMode=1&Admin=0&Usage=4&InstranetImage=42953>; Revised European Charter on the Participation of Young People in Local and Regional Life, May 21, 2003, available at [http://www.coe.int/T/E/cultural\\_co-operation/Youth/TXT\\_charter\\_participation.pdf#search=%22Revised%20European%20Charter%20on%20the%20Participation%20of%20Young%20People%20in%20Local%20and%20Regional%20Life%22](http://www.coe.int/T/E/cultural_co-operation/Youth/TXT_charter_participation.pdf#search=%22Revised%20European%20Charter%20on%20the%20Participation%20of%20Young%20People%20in%20Local%20and%20Regional%20Life%22).

100. Finnish Democratic Audit, *supra* note 96.

101. The goal is a 30% reduction in the gap between registration among young people (76%) and the population at large (93%). <http://www.dca.gov.uk/dept.strategy/dcastratch4.pdf>. [hereinafter PUBLIC SERVICE AGREEMENT]. See also DEP'T FOR CONST. AFFAIRS, CONSTITUTION DIRECTORATE SHADOW PUBLIC SERVICE AGREEMENT DELIVERY PLAN 4 (2005).

102. In a preliminary nationwide analysis of the 2004 Election, states with election day registration saw turnout that exceeded the national average by 14%. Media Release, Demos, States With Election Day Registration Led Nation in Voter Turnout on Nov. 2 (Dec. 6, 2004), available at <http://www.demos-usa.org/page249.cfm>. One district had a 98% voter turnout by actively encouraging young people to vote. *Id.*

campaigns with a 90% turnout.<sup>103</sup> To build skills for voting, a U.K. national citizenship curriculum has been developed for young people.<sup>104</sup> Since 2002, there has been more than a fourfold increase in the number of students taking the course, and the results are positive: students are scoring better on knowledge of citizenship issues.<sup>105</sup> There has been an overall increase in attention to citizenship education worldwide. A study of thirty countries showed that the challenges in education can be overcome through interactive and participative tools which are “co-constructed with parents, the community, and non-governmental organizations, as well as the school.”<sup>106</sup> This may translate into greater interest or other positive outcomes. For example, in Sweden, a Time for Democracy project began in 2000 to increase participation and awareness.<sup>107</sup> One of the activities under this project included a forum to teach young people about democracy and to teach elected officials about the young. The outcome was that both developed greater trust for the other.<sup>108</sup> Adult citizenship education for immigrants has been piloted in several hubs, and further expansion is being planned beginning in November 2005 with hopefully similar results.<sup>109</sup>

Part of increasing public confidence relates to those who stand for elections and hold public office. Just as there is a need to diversify the judiciary, there is also a need to diversify elected positions. Social and ethnic diversity may impact the levels of political and

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103. Policies for Democracy, *supra* note 33. Swedish schools require that by their ninth year, students must have “acquired an understanding of the fundamental concepts and characteristics of a democratic society and be capable of applying democratic principles to everyday life situations.” *Id.* Sweden also has developed a website with basic information on democracy and human rights: [www.sweden.gov.se](http://www.sweden.gov.se).

104. European Youth Parliament United Kingdom, <http://www.eybuk.com/curriculum.htm> (last visited Sept. 17, 2006).

105. In 2002–2003, 6,000 students took General Certificate of Secondary Education citizenship studies, and 54% received a grade C or better. In 2003–2004 the total entry rose to 27,184 students and 95% received a A\*-G. Ofsted Subject Report 2002/03 – Citizenship in Secondary Schools 2 (Feb. 2004), <http://www.ofsted.gov.uk/publications/index.cfm?fuseaction=pubs.displayfile&id=3535&type=doc>; Ofsted Subject Reports 2003/04, Citizenship in Secondary Schools (Feb. 2005), [http://www.ofsted.gov.uk/publications/annualreport0304/subject\\_reports/secondary/citizenship.htm](http://www.ofsted.gov.uk/publications/annualreport0304/subject_reports/secondary/citizenship.htm) (last visited October 24, 2006).

106. JUDITH TORNEY-PURTA, JOHN SCHWILLE & JO-ANN AMADEO, IEA CIVIC EDUCATION STUDY: EXPECTATIONS AND ACHIEVEMENTS OF STUDENTS IN THIRTY COUNTRIES 2 (1999), available at <http://www.indiana.edu/%7Eessdc/ieadig.htm>.

107. Thirty-five million Swedish Kroner were allocated. Policies for Democracy, *supra* note 33.

108. *Id.*

109. See generally Immigration and Nationality Directorate, <http://www.ind.homeoffice.gov.uk/> (last visited Oct. 26, 2006).

institutional trust.<sup>110</sup> There have been increases in the appointment of women, black, minority ethnic (BMEs) and the disabled to public bodies, but more attention is needed.<sup>111</sup>

For this reason, specific targets have been set by the judiciary and the Department of Constitutional Affairs to increase their representation. Appointment is one way to increase diversity. Another way is to stand for an elected position. The number of women who have stood for elections has increased.<sup>112</sup> Today there are 127 women in the U.K. Parliament, but the number of women who won was quite low in 2005 as compared to the number that ran for office.<sup>113</sup> While the courts struck down an affirmative action effort to create greater diversity, a new law was passed to do the same.<sup>114</sup>

110. ROGER HOOD, STEPHEN SHUTE & FLORENCE SEEMUNGAL, *ETHNIC MINORITIES IN THE CRIMINAL COURTS: PERCEPTIONS OF FAIRNESS AND EQUALITY OF TREATMENT* (2003), available at <http://www.dca.gov.uk/research/2003/2-03es.htm>.

111. Non-devolved appointments to public bodies in March 2002 included 34% women, 3% disabled, and 6% BME, and in March 2004, appointments included 38% women, 4% disabled, and 7% BME. PUBLIC APPOINTMENTS UNIT, REPORT OF THE CABINET OFFICE, SHORT LIFE WORKING GROUP ON IMPROVING DIVERSITY IN PUBLIC APPOINTMENTS 8 (2004), available at [www.publicappointments.gov.uk/publications/pdf/slwgreport.pdf](http://www.publicappointments.gov.uk/publications/pdf/slwgreport.pdf). In 2005, the following percent of black candidates were successful, by party: Conservative 5%, Labour 41%, Liberal Democrats 0%. Operation Black Vote, Black Candidates, <http://www.obv.org.uk/elec2005/blackcandidates.html> (last visited Oct. 20, 2005).

112. In 2005, Labour put forward 170 women, of whom 98 were elected, and the Liberal Democrats put forward 141 of whom 10 were elected. Female representation in Parliament over the last three general elections is encouraging: in 1997, 120, or 18%; in 2001, 118 or 18%; and in 2005, 127 or 19.7%. See Emily's List UK, Candidates we have helped, <http://www.emilyslist.org.uk/about/candidates.html> (last visited Oct. 26, 2006). Female representation is higher in the Scottish Parliament at 39.5%. SCOTTISH PARLIAMENT, FACT SHEET (Sept. 4, 2006), <http://www.scottish.parliament.uk/business/research/factsheets/documents/FemaleMSPs-Session2.pdf> (last visited Oct. 26, 2006). The same is true in the Welsh Assembly, with female representation at 48.3%. National Assembly for Wales, Your Questions – Who?, <http://www.wales.gov.uk/yourqwho/index.htm> (last visited Oct. 26, 2006).

113. Winning were 58% of women put forward by Labour and just 6% of those women put forward by Liberal Democrats. RICHARD CRACKNELL, *WOMEN IN PARLIAMENT AND GOVERNMENT* 5 (House of Commons Library 2006), available at <http://www.parliament.uk/commons/lib/research/notes/snsg-01250.pdf#search=%22PARLIAMENT%202005%20ELECTION%2058%25%20of%20women%20Labour%20and%20just%206%25%20of%20those%20women%20Liberal%20Democrats%22>.

114. The Labour Party adopted a policy of all women shortlists in 1993–1996. In a case brought in 1996, this policy was judged unlawful under the Sex Discrimination Act 1975. The Sex Discrimination (Election Candidates) Act 2002 was introduced to facilitate progress of women's representation in government. It removed legal barriers to political parties wishing to adopt positive measures to reduce inequality between the numbers of men and women elected. See Women & Equality Unit, Women's Representation in Politics, [http://www.womenandequalityunit.gov.uk/public\\_life/parliament.htm](http://www.womenandequalityunit.gov.uk/public_life/parliament.htm) (last visited Sept. 28, 2006). In the 2005 general election Labour used this policy in a constituency in South Wales, Blaenau Gwent. Peter Law stood as an independent candidate against Labour's women. Traditionally a safe Labour area (securing over 70% for the last two general elections), Peter Law won a 9,000 vote

Other countries are also making an effort to ensure participation of women. In Finland, a quota system is in place for committees in municipalities to have at least 40% representatives from both genders.<sup>115</sup> In Sweden, women represent 47% of the elected positions on the county council assemblies, and some studies say that this may be a result of child-friendly practices.<sup>116</sup> Other mechanisms need to be considered to increase representation of minorities. The Council of Europe has recommended that women should represent 40% of public decision-making bodies.<sup>117</sup> Culture should also be considered because it plays an important role in whether women hold political positions: a more traditional culture has resulted in fewer women represented in political positions in some countries.<sup>118</sup> In addition to minorities, studies show that the socio-economically vulnerable groups participate and vote less.<sup>119</sup>

Increasing public confidence may result from different voting systems. For example, proportional representation in Parliament is a popular topic of debate in the United Kingdom. Another way to affect participation, empowerment, and representation is to increase citizen's ability to have a "say" in how government works. Currently, only 36% of U.K. citizens believe that "when people like me get involved in politics, they can really change the way the country is run."<sup>120</sup> Meaningful public consultation with citizens may change this view. Since 2001, 80% of the public consultations have lasted more than the standard twelve weeks.<sup>121</sup> This standard is beyond the eight-week guideline set by the European Union.<sup>122</sup> Citizen consultation in Finland has concluded that success is also a matter of political commitment, cross government department cooperation, and well-trained civil servants. Another way to have a say is through referenda. There have been several referenda on issues that are of

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majority. *Labour and Tories Suffer at Polls*, BBC NEWS, June 30, 2006, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/5129524.stm](http://news.bbc.co.uk/1/hi/uk_politics/5129524.stm).

115. Finnish Democratic Audit, *supra* note 96.

116. Policies for Democracy, *supra* note 33. Examples include flexibility in taking time off and child care.

117. The Council of Europe recommendation is that representation of either women or men in any decision-making body in political or public life should not fall below 40%. *Future of Democracy*, *supra* note 28, at 25.

118. Policies for Democracy, *supra* note 33.

119. Finnish Democratic Audit, *supra* note 96. Such groups include the unemployed, immigrants, and the less educated.

120. THE ELECTORAL COMMISSION, AN AUDIT OF POLITICAL ENGAGEMENT 2, 26 (2005).

121. In 2004, the number was 76%. Cabinet Office Code of Practice on Consultation, [www.cabinetoffice.gov.uk/regulation/consultation](http://www.cabinetoffice.gov.uk/regulation/consultation) (last visited Oct. 26, 2006).

122. Enterprise Europe No. 11 (April-June 2003), [http://ec.europa.eu/enterprise/library/enterprise-europe/issue11/articles/en/enterprise24\\_en.htm](http://ec.europa.eu/enterprise/library/enterprise-europe/issue11/articles/en/enterprise24_en.htm).

public interest in the United Kingdom. In addition, many countries also use referenda for this purpose. However, there is no policy on their use in the United Kingdom. If it is found to be an effective method of expression, consideration may be given to developing a policy on when and how to use referenda. Being involved in decision-making is related to public satisfaction of government and the services it provides.<sup>123</sup>

There are many ways for citizens and government to interact. The OECD has described them in three ways: information that government provides to citizens both voluntarily and by request, consultation where the government seeks views and the citizen provides it, and active participation where there is collaboration and cooperation between government and the citizen in decision-making.<sup>124</sup> The OECD has set principles on hearing citizens.<sup>125</sup> The Council of Europe also has recommendations on participation.<sup>126</sup> All of these mechanisms are used in the United Kingdom, and all support the strengthening of good governance and the legitimacy of government. Whatever the mechanisms, experience shows that “interpersonal connections and civic engagement among ordinary citizens [are] essential to making participatory democracy work.”<sup>127</sup> Results show that social capital has increased since 1998.<sup>128</sup>

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123. Finnish Municipal Democratic Audit Project, <http://www.fsd.uta.fi/english/data/catalogue/FSD2042/index.html>.

124. KATJU HOLKERI & JOHANNA NURMI, *QUALITY, SATISFACTION AND TRUST IN GOVERNMENT: REASSESSING TRUST IN A REINVENTED GOVERNMENT, TRYING TO REAFFIRM TRUST BY PUBLIC MANAGEMENT REFORM WORK IN FINLAND 1995–2003*, 25 (2003).

125. See EUR. PARL. ASS., *Citizens' Participation in Politics*, Res. 980 (1992); EUR. PARL. ASS., *Citizens' Participation in Politics*, Res. 1121 (1997); EUR. PARL. ASS., *Democratic Function of National Parliaments*, Res. 1154 (1998); EUR. PARL. ASS., *Future of Democracy*, Res. 1353 (2003).

126. *Id.*

127. PUTNAM ET AL., *supra* note 83, at 274.

128. “People’s perceptions of their local neighbourhood give an indication of the strength of community spirit and neighbourliness.” National Statistics, *British Social Attitudes, Social Capital: One in Three Say We “Help Each Other,”* <http://www.statistics.gov.uk/cci/nugget.asp?id=286> (last visited Sept. 16, 2006). The number of people who say, “we help each other” has risen from around 30% in 1998 to 36% in 2000. *Id.* The number who think “we go our own way” has remained stable, at around 50%. *Id.*

### B. Free and Fair Elections

*The aim is that there is public confidence in elections  
and that they are accessible.*

Conducting free, fair, and regular elections is a requirement for a well functioning democracy. Elections are the primary way for citizens to participate in their government and have their voices heard. They also provide an effective mechanism of government accountability. The main principles of an election system are the right to vote, the right to be elected for established terms in institutions, transparency in the composition of any non-elected institutions, and an autonomous organization that supervises elections.<sup>129</sup> These principles are implemented through a commitment to “hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of legislature.”<sup>130</sup> To ensure transparency and integrity, these principles also imply that there are codes of conduct for elections that include behavior of political parties, candidates, the government in power, election observers, and polling staff.<sup>131</sup>

In the United Kingdom, the electoral reforms “aim to increase participation—both registration and voting rates—whilst at the same time ensuring that the system remains secure and free from malpractice.”<sup>132</sup> The overall goal is increased public confidence in accessible elections. The United Kingdom has been known for its integrity and “long-standing tradition of democratic elections,” but there is always room for improvement.<sup>133</sup> Today there is 53% public confidence level in the U.K. voting system,<sup>134</sup> which is above the

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129. INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, INTERNATIONAL ELECTORAL STANDARDS: GUIDELINES FOR REVIEWING THE LEGAL FRAMEWORK OF ELECTIONS 14–15 (2002).

130. Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11, Nov. 4, 1950, C.E.T.S. No. 005, art. 3 (1953).

131. INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *supra* note 129, at 17.

132. DEP’T FOR CONST. AFFAIRS, GOVERNMENT RESPONSE TO THE OSCE/ODIHR ASSESSMENT MISSION REPORT ON THE U.K. GENERAL ELECTION 3 (2005) [hereinafter GOVERNMENT RESPONSE].

133. OFFICE FOR DEMOCRATIC INST. & HUMAN RIGHTS, OSCE/ODIHR ASSESSMENT MISSION REPORT 3 (2005).

134. DEP’T FOR CONST. AFFAIRS, VOTERS AND VOTING INSIGHT PROJECT CONSTITUTION AND CONSUMER STRATEGY DIRECTORATES PHASE 2 REPORT: JUNE 2005, 44 (2005) [hereinafter VOTERS & VOTING INSIGHT PROJECT].

worldwide average.<sup>135</sup> Elections are accessible today, especially with postal voting, which ensures that the disabled, elderly, and others who may not be able to go to the polling stations have adequate access. However, increased postal voting also is alleged to increase fraud. Decreasing the perception of fraud in voting, establishing and meeting performance standards for the electoral process, use of a nationwide database for registered voters, and providing alternative means to vote are all expected to contribute to meeting the goal of increased participation.

In accordance with international best practice, the Electoral Commission was established in 2000 as an independent organization to report on elections, review election law, and promote public understanding of elections.<sup>136</sup> This new institution can contribute to achieving the overall goal for the election system through a number of key activities. One such activity is the establishment and monitoring of performance standards for the election process. Performance standards that monitor the efficiency, integrity, and access of elections will mean that there is greater supervision and more information on the election process. Election laws are numerous, and the public may benefit from having the election process explained in clear terms beyond placing the numerous laws on the internet. This may indeed help because in Sweden, where voting information is in written material, on the internet, and on television, 50% of the people used the information from television, and 75% of those were under the age of twenty-five.<sup>137</sup> Disseminating information in the United Kingdom may increase public knowledge, and this knowledge may increase interest that may then result in an increase in participation.

As part of the effort to increase access to elections, there has been increased attention to alternative voting mechanisms. Of course, access to elections also means physical access to voting facilities as well as geographic access to voting stations, like those set up in hospitals or care facilities.<sup>138</sup> Alternative means of voting will also facilitate participation in elections. For example, online and postal voting are two such efforts.<sup>139</sup> The United Kingdom has

135. THE GALLUP INTERNATIONAL MILLENIUM SURVEY, GOVERNMENT BY THE PEOPLE? 2 (1999), available at <http://www.gallup-international.com/ContentFiles/millennium5.asp>. The average is 48% worldwide (sixty countries). *Id.*

136. Political Parties, Elections & Referendums Act § 5.

137. Policies for Democracy, *supra* note 33.

138. In Sweden voting stations are established in elder homes, prisons, hospitals, etc. to increase access. Election Authority Presentation, (Aug. 2005) (on file with author). Sweden set up almost 2,000 voting stations in care facilities in the 2002 general election. *Id.*

139. In the United Kingdom in May 2002, there were fifteen e-voting and ten postal-voting pilots for local elections. The Electoral Commission, Electoral Pilot Schemes, <http://www.electoralcommission.gov.uk/elections/modernising.cfm> (last visited Sept. 17,

become a leader in its pilots for both, with results indicating that postal and online voting contribute to an increase in participation. Europe generally also has seen a positive impact on voter turnout with postal voting.<sup>140</sup> It is expected that these kinds of pilots will be further considered and possibly expanded. The Council of Europe is working on ways to suggest how e-voting can be used and to develop standards for experimentation.<sup>141</sup> France used an internet voting pilot in the 2002 presidential election,<sup>142</sup> and sixteen of the fifty United States now use all mail ballot elections.<sup>143</sup> However, online voting is on hold in the United States due to concerns about ballot security.<sup>144</sup> As these pilots increase access to voting, there may also be an increase in voter turnout. This would be a positive outcome, as voter turnout has generally declined across Europe over the years.<sup>145</sup> It is perhaps for this reason that the Venice Commission supports both remote and electronic voting systems.<sup>146</sup> Given the issues of ballot security, the Council of Europe recommends that postal voting be used while work continues in developing electronic voting.<sup>147</sup>

While online and postal voting encourage participation in elections, they also influence the perception and, on occasion, the incidence of fraud in voting. For example, the perception of election fraud has historically been an issue in Northern Ireland, but in the most recent elections, there were accusations of fraud in England and Wales as well.<sup>148</sup> It is for this reason that voter identification in

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2006). In May 2003, there were seventeen e-voting and thirty-one postal-voting pilots for local authority elections. *Id.* In June 2004, there were zero e-voting and 127 postal-voting pilots for local and Members of Parliament elections. *Id.*

140. Future of Democracy, *supra* note 28, at 116.

141. PRATCHETT & LOWNDES, *supra* note 52, at 27.

142. *Id.* at 41.

143. MARIE GARBER, INNOVATIONS IN ELECTION ADMINISTRATION 10, BALLOT SECURITY AND ACCOUNTABILITY 24 (1995). These tend to be smaller jurisdictions where the contests are non-partisan. *Id.* Oregon was the first all mail ballot state in 2000. *Id.* Innovations in Election Administration 10, Ballot Security and Accountability, Federal Election Commission. *Id.*

144. Secure Electronic Registration and Voting Experiment voting system (SERVE) was designed to increase voting from overseas, but it was cancelled in February 2004 due to security issues. The system was to be used by overseas military voters from seven states in fifty countries in the 2004 general election to both register and vote online. A report on SERVE can be found at: <http://www.servesecurityreport.org/>.

145. One such example is Sweden, which had 91% voter turnout in the National Parliament elections in 1981 and then 80% turnout in 2002. Sweden, Election Authority Presentation (Aug. 2005) (on file with author).

146. See Council of Europe, Venice Commission, *Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe*, Doc. No. CDL-AD (Mar. 18, 2004) 012, available at [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)012-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)012-e.asp) [hereinafter DEMOCRACY THROUGH LAW].

147. Future of Democracy, *supra* note 28, at 115.

148. GOVERNMENT RESPONSE, *supra* note 132, at 3.



Northern Ireland is the strictest in the United Kingdom.<sup>149</sup> An increase in alternative means of voting must also be balanced with security measures to ensure that the ballots are secret. A second way to achieve the goal is through an increase in voting security measures. Such security measures include identification at the polling stations, making it a crime to “steal another person’s vote” through impersonating a registered voter either at the polling station or in a postal vote,<sup>150</sup> allowing national and international observers at election stations, and ensuring that the ballot serial numbers are not used for improper purposes.<sup>151</sup> Serial numbers that had been put in place in 1872 to prevent fraud are now being raised as an issue that may prevent secrecy.<sup>152</sup> Provided that there are sufficient safeguards against fraud, the use of serial numbers may not hinder the secrecy. International observers were invited to attend the May 2005 elections even though the legislation to allow them has not yet been prepared.<sup>153</sup> Placing additional security measures should mean less public perception of election fraud and therefore build confidence in elections. In 2004, 70% of the public was confident in secrecy at the polling booth and 58% was confident in postal voting.<sup>154</sup> With greater attention to security measures, this confidence level in the integrity of the electoral process should increase. It should also mean that fewer cases are brought to trial over election fraud. For example, the Birmingham elections case in 2005 resulted in prosecution.<sup>155</sup> Measuring both perception as well as actual convictions of fraud is important.

A third way to address fraud and reach the overall goal is through security measures related to registration. The family registration system is said to encourage citizens to participate; however, it also may mean that people are registered without their knowledge and may, therefore, lead to fraud in voting. It is obligatory to return the form for registration, but registration is not compulsory.<sup>156</sup> As a result, the head of household must return the

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149. See Electoral Fraud (Northern Ireland) Act, 2002, Explanatory Notes; <http://www.opsi.gov.uk/acts/en2002/2002en13.htm>.

150. Electoral Administration Bill, 2005, Explanatory Notes, <http://www.publications.parliament.uk/pa/cm200506/cmbills/050/en/06050x-.htm>.

151. They also include security measures for the printing and storage of ballots. See GARBBER, *supra* note 143, at 6.

152. GOVERNMENT RESPONSE, *supra* note 133, at 8.

153. UK GENERAL ELECTION, *supra* note 54, at 3, 12. However, the 2006 Election Administration Act has provided for this now. Electoral Administration Act, 2006, c. 22 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2006/20060022.htm>.

154. VOTERS & VOTING INSIGHT PROJECT, *supra* note 134, at 44.

155. Electoral Administration Bill, *supra* note 150.

156. In contrast, Sweden is an example of a country that has no formal registration process, as registration is done automatically from the national census.

registration form, and it is conceivable that the head may decide whether to register (or not register) other members of the household without their consent. There is a need to ensure that the registration system has integrity. Establishing a nation-wide database for registered voters would contribute to achieving this goal. The Coordinated Online Record of Electors (CORE) will provide a way to avoid multiple registrations.<sup>157</sup> Voter registration should be transparent and accurate, protect the right of eligible citizens to vote, and prevent unlawful or fraudulent registration or removal of voters. This voter accuracy contributes to the international principle of the right to vote with universal and equal suffrage.<sup>158</sup>

Individual registration may be a consideration to enhance the integrity of the system. Family registration,<sup>159</sup> as well as head of household voting, can “undermine political rights of women” and “leaves the door open to electoral fraud.”<sup>160</sup> If individual voter registration is considered, it may not only serve to increase registration transparency but also encourage greater attention to the youth. The older population in Europe generally votes more and is more engaged in the democratic process. Therefore individual voter registration may contribute to youth’s understanding of the electoral process. Others may argue that there will be less registration because either citizens will not understand the process or not take the time. While, it is unclear whether voter registration would increase or decrease with individual registration, it may contribute to a sense of duty, which is a key reason for voting.

Options to increase voter registration and turnout have also been considered by the Council of Europe. The Council has created a wish list of recommended reforms, including voter registration from birth to create the sense of duty; a ballot choice of “none of the above” in elections; voter lotteries which would allow the winner to allocate state budgets to programs including non profit groups and associations; standing for office with a shared mandate, that is, two

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157. GOVERNMENT RESPONSE, *supra* note 133, at 6.

158. See EUR. PARL. ASS., *Code of Good Practice in Electoral Matters*, Res. 1264 (2001); see also Council of Europe, Venice Commission, *Guidelines on Elections*, Doc. No. CDL-AD 13 (July 10, 2002), available at [www.venice.coe.int/docs/2002/CDL-AD\(2002\)013-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)013-e.asp); EUR. PARL. ASS., CODE OF GOOD PRACTICE IN ELECTORAL MATTERS, RES. 1320 (2003); CONGRESS OF LOCAL AND REGIONAL AUTHORITY OF EUROPE, Res. 148 (2003); Council of Europe, Committee of Ministers, *Declaration by the Committee of Ministers on the Code of Good Practice in Electoral Matters* (2004), available at <https://wcd.coe.int/ViewDoc.jsp?Ref=Decl13.05.2004/1&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>.

159. COUNCIL OF EUROPE, FIND WOMEN’S INDIVIDUAL VOTING RIGHTS: A DEMOCRATIC REQUIREMENT 27 (2002).

160. *Id.*

people share the position to encourage broader representation; specialized elected councils; democracy kiosks with the use of technology for transactions; advice and perhaps even voting, citizenship mentors to acclimatize new comers with society; a council for legal residents from non-E.U. member states; compulsory civic service; education for political participation; and guardian agencies to report on the public sector and media.<sup>161</sup> In addition, election day registration could be added to this list to increase voter turnout,<sup>162</sup> as well as the citizenship ceremonies that are now taking place in the United Kingdom. Of course, compulsory voting is consistently debated because it does appear to ensure a high voter turnout.<sup>163</sup> Whichever options are considered, innovative thinking is taking place to reinvigorate democracy through elections.

### C. Openness and Transparency

*The aim is that public authorities are open, that FOI decisions are consistent across government, and that citizens are aware of their information and data protection rights, how they can be exercised, and have trust that government protects their data.*

The success of democracy and engagement by the public depends to some degree on the available information. The degree of openness<sup>164</sup> and transparency of government is central to good governance and has a positive effect on economic growth, government performance, quality of policy, and integrity.<sup>165</sup> The United Kingdom

161. Future of Democracy, *supra* note 28, at 86–118.

162. This is a fail-safe voting approach designed so that once registered, voters should remain on the list of voters so long as the individual remains eligible to vote in that jurisdiction. There was an increase in twelve million registered voters from 2000 to 2004. GRACIA HILLMAN ET AL., THE IMPACT OF THE NATIONAL VOTER ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 4, 6 (2005).

163. In twenty-four countries with compulsory voting, the turnout is 8% higher than in non-compulsory countries. Int'l Inst. for Democracy and Electoral Assistance, What Effects Turnout?, [http://www.idea.int/vt/survey/voter\\_turnout8.cfm](http://www.idea.int/vt/survey/voter_turnout8.cfm) (last visited Sept. 17, 2006). In Australia, federal compulsory voting was implemented in 1924, and the increased voter turnout was 33% higher than in the previous election. Austl. Electoral Commission, Voter Turnout 1901-Present, [http://www.aec.gov.au/\\_content/what/voting/turnout/index.htm](http://www.aec.gov.au/_content/what/voting/turnout/index.htm) (last visited Sept. 17, 2006).

164. Openness is used to mean accessibility and responsiveness of government. OECD PUBLIC SECTOR MODERNISATION: OPEN GOVERNMENT 2 (2005), available at <http://www.oecd.org/dataoecd/1/35/34455306.pdf> [hereinafter PUBLIC SECTOR MODERNISATION].

165. ROUMEEN ISLAM, DO MORE TRANSPARENT GOVERNMENTS GOVERN BETTER? 23 (2003), available at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/07/08/000094946\\_03062104301553/Rendered/PDF/multi0 page.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/07/08/000094946_03062104301553/Rendered/PDF/multi0 page.pdf).

is one of more than sixty countries around the world that have enacted freedom of information (FOI) laws to improve governance.<sup>166</sup> Sweden enacted the first FOI law in 1766. While in some countries access to information is a basic right,<sup>167</sup> as of January 2005 in the United Kingdom, there is a statutory right to information and a policy of openness, subject to a list of twenty-three exemptions to information held by government departments.<sup>168</sup> Both are consistent with international practice.<sup>169</sup> One of the objectives of FOI internationally is increased transparency of government as well as reduced fraud and corruption. With greater demand for public scrutiny, there is greater demand for openness.<sup>170</sup> In Europe generally, there is a growing concern over the asymmetric distribution of information.<sup>171</sup> For the new candidate countries to the European Union, a set of criteria is being developed to help countries improve anti-corruption measures.<sup>172</sup> Civil society has increased its role, and now many organizations that advocate transparency and

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166. FOI laws enhance transparency, encourage public participation, increase the quality of decision-making, raise public confidence in the government processes, etc.

167. See, e.g., Regeringsformen [RF] [Constitution] ch. 2 art. 1 (Swed.) (providing for freedom of information as a fundamental right); see also OECD ANTI-CORRUPTION DIVISION, ADB OECD ANTI-CORRUPTION ACTION PLAN FOR ASIA-PACIFIC, available at [http://www1.oecd.org/daf/ASIAcom/pdf/ap\\_english.pdf](http://www1.oecd.org/daf/ASIAcom/pdf/ap_english.pdf) (encouraging openness in information regarding hiring of public officials and regarding fiscal practices). The Philippines Supreme Court has interpreted a broad right to information. *Legaspi v. Civil Commission*, 150 SCRA 530, (1987), available at <http://www.aer.ph/images/stories/projects/id/cases/legaspi.pdf>. Such a right is also in the constitutions of Austria, Hungary, and Poland. PUBLIC SECTOR MODERNISATION, *supra* note 164, at 3.

168. Order Implementing the Freedom of Information Act, 2000, No. 3122, c. 131 (U.K.).

169. Universal Declaration on Human Rights, art. 19 (1948), available at <http://www.un.org/Overview/rights.html> (guaranteeing the right to freedom of expression). Article III on Transparency of the General Agreement on Trade in Services (GATS) requires each member to publicly make available all relevant measures affecting operation of the Agreement. World Trade Organization, Services: Rules for Growth and Investment, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm) (last visited Sept. 17, 2006). The European Commission established the right to its institutional documents in the Amsterdam Treaty in 1999. See Treaty of Amsterdam amending the Treaty on European Union, Oct. 2, 1997, O.J. C 340/1 (1997).

170. PUBLIC SECTOR MODERNISATION, *supra* note 164, at 2. Five percent of the public thought that government was open. *Id.*

171. Future of Democracy, *supra* note 28, at 99.

172. European Union Monitoring and Advocacy Program [EUMAP], Corruption and Anti-Corruption Policy, <http://www.eumap.org/topics/corruption> (last visited Sept. 17, 2006).

anti-corruption are also advocates of FOI.<sup>173</sup> Equal to FOI is the responsibility to protect the right to privacy, and that means protecting personal data from being released and abused by the government. The long-term goals, therefore, are that public authorities are open; that FOI decisions are consistent across government; that citizens are aware of their information and data protection rights and how they can be exercised; and that citizens have trust that government protects their data.

One outcome that contributes to achieving this goal is an increase in the quality of information distributed by government. The information the national government puts on its website, especially information about the services it provides, has increased since 2002.<sup>174</sup> The website provides information in minority languages and Braille formats as well as telephone help-lines.<sup>175</sup> In Finland, one successful mechanism to share information is the national register for government projects, which is a one-stop shop for information.<sup>176</sup> Other information could mean greater transparency regarding the meetings of Members of Parliament (MPs). Currently in the United Kingdom some information is accessible *ex post* and after request. While there are some security issues to consider when releasing MPs' day-to-day schedules, these issues need to be balanced with the public's desire to have knowledge and accountability of government. Additional information related to surgeon success rates, for example, can empower citizen decision-making.

The expectation was that there would be an influx of requests, especially since there was in most cases no cost to request information.<sup>177</sup> However, in the first nine months since implementation, there were only 22,000 requests to the central government.<sup>178</sup> This number is lower than the number of requests in Mexico and Bulgaria, where FOI legislation was implemented

173. See Transparency Int'l, News Room, Transparency International Marks Right to Know Day, [http://www.transparency.org/news\\_room/in\\_focus/2005/right\\_to\\_know\\_day](http://www.transparency.org/news_room/in_focus/2005/right_to_know_day) (last visited Oct. 26, 2006).

174. NAT'L AUDIT OFFICE, GOVERNMENT ON THE WEB II, 2001-2, H.C. 764, available at <http://www.nao.org.uk/pn/01-02/0102764.htm>.

175. GROUP OF STATES AGAINST CORRUPTION [GRECO], EVALUATION REPORT ON THE UNITED KINGDOM—SECOND EVALUATION ROUND 11 (2004) [hereinafter GRECO].

176. See PUBLIC SECTOR MODERNISATION, *supra* note 164, at 11. See also Hare Website, <http://www.hare.vn.fi> (last visited Sept. 17, 2006).

177. Fees are permitted by Section 9 of the Freedom of Information Act 2000, but to date the cost is free in most public bodies. See DEP'T OF CONST. AFFAIRS, FREEDOM OF INFORMATION ACT 2000, STATISTICS ON IMPLEMENTATION IN CENTRAL GOVERNMENT JANUARY—MARCH 2005, 4 (2005) [hereinafter JANUARY-MARCH 2005 FOI STATISTICS].

178. See DEP'T OF CONST. AFFAIRS, FREEDOM OF INFORMATION ACT 2000, STATISTICS ON IMPLEMENTATION IN CENTRAL GOVERNMENT JULY—SEPTEMBER 2005, 2 (2005).

recently as well.<sup>179</sup> But even with this result, the general public is still learning about the FOI Act and its benefits. It is not clear that the number of requests in the United Kingdom will increase in the future, in line with the experience in Bulgaria.

It is expected that as implementation continues, there will be an increase in the proportion of people expressing confidence in the benefits of information rights in encouraging openness. A large information campaign has been launched for the public, and this is expected to continue as a way for citizens to understand their rights as well as build confidence in government's commitment to openness and to how their personal data is protected.

Public confidence is also affected by how the government responds to requests for access to information. The request for information was fully granted 57% of the time.<sup>180</sup> This result is higher than the average of 42% success in FOI requests in five countries, as found by one study.<sup>181</sup> Case law is currently being developed, government departments are working out policies, and civil servants are adjusting to the new culture and determining how to make decisions on requests. All of this means that necessarily there are different views and decisions taken by government departments. However, it is expected that over time there will be fewer inconsistencies as seen by fewer appeals to the Information Commissioner's Office and new Tribunal. In the first nine months of 2005, the Information Commissioner had 1,855 appeals.<sup>182</sup> There have been about 500 first review challenges of decisions by governments, which were upheld 83% of the time, with the applicant succeeding in 6% of the cases.<sup>183</sup> The policy is designed to balance the citizen's right to know with the assurance that government can conduct itself effectively. Over the long-term, governments as well as the businesses and organizations that they engage with should be more transparent and as a result more accountable.

The Information Commissioner also has responsibility for data protection and is currently increasing outreach programs for both government departments and the public on the new Data Protection

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179. Mexico passed a freedom of information act, Ley Federal de Transparencia y Acceso, on June 10, 2002. Mexico: Transparency and Access to Information 4, available at <http://www.ifai.org.mx/publicaciones/mexicotai.pdf>. The Bulgarian Access to Public Information Act was published in the State Gazette No. 55 on July 7, 2000. Access to Information Program, <http://www.aip-bg.org/apia.htm> (last visited October 24, 2006). See *infra* Appendix 1f.

180. JANUARY-MARCH 2005 FOI STATISTICS, *supra* note 177, at 12.

181. *Id.*

182. Interview with James Ford, Information Commissioner's Office (Oct. 28, 2005). This number of appeals was accurate as of Sept. 30, 2005.

183. JANUARY-MARCH 2005 FOI STATISTICS, *supra* note 177, at 15.

Act.<sup>184</sup> Data protection was enacted as part of the United Kingdom's implementation of E.U. Directives.<sup>185</sup> It is not clear to citizens what data they can expect will be held confidential, what will be released, and what they have access to. With greater understanding of what can be accessed and what should be confidential, and with fewer instances of breach of data by the government and other E.U. governments, there should be greater public trust that personal data will be protected.

FOI legislation is in its early stages of implementation and evaluation of progress is needed. One recent evaluation was done in five countries (Armenia, Bulgaria, Macedonia, Peru, and South Africa).<sup>186</sup> Some of the main findings were: a lack of political will remains an issue with those at the senior levels; there is insufficient training of public officials in information management systems; there is a lack of clear internal decision-making procedures; there are excessive bureaucratic obstacles; all requests were not treated equally, especially those from vulnerable individuals (journalists were more likely to have their requests fulfilled); and shorter time frames for responses do not work against the request.<sup>187</sup> International time frames range from twenty-four hours in Norway and Sweden to fourteen days in Finland and thirty days in Canada, India, Ireland, and South Africa.<sup>188</sup> As expected, greater attention to political will, having information management systems, and investing in human capital are critical factors to the implementation of FOI. The biggest challenge today is balancing openness with national security and law enforcement issues.<sup>189</sup> How this balance is struck may affect trust—greater or diminished openness can undermine trust. Greater openness by the government allows for greater

184. Data Protection Act, 1998, c. 29, § 51 (Eng.).

185. Council Directive 95/46, art. X, 1995 O.J. SPEC. ED. (L 281) 31. The Directive was adopted on October 24, 1995, and Member States were obligated to implement the provisions by 1998. Charter of Fundamental Rights of the European Union, Ch. II, art. 8, Dec. 18, 2000, 2000 O.J. (C 364) 3.

186. OPEN SOCIETY JUSTICE INITIATIVE, JUSTICE INITIATIVE ACCESS TO INFORMATION MONITORING TOOL: REPORT FROM A FIVE-COUNTRY PILOT STUDY 1 (2004) [hereinafter FIVE-COUNTRY PILOT STUDY]. It provides a methodology for determining whether the law and implementation conform to international standards as well as whether implementation is consistent with the FOI law itself. *Id.* at 1–2. The tool establishes fifteen international standards that include the core principles of openness and timeliness, and if exemptions apply, then there shall be partial access to relevant documents, etc. *Id.* at 5–8. In addition, it also provides indicators that can be measured across time in one country or across countries. *Id.* at 4. In summary, 100 FOI requests were made in each pilot country to institutions including the executive and the judiciary. *Id.* at 10. These requests were made by NGOs, journalists, and non-affiliated individuals, and 35% on average received the information requested. *Id.*

187. *Id.* at 12–20.

188. *Id.* at 16.

189. PUBLIC SECTOR MODERNISATION, *supra* note 164, at 31.

scrutiny by the public. In the United Kingdom anecdotal evidence suggests that more than two-thirds of these requests have been from individual citizens,<sup>190</sup> while in Canada they are from business organizations and in the United States they are from veterans.<sup>191</sup> Whether from an individual, business, or civil society organization, there is general public demand for accountability. Accountability addresses how money is spent, the value of the expenditure, and whether it was spent for the intended purpose.

The United Kingdom is not a country where corruption is perceived to be a real problem, and therefore some may argue anti-corruption measures are not a priority. The United Kingdom ranks as the eleventh least corrupt country in the world.<sup>192</sup> The Council of Europe reports that young people say, "political leaders have stolen much more than we have."<sup>193</sup> If they don't believe that politicians are working in their interests, they become more unwilling to comply with the law, pay taxes, and behave respectfully. Even if corruption is not a problem, ethics is becoming a topic of greater importance, especially for elected officials who are being held to a higher standard.

Civil society and the media are more active and more organized in networks internationally.<sup>194</sup> Through these networks they pool resources and knowledge, and the use of the internet has only enhanced their effectiveness. The media is more able and likely to research and publicize alleged misconduct. Prosecutors are better able to make a case, and judges are more equipped to make fair and independent decisions. There is general "cynicism about the motives

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190. E-mail from Kevin Fraser, Access Rights Unit, to eDelivery Group (Sept. 27, 2005, 15:33 CST) (on file with author).

191. In 2002–2003 businesses filed 45% of the requests under the Access to Information Act in Canada. Of all federal departments, the Department of Veterans Affairs reported the largest number of requests received: 1,496,191 out of 2,402,938. U.S. Dep't of Just., Off. of Info. & Privacy, Summary of Annual FOIA Reports for Fiscal Year 2002, <http://www.usdoj.gov/oip/foiapost/2003foiapost31.htm>.

192. The 2005 Global Corruption Report shows Britain's Corruption Perception Index Score for 2004 was 8.6, or eleventh out of 146 countries. Transparency Int'l, *Global Corruption Reports-Country Reports*, available at [http://www.transparency.org/publications/gcr/download\\_gcr/download\\_gcr\\_2005#download](http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2005#download).

193. Future of Democracy, *supra* note 28, at 33. In the United Kingdom 41% of the public think that political parties are the most corrupt of the institutions, as compared to a global average of 30%. THE TRANSPARENCY INT'L GLOBAL CORRUPTION MONITOR: A 2002 PILOT SURVEY OF INTERNATIONAL ATTITUDES, EXPECTATIONS, AND PRIORITIES ON CORRUPTION 32 (2003), available at <http://www.transparency.org/surveys/barometer/barometer2003.html>.

194. See generally Maria Dakolias, *Legal and Judicial Development: The Role of Civil Society in the Reform Process*, 24 FORDHAM INT'L L.J. S26 (2000) ("[T]here is a growing sense of identity among civil society organizations which transcend international boundaries . . ."); see also PUBLIC SECTOR MODERNISATION, *supra* note 164, at 16.



and practices of politicians,” and in some countries this has resulted in “political corruption to be business as usual.”<sup>195</sup> In the United Kingdom, the reason the government submitted a Corruption Bill to Parliament in 2003 was to clarify and make legislation consistent with international standards.<sup>196</sup> While the Joint Committee of both Houses agreed with the concept, it found the definition of corruption to be lacking, so it made comments and invited the government to submit a revised bill.<sup>197</sup> A new corruption bill was introduced May 2006.<sup>198</sup> What it did do was extend bribery and corruption offenses to reach activities conducted outside the United Kingdom<sup>199</sup> as well as deny tax relief for payments outside the United Kingdom.<sup>200</sup> While this is a positive step forward, there are additional issues that need to be addressed to meet the OECD Convention.<sup>201</sup> One such issue is to clarify that members of both Houses in Parliament are subject to anti-bribery laws without the protection of the Parliamentary Privilege.<sup>202</sup> There appears to be no resistance to this as the Office of Public Integrity has indicated that it will pursue claims regardless of a law.<sup>203</sup> It should be noted, however, that a review of the Code of Conduct for MPs was a priority that was undertaken, and a revised Code was prepared in March 2005.<sup>204</sup>

195. Future of Democracy, *supra* note 28, at 44. An added problem is that private donations to political parties are decreasing, and fundraising as a result is a challenge. *Id.* at 45. Money laundering, racketeering, extortion, and organized crime are some of the challenges that are faced.

196. RUTH WINSTONE, PARLIAMENT & CONST. CTR., CORRUPTION, DRAFT LEGISLATION, SN/PC/2059, at 3 (Sept. 3, 2003).

197. See THE GOVERNMENT REPLY TO THE REPORT FROM THE JOINT COMMITTEE ON THE DRAFT CORRUPTION BILL, 2003, Cm. 6086, at 3 [hereinafter GOVT. REPLY TO DRAFT TO CORRUPTION BILL].

198. Corruption Bill, 2006, Bill [185] (Eng.), available at <http://www.publications.parliament.uk/pa/cm200506/cmbills/185/2006185.pdf>.

199. Anti-Terrorism, Crime and Security Act, 2001, c. 24, p. 112, § 109 (U.K.); HOME DEP'T, CORRUPTION DRAFT LEGISLATION, 2003, Cm. 5777, at 12.

200. GRECO, *supra* note 175, at 20.

201. See OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, Nov. 21, 1997, available at [http://www.oecd.org/document/21/0,2340,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html#text](http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html#text), for a list of these additional issues.

202. Article IX of the Bill of Rights (1689) states “that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.” There has been uncertainty whether members of Parliament are subject to common law offence of bribery and thus beyond the reach of the courts. U.K. BILL OF RIGHTS art. IX (1689).

203. The Joint Committee agrees that Members of Parliament should be subject to criminal law of bribery. OONAGH GAY, CORRUPTION LEGISLATION, RAISING STANDARDS AND UPHOLDING INTEGRITY: THE PREVENTION OF CORRUPTION, 2001, Cm. 4759, at 15; GOV'T REPLY TO DRAFT CORRUPTION BILL, *supra* note 197, at 38.

204. SELECT COMMITTEE ON PARLIAMENTARY COMMISSIONER FOR STANDARDS, FIRST REPORT, 2004–5, available at [www.publications.parliament.uk/pa/cm200405/cmselect/cmstand/264/26403.htm](http://www.publications.parliament.uk/pa/cm200405/cmselect/cmstand/264/26403.htm).

The United Kingdom also committed to submitting a Civil Service Bill.<sup>205</sup> This would mean that only Parliament could legislate changes, which would thus give stability and ensure impartiality of the civil service. The Civil Service Code does require compliance, and there is a Committee on Standards of Public Life that produces annual reports. The Civil Service Code could be revised to take into account human rights, and consideration could also be given to whether special advisors in departments would be included in the Civil Service Code.<sup>206</sup> There is growing concern in Europe of corruption related to political parties, especially related to improper influence over decision-making.<sup>207</sup> As a result, foreign donations made to registered parties or their members are now prohibited.<sup>208</sup>

Overall, many reforms since 1997 have positively contributed to a more open and transparent government. Despite the current need to protect national security, implementing the FOI Act continues with greater requests for health and safety rather than defense information.<sup>209</sup> Further action can be taken to enhance transparency. One example, given that the government made a commitment to make corruption part of its program in 2002-2003, is implementation of a corruption act that would contribute to the value of having a government that is open and accountable. All of these reforms should be considered in a coherent way because access to information increases demand for better governance, which means better and more legitimate democratic institutions.<sup>210</sup>

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205. GRECO, *supra* note 175, at 9, 17.

206. COMMITTEE ON STANDARDS IN PUBLIC LIFE, NINTH REPORT ON DEFINING THE BOUNDARIES WITHIN THE EXECUTIVE: MINISTERS, SPECIAL ADVISORS AND THE PERMANENT CIVIL SERVICE, 2003, CM. 5775, at 2, 45, *available at* [http://www.public-standards.gov.uk/publications/reports/9th\\_report/report/report.pdf](http://www.public-standards.gov.uk/publications/reports/9th_report/report/report.pdf).

207. EUR. PARL. ASS., *Financing of Political Parties*, Rec. 1516 (2001), *available at* <http://assembly.coe.int/Documents/AdoptedText/ta01/EREC1516.htm>. Recently there were accusations in the United Kingdom that life peers were appointed on the basis of loans provided to political parties. BBC News, Peer nominee in £1.5m Labour loan, [http://news.bbc.co.uk/1/hi/uk\\_politics/4798064.stm](http://news.bbc.co.uk/1/hi/uk_politics/4798064.stm) (last visited Oct. 26, 2006).

208. Political Parties, Elections & Referendums Act, 2000, Explanatory Notes, Part IV.

209. There were more requests to the health and safety executive than to the Ministry of Defense. JANUARY-MARCH 2005 FOI STATISTICS, *supra* note 177, at 11.

210. U.N. DEV. PROGRAMME [UNDP], PRACTICE NOTE: ACCESS TO INFORMATION 5 (Oct. 2003).

D. *Effective Checks and Balances*

*The overall aim is that the public has an understanding of the system of government as well as the role of the European Union in the U.K. democracy, and that there are effective checks and balances between the executive, legislative and judicial powers.*

A system of checks and balances is fundamental to democracy and therefore to a country's constitution. There have been constitutional reforms in the United Kingdom that have and will continue to affect the checks and balances of the Westminster system. Reforms have impacted Parliament, the executive, and the judiciary. Additional reforms being considered may further affect the checks and balances between the powers of government. But it is not just reforms that are affecting the system; it is also the debate surrounding a large or slim majority held by the government in Parliament and its impact on the system of checks and balances.<sup>211</sup> Furthermore, the role of the European Union has had a de facto impact on the system without rewriting the political structure. The complex system of government is the underpinning of the constitution and its principles. With these reforms, public understanding of the constitutional principles becomes more important if citizens are expected to actively participate in the functioning of democracy.<sup>212</sup> This is important because public satisfaction with how democracy works appears to be stagnant, despite being quite high in 2000, and that may be explained by the public's expectation of and support for the checks and balance as well as devolution reforms being undertaken.<sup>213</sup> The overall goal is that the public has an understanding of the system of government as well as the role of the European Union in the United Kingdom and that there are effective checks and balances between the executive, legislative, and judicial powers.

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211. In the May 2005 election, the government's majority was reduced from 166 to 65 seats in Parliament. *Parliament: The Aftermath of the Election*, MONITOR (THE CONST. UNIT BULLETIN), Sept. 2005, at 4.

212. See EUR. PARL. ASS., *Instruments of Citizen Participation in Representative Democracy*, Res. 1121 (1997) ("A truly living democracy depends on the active contribution of all citizens.") [hereinafter *Citizen Participation in Representative Democracy*].

213. In 1997, the percentage of public satisfaction with the way democracy works was 63%, and in 2004 it was 58%. It did reach a remarkably high level in 2000 with 84%. See Eur. Comm'n, *Public Opinion Analysis*, [http://europa.eu.int/comm/public\\_opinion/cf/index\\_en.cfm](http://europa.eu.int/comm/public_opinion/cf/index_en.cfm) (last visited Oct. 26, 2006), for access to these statistics.

There are several approaches that may contribute to more effective checks and balances between the different branches of government. One approach is a resolution on the function and composition of the House of Lords.<sup>214</sup> Since 1999, most of the hereditary members have been removed from the House of Lords,<sup>215</sup> and today there are only ninety-two hereditary members left.<sup>216</sup> Removal of members whose sole reason for membership is their bloodline is a justifiable reason in and of itself. However, the step that needs to be done in tandem is a consideration of what the House of Lords is meant to do and, given that role and responsibility, how its membership would best be devised. Issues that the government has been wrestling with already are whether the second chamber should be equal to or subordinated to the House of Commons and whether its membership should be reduced from the current number of 740.<sup>217</sup> Clearly, whatever the function and membership, the process of appointing or electing should be transparent. An appointments commission was set up in 2000 and is one option that could be used so that the House of Lords reflects U.K. society and includes representation from the various political parties.<sup>218</sup> The role of the second chamber is designed to balance the elected House of Commons, which responds directly to the electorate.<sup>219</sup> The challenge for future reform is how to maintain its quality function while at the same time improving the House of Lords' legitimacy. Another question is what should happen with the twenty-six bishops in the House of Lords. While there are eighteen countries that have an appointed second chamber, there are no countries that have designated seats for the church.<sup>220</sup> In a society with increasing

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214. JOINT COMMITTEE ON HOUSE OF LORDS REFORM, SECOND REPORT, 2003, H.L. 97, available at <http://www.parliament.the-stationery-office.co.uk/pa/jt200203/jtselect/jtholref/97/9702.htm>.

215. House of Lords Act, 1999, c. 34, § 1 (U.K.) ("No-one shall be a member of the House of Lords by virtue of a hereditary peerage."). While it was announced in the Queen's speech in 2003 that legislation would be brought forward on the House of Lords, a bill has yet to be published. RICHARD KELLY, PARLIAMENT & CONSTITUTIONAL CTR., HOUSE OF LORDS REFORMS: RECENT DEVELOPMENTS 1 (2005).

216. UK Parliament, Analysis of Composition, [http://www.parliament.uk/directories/house\\_of\\_lords\\_information\\_office/analysis\\_by\\_composition.cfm](http://www.parliament.uk/directories/house_of_lords_information_office/analysis_by_composition.cfm) (last visited Oct. 26, 2006).

217. KELLY, *supra* note 215, at 6.

218. While the Tories have been the largest party in the House of Lords for more than a century, there is an equal balance today between the Tories with 30%, Labour with 29%, and the Liberal Democrats with 10% of the vote. *Id.* at 5, 6, 16.

219. However, Parliament Act of 1911 stated that the House of Lords "cannot prevent the House of Commons from, in effect, passing" any change of the constitution. Jackson & Others, *supra* note 5, at 44.

220. The eighteen countries with an appointed second chamber are: Algeria, Bahamas, Bahrain, Barbados, Belize, Bosnia and Herzegovina, Cambodia, Canada, Egypt, Germany, Ireland, Jordan, Lesotho, Russian Federation, Saint Lucia, Togo,

diversity and tolerance, representation by a single religion may become difficult to justify. If such a discussion takes place, it may also stir debate over the role of religion in the governance system.

The discussion of possibly electing members to the House of Lords inevitably leads to a discussion of proportional representation. The current system in the House of Commons tends to yield large majorities that are disproportionate to the proportion of votes cast.<sup>221</sup> Given the desire to increase legitimacy, the voting system may be an important factor to consider. Proportional representation is a popular topic of debate in the United Kingdom. Forty-four percent of Britons support the idea of using proportional representation generally.<sup>222</sup> The argument that proportional representation gives equal weight to all voters is said to increase turnout.<sup>223</sup> The system has been used in the Scottish Parliament and Welsh Assembly, but it has yet to be adopted at the national level for either house of Parliament.<sup>224</sup>

The use of referenda is another approach that would impact the checks and balance system. Referenda are recommended by the Council of Europe for relatively small regional and local areas and for practical issues.<sup>225</sup> The Council also suggests that referenda and initiatives should be binding to increase voter turnout.<sup>226</sup> However, referenda can reduce parliamentary sovereignty because Parliament will have a difficult time discarding even consultative referenda.<sup>227</sup> So, the very fact that a referendum or an initiative can be used may be a sufficient safeguard of the population's views. If referenda were ignored, it would certainly lead to increased apathy and decrease in voter turnout.<sup>228</sup> "Inserting forms of direct democracy as a complement to representative democracy is considered one way—perhaps the best way—of filling the gap."<sup>229</sup> National referenda and

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United Kingdom, and Yemen. See Ace Project the Electoral Knowledge Network, Comparative Data, [http://ace.at.org/epic-en/es/Epic\\_view/ES06](http://ace.at.org/epic-en/es/Epic_view/ES06) (last visited Sept. 18, 2006).

221. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE [IDEA], INTERNATIONAL ELECTORAL STANDARDS: GUIDELINES FOR REVIEWING THE LEGAL FRAMEWORK OF ELECTIONS 23 (2002), available at <http://www.idea.int/publications/ies/>.

222. BROMLEY ET AL., *supra* note 86, at 14.

223. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE [IDEA], YOUTH VOTE PARTICIPATION 31 (1999).

224. In Scotland, using a rating of 1–4, where 1 is most preferred, the voting systems were ranked as: First Past the Post (1.8), Single Transferable Vote (2.2), Additional Member System (2.7), and List Based Proportional System 3.2. COMMISSION ON BOUNDARY DIFFERENCES AND VOTING SYSTEMS, FINAL REPORT, Doc. No. 4132 (August 2005), available at <http://www.arbuthnotcommission.gov.uk/docs/research/Focus%20group%20Final%20report.pdf>.

225. *Citizen Participation in Representative Democracy*, *supra* note 212.

226. *Future of Democracy*, *supra* note 28, at 112.

227. *Id.* at 73.

228. *Id.* at 79.

229. *Id.* at 74.

initiatives occurred 628 times in thirty-nine countries, although more than half of these occurred in Switzerland.<sup>230</sup> All European countries have used popular votes “even if the frequency, form and effect of these consultations have varied greatly.”<sup>231</sup>

### International Public Initiative/Referenda Policies

| Country       | Public Initiative                              | Popular Referendum                        |
|---------------|--|---|
| Australia     | No such rights exists                          | No  |
| Austria       | 100,000 voters to initiate                     | No  |
| Canada        | No such rights exists                          | No  |
| Denmark       | No such rights exists                          | No  |
| Finland       | No such rights exists                          | No  |
| France        | No such rights exists                          | No  |
| Hungary       | 50,000 voters to initiate                      | Yes, 200,000 voters, 25% turnout required |
| Ireland       | No such right exists                           | No  |
| Italy         | 50,000 voters, abrogate option (500,000)       | Yes, 50% turnout                          |
| South Africa  | No such right exists                           | No  |
| Spain         | 500,000 voters to initiate                     | No  |
| Sweden        | No such right exists                           | No  |
| Switzerland   | 50,000 voters to initiate, abrogate option     | Yes                                       |
| United States | No such national right, available in 21 states | Available in 25 of 50 states              |

The United Kingdom legislated in 2000 on referenda to ensure fairness in their use by giving each campaign side the same amount of money and restricting publication twenty-eight days prior to the referendum.<sup>232</sup>

The balance to be struck is between the responsibility of the government to exercise its authority and the role of citizens in the decision-making process.<sup>233</sup> Switzerland uses referenda the most, while Sweden has used them only six times since 1922.<sup>234</sup> There is a

230. Thirty-nine countries of the forty-five member states in the Council of Europe have used the procedure. *Id.* at 75–76.

231. *Id.* at 76.

232. Political Parties, *supra* note 43, § 125.

233. *Citizen Participation in Representative Democracy*, *supra* note 212.

234. Todd Donovan & Jeffrey A. Karp, *Popular Support for Direct Democracy*, 12 PARTY POLITICS 671, 676 (2006). In Sweden, they were used for liquor prohibition, right-hand traffic, occupational pension, nuclear power, E.U. membership, and the Euro as currency. *Id.*

wide range of countries that allow for referenda to be initiated by their citizens. The United Kingdom permits citizens to initiate a local referendum, but this possibility has never occurred.<sup>235</sup> Citizen-initiated consultations are included in several constitutions in Eastern Europe but are less common in Western Europe.<sup>236</sup> Sweden has had local referenda since 1977, but they have been used only sixty-eight times since then, and only five of those were citizen initiated.<sup>237</sup> The ability of citizens to make proposals is viewed as a positive input for democracy, but more research is needed as to its impact.

A third means of increasing checks and balances is through the committees in Parliament. The Modernization Committee has expressed that there is a need to “strengthen ministerial accountability to Parliament.”<sup>238</sup> Another way to increase accountability is through the use of Ombudsperson Offices that provide legal review of an official action for free. Less than 3% of government departments did not comply with an Ombudsperson’s recommendations between 1994-2005.<sup>239</sup> The use of Ombudsperson Offices to increase accountability has risen worldwide. In 1960 only Sweden, Finland, and Denmark had such offices, and now 90% of OECD countries have Ombudspersons.<sup>240</sup> In the United Kingdom, reports go directly to Parliament, and while recommendations are usually not binding, they are almost always enforced.<sup>241</sup> As a result, oversight by the Ombudsperson Offices in the United Kingdom is effective, with a 98% compliance rate with their recommendations.<sup>242</sup> The Group of States Against Corruption (GRECO) highlighted this high rate of compliance as a positive factor for accountability.<sup>243</sup>

235. Citizens are allowed to initiate locally if 5% of the local population has signed a petition. Nationally, citizen initiation is not allowed. Citizen initiation has never been used. Local Government Act, 2000, c. 22 (Eng.). See also Oonagh Gay, *Thresholds in Referendums* 5 (March 17, 2004), available at <http://www.parliament.uk/commons/lib/research/notes/snpc-02809.pdf>.

236. Hungary, Latvia, Liechtenstein, Lithuania, Poland, Romania, San Marino, Slovenia, Slovak Republic, Switzerland, and Ukraine have citizen initiatives within their constitutions. More western European countries have this at the local and regional levels. *Future of Democracy*, *supra* note 28, at 78.

237. *Policies for Democracy*, *supra* note 33.

238. LUCINDA MAER, PARLIAMENTARY & CONSTITUTION CTR., MODERNISATION OF THE HOUSE OF COMMONS 1997–2005, 25 (2005).

239. Some of these may be related to FOI cases. PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN, ACCESS TO OFFICIAL INFORMATION: MONITORING OF THE NON-STATUTORY CODES OF PRACTICE 1994–2005, available at [http://www.ombudsman.org.uk/pdfs/aoi\\_1994-2005.pdf](http://www.ombudsman.org.uk/pdfs/aoi_1994-2005.pdf) [hereinafter ACCESS TO OFFICIAL INFORMATION].

240. PUBLIC SECTOR MODERNIZATION, *supra* note 164, at 3.

241. ACCESS TO OFFICIAL INFORMATION, *supra* note 239, at 34–35.

242. Telephone interview with British and Irish Ombudsman Association Representative (Sept. 30, 2005).

243. GRECO, *supra* note 175, at 12.

It could be argued that greater constitutional safeguards are necessary in the United Kingdom after the experience of several reforms thus far.<sup>244</sup> One example of a constitutional safeguard is the use of constitutional committees that review proposed legislation. The first such committee in Europe was established in Finland in 1906.<sup>245</sup> The Constitutional Committee in Parliament has evolved over time to become the “most authoritative control body” for constitutional issues.<sup>246</sup> However, it seems that early on it received requests for input when there were problematic constitutional issues rather than on a systematic basis.<sup>247</sup> Now, however, when the Committee makes a decision, it is considered binding.<sup>248</sup> The Committee is the only authority that can determine the constitutional process to follow.<sup>249</sup> Its terms of reference include responsibilities relating to the preparation of legislation as well as enforcing the constitution.<sup>250</sup> It receives about twenty requests for opinions on draft bills every year.<sup>251</sup> It leans towards unanimous decisions, and the opinions are publicly available. The Committee also has developed a guide on constitutional issues for legal drafters, and this checklist is currently being revised.<sup>252</sup>

The House of Commons Constitutional Affairs Committee was established in 2003 to reflect the new DCA.<sup>253</sup> The House of Lords Constitution Committee was formed in 2001 with the specific purpose to review constitutional aspects of proposed legislation.<sup>254</sup> While a constitutional reform bill goes through Parliament just like any other bill, the House of Lords Constitution Committee may provide closer scrutiny of a bill that involves constitutional reform. Part of this scrutiny could be enhanced by consideration of a checklist for constitutional issues so that it may carry out its responsibilities more

244. Lord Woolf, L.C.J. of Eng. & Wales, Lionel Cohen Lecture (Dec. 2, 2003), available at <http://www.dca.gov.uk/judicial/speeches/lcj021203.htm>.

245. However, a committee of parliament reviewed the constitutionality of bills since 1863–1864. Antero Jyranki, *Taking Democracy Seriously: The Problem of the Control of the Constitutionality of Legislation - The case of Finland*, in *THE FINNISH CONSTITUTION IN TRANSITION* 10 (Maija Sakslin ed. 1991).

246. Pekka Lansineva, *The Constitutional Committee of Parliament: The Finnish Model. Norm Control*, in *THE FINNISH CONSTITUTION IN TRANSITION* 68 (Maija Sakslin ed. 1991).

247. *Id.* at 69–70.

248. *Id.* at 70.

249. *Id.*

250. Memorandum from Committee Counsel Sami Manninen on the Tasks of the Constitutional Law Committee (Aug. 16, 2005) (on file with author).

251. Lansineva, *supra* note 246, at 70.

252. *Id.*

253. United Kingdom Parliament, Constitutional Affairs Committee, [http://www.parliament.uk/parliamentary\\_committees/conaffcom/cacaboutthecommittee.cfm](http://www.parliament.uk/parliamentary_committees/conaffcom/cacaboutthecommittee.cfm) (last visited Sept. 18, 2006).

254. *Id.*



effectively. However, for this to be done, it would be helpful if there were a written articulation of the values and principles of the constitution.<sup>255</sup> Such articulation would also assist in defining what are now informal rules concerning what is considered to be “constitutional.” The role of the two Committees may increase with time. Given that there is no written, codified constitution and that reforms take place just like any other piece of legislation, the role of these committees becomes one of safeguarding the constitution and its integrity. Constitutional committees in many other countries play critical roles—Sweden and Finland are two such examples. Some argue that the House of Lords has been known to provide closer review of proposed bills that enhances their quality,<sup>256</sup> but it has also been known to hold up legislation that affects tradition—the removal of peers is one example and the Lord Chancellor Reform is another.

At the heart of this discussion of checks and balances and the role of constitutional committees is whether Parliamentary supremacy, the historical foundation of the U.K. political system, is changing. The answer is it changed with entry into the European Union in 1973 where European Directives required the United Kingdom to comply with and harmonize its legislation and required the judiciary to determine compliance of such legislation. The result, some could argue, is that the European Union as a whole “promotes high and more uniform standards of democratic performance at the national and sub-national levels.”<sup>257</sup> While the impact is significant, the public is not familiar with the European Union and its institutions. The public in the United Kingdom is less aware of the European Union than the average European country.<sup>258</sup> They are less aware that E.U. law is “supreme” to U.K. law.<sup>259</sup> In addition, the second change occurred with the 1998 Human Rights Act,<sup>260</sup> followed

255. Finnish courts cannot strike down an unconstitutional law, but they are required not to apply it in the case before them. One of the effects of having a single constitution is that the courts refer to sections of the constitution in their judgments. Similarly, the Constitution Committee can refer to constitutional principles and values. Interview with Sami Manninen, Counsel, Constitutional Law Committee, Parliament of Finland in Helsinki, Fin. (Aug. 9, 2005).

256. They can request modification or engage in negotiation that occurred for the hereditary lords reforms.

257. Future of Democracy, *supra* note 28, at 19.

258. The United Kingdom average is 45% while the EU average is 55%. EUR. COMM’N, EUROBAROMETER: PUBLIC OPINION IN THE EUROPEAN UNION, REP. NO. 55, at 74 (2001), available at [http://europa.eu.int/comm/public\\_opinion/archives/eb/eb55/eb55\\_en.pdf](http://europa.eu.int/comm/public_opinion/archives/eb/eb55/eb55_en.pdf).

259. Swedish constitutional review is considering how to include the implementation of E.U. policy.

260. Francesca Klug, *Judicial Deference Under the Human Rights Act 1998*, 2 EUR. HUM. RTS. L. REV. 125, 128 (2003).

by the Scottish and Welsh devolution<sup>261</sup> and the 2005 constitutional reform creating structural independence—all have contributed to changes in the checks and balances, as well as changing the relationship with the judiciary. The United Kingdom may be moving towards constitutional supremacy.<sup>262</sup>

This changing relationship between the judicial, executive, and legislative branches is affecting the system of checks and balances. The judiciary is now almost an equal power in the political balance. In the future, the Lord Chancellor will be appointed with revised responsibilities ensuring separation from the judiciary and the House of Lords. Thus, the structural reforms making the judiciary clearly independent will also create a more defined system of checks and balances. The judiciary started asserting its role from the start of the announcement of the reforms. Lord Woolf and the Lord Chancellor agreed to a Concordat, which in itself demonstrates judicial leadership and independence by defining clear responsibilities for the independence of the judiciary of England and Wales and ensuring that adequate resources were in place for the Supreme Court of the United Kingdom.<sup>263</sup>

There was, however, some resistance to the reforms in 2005—some say because the announcement of the reforms was not first discussed with those it affected, and others say because the system was working fine, and still others say because custom and tradition should be respected.<sup>264</sup> Based on international standards, the issues were clear-cut.<sup>265</sup> The judiciary should be separate from the executive and the legislature, and the positions of Lord Chancellor and the Law Lords will reflect this international principle of this

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261. The Scottish Act 1998 and Welsh Act 1998 give the courts and ultimately the judicial committee of the Privy Council authority to make binding decisions.

262. This means that the constitution would be superior to Parliament and would be the yardstick by which all other laws would be judged. It also means that any law that violated the constitution, or any conduct that conflicted with it, could be challenged and struck down by the courts. "It is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism." Jackson & others, *supra* note 5, at 56. John Laws, L.J., sees that there is at least a movement towards a half-way house. See *Sec'y of St. for the Home Dept. v. Int'l Transport Roth GmbH & others* [2002] EWCA Civ. 158, [2002] 1 C.M.L.R. 52. Finland made this change, and its constitution now is supreme.

263. CATHERINE FAIRBAIRN & SALLY BROADBRIDGE, HOME AFFAIRS SECTION, THE CONSTITUTIONAL REFORM BILL [HL]: A SUPREME COURT FOR THE UNITED KINGDOM AND JUDICIAL APPOINTMENTS: BILL NO. 18 OF 2004–05, 30, 59–61 (House of Commons Library 2005).

264. *Id.* at 30.

265. The Council of Europe recommends formal separation of powers. Council of Europe Parliamentary Assembly, Resolution 1455 (2005), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1455.htm>.

separation.<sup>266</sup> The judiciary knows that this reform supports its role in upholding the rule of law. Lord Bingham, the senior Law Lord, is supportive of structural independence for the Supreme Court of the United Kingdom and the Privy Council.<sup>267</sup> As a result of the Concordat, a system will be in place where the Lord Chief Justice and the Lord Chancellor share responsibilities for budget administration of the courts.<sup>268</sup> This coordination will ensure that resources are spent according to the needs of the judiciary and that there is executive accountability to the Treasury. In the future, the judiciary may take on more and more responsibilities of management as its members acquire increased experience.<sup>269</sup>

Good governance depends on both the independence and accountability of the judiciary. Such independence often creates tension with the legislature and executive because each is expected to provide checks and balances. A certain amount of tension can be healthy for a democracy as it balances. What minimizes this tension is public understanding of the role of the judiciary. Its role is to provide independent interpretation of the law, where no one is above the law and where everyone is treated equally before the law. This means that both individuals and the government alike are subject to the law. Laws are fundamental, and it is the role of government to propose legislation and the role of Parliament to consider and pass laws.<sup>270</sup> The role of the judiciary, on the other hand, is to independently interpret the laws. While Parliament functions under majority rule, the judiciary protects minorities, even when it may be unpopular to do so. The Court of Appeal of England and Wales has been more assertive of its role, and the House of Lords has on occasion told the Court of Appeal that it engaged in “judicial

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266. 657 PARL. DEB., H.L. (5th ser.) (2004) 1213; Uncorrected Transcript of Oral Evidence at Q272, HC 628-iv, available at [www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/uc628-iv/uc62802.htm](http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/uc628-iv/uc62802.htm). The Lord Chancellor will no longer be able to vote as a judge in the Judicial Committee of the House of Lords. The last time this was done was when Lord Irvine sat as Lord Chancellor on October 25, 2001. The Appellate Jurisdiction of the House of Lords (Updated March 2006) 13 (2006), <http://www.parliament.uk/documents/upload/HLLAppellate.pdf>.

267. ROGER SMITH & RUTH BRANDER, JUSTICE, A SUPREME COURT FOR THE UNITED KINGDOM 4–6 (2002).

268. Constitutional Reform Act, *supra* note 7, Explanatory Notes, available at [http://www.opsi.gov.uk/acts/en2005/ukpgaen\\_20050004\\_en.pdf#search=%22Concordat%2C%20Lord%20Chief%20Justice%20and%20the%20Lord%20Chancellor%2C%20budget%20administration%20of%20the%20courts%22](http://www.opsi.gov.uk/acts/en2005/ukpgaen_20050004_en.pdf#search=%22Concordat%2C%20Lord%20Chief%20Justice%20and%20the%20Lord%20Chancellor%2C%20budget%20administration%20of%20the%20courts%22).

269. See INT’L COMM’N OF JURISTS, INTERNATIONAL PRINCIPLES ON THE INDEPENDENCE AND ACCOUNTABILITY OF JUDGES, LAWYERS AND PROSECUTORS: A PRACTITIONER’S GUIDE 33 (Foreign & Commonwealth Office 2004) [hereinafter INDEPENDENCE & ACCOUNTABILITY OF JUDGES].

270. Bill of Rights, 1688, 1 W. & M. sess. 2, ch.2 (Austl.).

innovation.”<sup>271</sup> It will be interesting to see whether there is change when the Law Lords transfers to the Supreme Court and whether the term “judicial deference” to the legislature will disappear.<sup>272</sup> The judiciary is no less legitimate merely because its members are appointed; its role has been vested by Parliament. For example, the judiciary cannot “abdicate” its responsibility as guardian of human rights.<sup>273</sup> Government holds the judiciary accountable through the allocation of its budget, the appointment and removal of judges, and the determination of courts’ jurisdiction. In addition, the European Court for Human Rights (ECHR) as well as the European Court of Justice also hold the judiciary and other branches of government accountable to implement E.U. policy and legislation.

### E. Devolution

*The aim is that devolved and local governments are responsive to their citizens, that there is an effective relationship between the devolved and central governments, that devolution continues while maintaining equality and diversity, that there is government commitment for devolution across different levels, and Scottish, Welsh, and Northern Irish identities are maintained along with Britishness.*

Another way of promoting improved governance has been through devolution to Scotland, Wales, and London. The reform has meant greater self-government for the nations and regions within the United Kingdom. It is not just one of the most significant reforms since 1997 but the most significant reordering of the nation-state since the creation of Great Britain and the Act of Union. For a state whose institutions are predicated on the centrality and sovereignty of Westminster, devolution represents a major departure from historical and political norms. Westminster remains sovereign, however, with devolution arrangements structured with varying degrees of powers

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271. *In re S (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 WLR 720, 73 (U.K.).

272. Judicial deference is a judge-made concept, which has emerged as a recurring theme in many of the leading post-Human Rights Act decisions. Klug, *supra* note 260, at 129.

273. *Int'l Transport Roth*, EWCA Civ. 158.

and responsibilities.<sup>274</sup> Overall, the objectives of devolution were to enhance delivery of services as well as accountability and to promote greater unity in the United Kingdom, while at the same time respecting national culture and identity. As such, while the reforms are still in their early stages of implementation, the results are expected to yield a substantial change in the system of governance in the United Kingdom as well as the relationship between the citizen and the different levels of government.

The key issues for implementation are therefore diversity and unity. Diversity includes different degrees and levels of public services offered to citizens. At the same time, there is a desire for greater equity across the United Kingdom. In addition, the role of central government, its relationship with devolved institutions, as well as future decisions to devolve more functions will certainly evolve over the next few years. The issue of unity includes national identity and Britishness, which is taking on greater importance. The paradox of devolution is that in the long run there may be greater unity in the United Kingdom. Overall, the long-term goals for devolution are that national and local governments are responsive to their citizens, that there is an effective relationship between the devolved and central governments, that devolution continues while maintaining equality and diversity, that there is government commitment for devolution across different levels, and that Scottish, Welsh, and Northern Irish identities are maintained along with Britishness.

One way to measure this goal is through an increase in public confidence in devolved governments. Support for devolved power has increased since the 1979 referenda that failed to reach the threshold to support devolution in Scotland and Wales.<sup>275</sup> Today, there is a clear majority that supports devolved power, and it is expected that as devolution continues, this support will increase. In 2001, 56% of the public in Scotland and 62% in Wales supported devolution.<sup>276</sup> The majority of the people in Scotland think that the Scottish Executive should run Scotland.<sup>277</sup> While there is public support for devolution in Wales, the voter turnout in the elections to the Welsh Assembly

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274. Commission on the Assembly's Powers & Electoral Arrangements, Memorandum by UK Government, [http://www.oss.wales.gov.uk/2003/sp\\_20030220.html](http://www.oss.wales.gov.uk/2003/sp_20030220.html) (last visited Sept. 19, 2006).

275. Government of Wales Act, 1998, c. 38 (Wales), available at <http://www.opsi.gov.uk/acta/acts1998/19980038.htm>.

276. John Curtice, *A Stronger or Weaker Union? Public Reactions to Asymmetric Devolution in the United Kingdom*, 36 J. FEDERALISM Table 4 (2006).

277. Sixty-seven percent think the Scottish Executive should run Scotland. Media Release, Scottish Ctr. for Soc. Res. (Sept. 9, 2005) (on file with author) [hereinafter Scottish Ctr. for Soc. Res.].

was only 38% in 2003.<sup>278</sup> In Scotland, voter turnout was 50% in 2003, and in both nations these turnouts were a reduction from the first devolved elections in 1999.<sup>279</sup> Institutional development takes time, and as the institutions develop into their roles and responsibilities, the benefits of devolution will become clearer. For example, in Spain, after twenty-five years of devolution, citizens demonstrate an increase in satisfaction and trust in the devolved administrations.<sup>280</sup> Governments that are responsive to citizen interests should translate into greater public support for devolution in the United Kingdom.

At the moment, however, many citizens do not understand the central government's responsibilities versus those of the devolved governments.<sup>281</sup> This may be a result of the asymmetric devolution that has occurred. For example, the Welsh government does not have any taxation powers, but the Scottish government has a limited ability to adjust the income tax.<sup>282</sup> In addition, the Scottish Parliament may pass primary legislation where it has competence (Westminster determines whether it has this competence).<sup>283</sup> While education is devolved, the majority of the public perceives that the quality of education and standard of living is the result of the U.K. government rather than the devolved governments.<sup>284</sup> Therefore at present, the public does not know whether or not the devolved government is being responsive to its needs since the identity of the devolved institutions has not yet been linked to some of the services they deliver.

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278. DEPT OF THE PARLIAMENTARY LIBRARY, RESEARCH NOTE NO. 39 (May 2003), available at <http://parlinfoweb.aph.gov.au/piweb/Repository1/Library/PrsPub/SXF960.pdf>.

279. *Id.*

280. Even in Pais Vasco, the number of unsatisfied citizens with devolution decreased from 26% in 1993 to 20% in 2002, and those that support autonomy increased from 29% to 34% from 1977 to 2002. Calendario de Reuniones de la Comision General de las Comunidades Autonomas, del Senando; Conferencias sectoriales; y Organos Colegiados de la Administracion General del Estado con Participacion de las Comunidades Autonomas, Ministerio De Administraciones Publicas, at 51-52 (2004). The desire for independence also increased from 24% to 31% between 1977 and 2002. *Id.*

281. See Scottish Ctr. for Soc. Res., *supra* note 277.

282. Compare Scotland Act, 1998, c. 38, p. IV, § 76, available at <http://www.opsi.gov.uk/acts/acts1998/19980046.htm>, with Government of Wales Act, 1998, c. 38, p.IV, available at <http://www.opsi.gov.uk/acts/acts1998/19980038.htm>.

283. Scotland Act, 1998, c. 38, p. IV, § 76, available at <http://www.opsi.gov.uk/acts/acts1998/19980046.htm>.

284. In Scotland, 40% of the public views the United Kingdom government as being responsible for the quality of education, as does 52% of the public in Wales. THE STATE OF THE NATIONS: THE THIRD YEAR OF DEVOLUTION IN THE UNITED KINGDOM 267 (Robert Hazell ed., 2003) [hereinafter STATE OF THE NATIONS]. In Scotland, 53% perceive the United Kingdom to be responsible for the standard of living, and in Wales, that number is 58%. *Id.*

Devolution and local forms of governance are increasing in Europe generally, but they do not come without a distinct set of challenges. Some of the challenges include accountability, equality of voice and participation, and resolution of conflicts.<sup>285</sup> It also creates uncertainty as to who is in charge, but this can be offset by increased transparency and accountability mechanisms. Perhaps the White Paper on devolution in Wales will produce an increase in participation and understanding by the public of its effects.<sup>286</sup> The proposal is to separate the executive and legislative functions, which will make the governance structure clearer, and over time to grant the assembly legislative authority over its devolved powers.<sup>287</sup> In the meantime, there will be central oversight from Westminster of legislation interpreted if necessary by the Judicial Committee of the Privy Council. As time goes by, citizens should better understand that their vote does make a difference to their local governance, and that they can hold government accountable by becoming more involved and actively participating in the governance system. As a result, perhaps voter turnout will increase.

A second way to measure progress is through mechanisms to establish common policies to promote equity, conduct consultation on new policies and legislation, and ensure cooperation between the central and devolved governments. Such mechanisms should promote equity, but much of the success of devolution depends on cooperative behavior. Effective cooperation is needed because some reforms include a mix of devolved and reserved matters.<sup>288</sup> As a result, a Concordat sets out that the U.K. Departments will have policy responsibility on non-devolved matters but will ensure that the interests of the devolved governments are "represented and considered."<sup>289</sup> As with the Concordat related to the Constitutional

285. Future of Democracy, *supra* note 28, at 68.

286. See generally COMMITTEE ON THE BETTER FOR WALES WHITE PAPER, REPORT 8 (2005) ("We have undertaken this inquiry with the intention of articulating an agreed Assembly response to the White Paper, as well as informing the wider public debate about the issues."), available at <http://www.wales.gov.uk/keypubassembettergov/content/bgw-report.pdf#search=%22We%20have%20undertaken%20this%20inquiry%20with%20the%20intention%20of%20articulating%20an%20agreed%20Assembly%20response%20to%20the%20White%20Paper%2C%20as%20well%20as%20informing%20the%20wider%20public%20debate%20about%20the%20issues%22>. These proposals now have been enacted. Government of Wales Act, 2006, c.32. (2006).

287. In Spain, the number of acts or laws was used as an indicator of devolution in the autonomous communities. See MINISTERIO DE ADMINISTRACIONES PUBLICAS, THE SPANISH STATE OF AUTONOMIES, CHARACTERISTICS AND GENERAL INFORMATION 6 (2002) [hereinafter STATE OF AUTONOMIES].

288. See Scotland Act, 1998, c. 46, sched. 5.

289. U.K. GOV'T SCOTTISH MATTERS, THE CABINET OF THE NATIONAL ASSEMBLY FOR WALES AND THE NORTHERN IRELAND EXECUTIVE COMMITTEE, DEVOLUTION:

Reform Act, this Concordat is not legally-binding; so while the Concordat sets out mechanisms for cooperation, it ultimately depends on behavior.<sup>290</sup> Some of the mechanisms involve regular ministerial meetings among the devolved and central governments, and others involve regular exchange of information.<sup>291</sup> Monthly meetings on agriculture with department officials are an example of effective coordination. In Spain, for example, approximately 100 meetings take place every year among all the devolved sectors to facilitate coordination. These are meetings on topics related to the environment, agriculture, labor, and fishing.<sup>292</sup> These sector meetings have meant greater collaboration on state regulations, and they ensure that the interests of the autonomous communities are reflected.<sup>293</sup> The majority of citizens believe that power lies and decisions are taken at the center regardless of whether the area is devolved.<sup>294</sup> With devolution, however, citizens also believe that they have a stronger voice within the United Kingdom.<sup>295</sup> Such cooperation is important if the views of the devolved governments are to be considered at the central level. Cooperation is also necessary for the central government to ensure implementation of E.U. directives.

Collaboration may also avoid future litigation between devolved governments and Westminster. To date there have not been any cases in the courts between governments because disagreements are sorted out in private. Currently all the governments are from the same party, but disagreements may be more likely to end up in the court if this changes. This approach is consistent with the E.U. recommendation that there be legal remedies where there is undue interference by central governments in the free exercise of devolved powers.<sup>296</sup> While there have been a number of conflicts in Spain between the state and the autonomous communities, the principle of collaboration and clear responsibilities has reduced the number of

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MEMORANDUM OF UNDERSTANDING AND SUPPLEMENTARY AGREEMENTS, 2001, Cm. 5240, at 9 [hereinafter DEVOLUTION M.O.U.].

290. "It is intended to be binding in honour only." *Id.* at 5.

291. *Id.* at 9-10.

292. Calendario de Reuniones de la Comision General de las Comunidades Autonomas, del Senado; Conferencias sectoriales; y Organos Colegiados de la Administracion General del Estado con Participacion de las Comunidades Autonomas, Ministerio De Administraciones Publicas, at 1-9 (2004).

293. See STATE OF AUTONOMIES, *supra* note 287, at 13.

294. In 2001, 66% in Scotland and 61% in Wales viewed the U.K. government as the body with the most perceived power. STATE OF THE NATIONS, *supra* note 284, at 266.

295. In 2001, 52% of Scots felt that they had a strong voice in the United Kingdom, while in Wales the figure was 49%. *Id.* See also Scottish Ctr. for Social Research, *supra* note 277.

296. PRATCHETT & LOWNDES, *supra* note 52, at 67.



conflicts.<sup>297</sup> The Spanish Constitutional Court is the ultimate arbiter.<sup>298</sup> While it would seem unlikely to happen, the ultimate arbiter has yet to be tested in the United Kingdom. Courts would decide cases before them, but the ultimate sanction available is for Westminster to override legislation from a devolved legislature.<sup>299</sup> In contrast, the Spanish Government only has the power to “compel” an autonomous community to meet its legal obligations, but this power has never been used.<sup>300</sup> The challenge in the United Kingdom, which lacks a federal system, is how to establish clear lines of responsibility. In the future it will be interesting to see if disagreements about devolved matters result in the use of the court system rather than private, informal conflict resolution.<sup>301</sup>

Collaboration is also extended to E.U. policy issues under a specific Concordat.<sup>302</sup> The relationship of devolved governments with the European Union is also important, and given that Scotland and Wales have separate representation in Brussels, they can have an influence over the grants that they received from the European Union. Similarly, the Spanish autonomous communities also have their own representation in Brussels.<sup>303</sup> In general, regional representation from countries across Europe is increasing in Brussels.<sup>304</sup>

A third measure of progress is that there is no change in migration between devolved areas with varying policies. In Scotland, over 30% of the people feel that living standards are improving.<sup>305</sup> It may be for this reason that more people moved into Scotland than

297. STATE OF AUTONOMIES, *supra* note 287, at 12. Up until 2002, Catalonia had the largest number of conflicts (379). *Id.* at 13.

298. The Constitutional Court handles appeals on the grounds of constitutionality, violation of rights, and liberties and conflicts of jurisdiction between the state and autonomous communities. *Id.* at 10.

299. “The United Kingdom Parliament retains authority to legislate on any issue whether devolved or not. It is ultimately for Parliament to decide what use to make of that power.” DEVOLUTION M.O.U., *supra* note 289, at 8. “However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.” *Id.*

300. Constitución [C.E.] art. 155 (Spain).

301. In Finland, there are currently no cases between the municipalities and the state, though there are between the citizen and the municipalities. Interview with Kari Prattala, Legal Director, The Association of Finnish Local and Regional Authorities, in Helsinki, Fin. (Aug. 9, 2005).

302. DEVOLUTION M.O.U., *supra* note 289, at 21.

303. STATE OF AUTONOMIES, *supra* note 287, at 15.

304. *Welsh Devolution: The Next Steps*, MONITOR (THE CONST. UNIT BULLETIN), Sept. 2005, at 9.

305. Scottish Ctr. for Soc. Res., *supra* note 277.

moved out in 2002.<sup>306</sup> There has also been a positive migration to Wales, while in England there has been negative migration.<sup>307</sup> In Northern Ireland, where there has not been devolution to date, there has also been positive migration since 1996 until today.<sup>308</sup>

Given that one of the purposes of devolution is to permit greater autonomy and governance, this inevitably leads to diversity of policies. These varying policies may create incentives for migration of individuals, where business should locate, and where professionals should seek employment based on competitiveness of professional fees.

Already there are varying degrees of services provided by Scotland and Wales. In 2004, all devolved governments spent more on healthcare per person than England; however, the percentage change in England was greater than elsewhere.<sup>309</sup> In Scotland there is free university education and long-term care, and the restaurants and pubs will be free from smoking beginning in April 2006.<sup>310</sup> In Wales, there is free public transportation for pensioners and free prescriptions for those under twenty-five years of age.<sup>311</sup> This divergence is permitted and is necessary to meet local needs. For example, illness is not evenly distributed across the United Kingdom, and neither is the standard of living. As a result, different measures are needed in each nation. The central government has set policies on child poverty as well as employment that should contribute to promoting equity.<sup>312</sup> In comparison, Spain establishes statewide policies through sector agreements to create consistency and

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306. GEN. REGISTER OFFICE FOR SCOTLAND, SCOTLAND'S POPULATION 2003: THE REGISTER GENERAL'S ANNUAL REVIEW OF DEMOGRAPHIC TRENDS 32 (2004), available at <http://www.gro-scotland.gov.uk/files/2003-ar.pdf>.

307. National Statistics Office, Internal Migration, Population Trends 125, available at <http://www.statistics.gov.uk/STATBASE/ssdataset.asp?vlnk=9456> (last visited Oct. 26, 2006).

308. *Id.* See *infra* Appendix 1h.

The U.K. government came out with a timetable for devolution in Northern Ireland in October 2006. It contains a target date of 26 March 2007 for a new executive to be up and running. The parties have until 10 November 2006 to respond to the plan. If they agree to it, a first and deputy first minister would be nominated on 24 November 2006. The plan follows three days of multi-party talks at St. Andrews in Scotland. Prime Minister Tony Blair said there would have to be some form of electoral endorsement of the plan—either an election or a referendum.

309. KATIE SCHMUECKER & JOHN ADAMS, DEVOLUTION, DIVERGENCE & SOCIAL JUSTICE 13 (2005) On health, England increased spending per person from £818 in 1999 to £1,350 in 2004. Scotland went from £997 in 1999 to £1,563 in 2004, while Wales went from £917 in 1999 to £1,421 to 2004. *Id.*

310. Smoking, Health, and Social Care (Scotland) Act, 2005, (A.S.P. 13), available at <http://www.opsi.gov.uk/legislation/scotland/acts2005/20050013.htm>.

311. SCHMUECKER & ADAMS, *supra* note 309, at 29.

312. *Id.*

equity.<sup>313</sup> However, each autonomous community decides how to implement the policies, thus allowing for divergence.<sup>314</sup> For example, while there is a policy to support women who choose to leave a domestic violence situation with funds allocated based on the number of domestic violence cases, each autonomous community decides for how long women receive this assistance.<sup>315</sup> In the United Kingdom, health, education, and housing are devolved, and this autonomy is complete without a commitment to minimum standards or performance indicators. Given that there are different indicators in each devolved power, there are varying statistics and definitions, which make comparisons in some areas difficult.

For these reasons as well as others, financing of devolution is critical. The process of budget allocation is determined through the Barnett formula, which accounts for 96% of all spending.<sup>316</sup> The benefit of this formula is that the baseline spending per person is fixed, and it is provided as a block grant giving autonomy for the devolved government to decide how to spend.<sup>317</sup> At the same time, the financing arrangements do have their limitations. Spanish autonomous communities use their ability to raise funds for areas that are not taxed by the state. Resources necessary to meet population needs are also an issue at the local government level. It is necessary to create a framework and respect autonomy of local governments, but not to give unfunded mandates.<sup>318</sup> Municipalities in Finland have an obligation to guarantee services because there are basic rights to social services, but local governments do not always have the finances to meet these obligations, such as care for the elderly. An option that has been considered is pooling resources among localities to render services. If there is a downturn in the U.K. economy, it will be interesting to see what effect it will have on the services that devolved governments have committed to deliver. Such situations may also affect how the fiscal arrangements evolve in the future, whether there will be a movement towards fiscal autonomy, and whether devolved governments continue to receive subsidies to promote greater equity.

A fourth way to contribute to the success of devolution is to increase citizens' identifying themselves as both British and Scottish,

313. Interview with Juan Palacios, Madrid Ministry of Public Administration (July 22, 2005).

314. *Id.*

315. *Id.*

316. ROBERT TWIGGER, ECONOMIC AND POLICY SECTION, THE BARNETT FORMULA 5 (1998), available at <http://www.parliament.uk/commons/lib/research/rp98/rp98-008.pdf>.

317. Two factors are central: the relative populations and the extent to which the policy area is devolved. *Id.* at 10–11.

318. Future of Democracy, *supra* note 28, at 102.

Welsh, English, or Northern Irish. Only England comes close to a majority considering themselves both English and British.<sup>319</sup> In the devolved nations, only about a quarter of the citizens consider themselves both, but that number appears to be decreasing rather than increasing.<sup>320</sup> One of the objectives of pursuing Britishness is to preserve local and regional culture, while at the same time fostering unity within the United Kingdom. Together with the issue of migration, greater attention is being given to Britishness. In Spain, while there is a wide spectrum of opinions, on average 57% of citizens identify themselves as both Spanish and members of their regional autonomous community.<sup>321</sup> To increase the sense of Britishness, first there needs to be a sense of what it is and what values it represents. One recent study indicates that Britishness relates to geography, national symbols, people, values, attitudes, cultural habits, behavior, citizenship, language, and achievements.<sup>322</sup> What is interesting is that there is no common understanding of the meaning and purpose, but those that do identify with Britishness happen to be from ethnic minority backgrounds.<sup>323</sup> In a multicultural society, efforts to promote greater inclusiveness by means of both national and regional identities can be helpful for cohesion and unity.

Part of the system of subsidiarity also includes regional and local government in England. One way to contribute to progress of subsidiarity is greater autonomy of spending by local government and legitimacy or removal of regional assemblies.<sup>324</sup> There is a 2005 government commitment to further devolve planning, housing, economic development, and transport to the regions and to further devolve to the city of London.<sup>325</sup> Even though the first referendum in 2004 resulted in an overwhelming rejection of the regional assembly

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319. Curtice, *supra* note 276, at 95, 100.

320. *Id.*

321. The range is from 34% in Pais Vasco to 75% in Extremadura. Calendario de Reuniones de la Comision General de las Comunidades Autonomas, del Senando; Conferencias sectoriales; y Organos Colegiados de la Administracion General del Estado con Participacion de las Comunidades Autonomas, Ministerio De Administraciones Publicas, at 50-52 (2004).

322. COMM'N FOR RACIAL EQUAL., CITIZENSHIP AND BELONGING: WHAT IS BRITISHNESS? 6-7 (2005).

323. *Id.* at 7-8.

324. The Local Government Act of 1999 required that local governments carry out their functions with economy, efficiency, and effectiveness. Local Govt. Act, 1999, c. 27, § 3 (U.K.)

325. LABOUR PARTY, LABOUR PARTY MANIFESTO 2005: BRITAIN FORWARD NOT BACK 102-08 (2005), available at [http://www.labour.org.uk/fileadmin/manifesto\\_13042005\\_a3/pdf/manifesto.pdf](http://www.labour.org.uk/fileadmin/manifesto_13042005_a3/pdf/manifesto.pdf) [hereinafter LABOUR PARTY MANIFESTO].

for the northeast region,<sup>326</sup> government commitment continues perhaps because decentralization will help to reduce the gap in growth between regions, thereby achieving greater equity while at the same promoting efficiency.<sup>327</sup> As discussed above, the benefits need to be balanced with the risk of greater divergence in the quality of public services. Just as the devolved governments seek to better explain their roles and responsibilities, the English regions also have this challenge.<sup>328</sup> Part of the response to this challenge has been adopting constitutions, committees, and ethical frameworks.<sup>329</sup> As a result, the majority of the councilors and officers think that decision-making is more efficient, that there is public recognition of elected mayors, and that there is greater public participation with new constitutions.<sup>330</sup> While 25% of the councilors are women, there has been no real increase since 1999,<sup>331</sup> and therefore diversity is still an area for improvement.

Overall, devolution and decentralization may encourage greater participation. While voter turnout has not increased, diversity in devolved government has started off well. As discussed earlier, the number of women in the devolved governments in Scotland and Wales is greater than those in Westminster.<sup>332</sup>

This may be because women are more represented at the local level generally, and devolved governments are closer to local governments. It has been found that citizen interest and participation may also increase with time as a result of devolved governance structures because it allows people a greater opportunity to influence decisions.<sup>333</sup> In order to promote and demonstrate commitment to devolution, a long-term vision could be considered. This would allow evaluation of the current devolution process thus far

326. On November 4, 2004, turnout was 48%, and 22% voted for and 78% voted against elected assemblies. Andrew Stevens, *North East England Rejects Elected Regional Assembly*, [http://www.citymayors.com/politics/uk\\_neref.html](http://www.citymayors.com/politics/uk_neref.html) (last visited Sept. 10, 2006).

327. See NAT'L AUDIT OFFICE, *ENGLISH REGIONS: SUCCESS IN THE REGIONS*, 2002-3, H.C. 1268, at 18.

328. See *id.* at 23.

329. See JANE ASPDEN & DEMELZA BIRCH, *NEW LOCALISM - CITIZEN ENGAGEMENT, NEIGHBOURHOODS AND PUBLIC SERVICES: EVIDENCE FROM LOCAL GOVERNMENT* 109 (2005), available at [http://www.communities.gov.uk/pub/169/NewLocalismCitizenEngagementNeighbourhoodsandPublicServicesEvidencePDF646Kb\\_id1137169.pdf](http://www.communities.gov.uk/pub/169/NewLocalismCitizenEngagementNeighbourhoodsandPublicServicesEvidencePDF646Kb_id1137169.pdf).

330. See *id.* at 109-33.

331. See *id.* at 116.

332. See *infra* Appendix 1i.

333. For example, in India participation increased as a result of devolution. See D. Narayana, OECD, *Institutional Change and its Impact on the Poor and Excluded: the Indian Decentralization Experience*, 19, 43 (OECD Dev. Centre, Working Paper No. 242, 2005).

as well as consideration of future areas that could be devolved and what measures would need to be in place for this to occur. For example, in the future, police functions could be a devolved area in Wales. Or, perhaps there will be further delegation of powers like the delegated powers for railways to the Scottish Executive. Spain began its devolution in 1978 with the autonomous communities.<sup>334</sup> Since that time, there has been asymmetric devolution based on a sequenced approach.<sup>335</sup> For example, non-university teaching was transferred to Catalonia in 1980, while Asturias received it in 1999.<sup>336</sup> As discussed, the balance of divergence and convergence will evolve, and a vision for the future would assist in managing the process. It may also assist in promoting government cooperation and commitment.

## V. RULE OF LAW

The recent constitutional reforms in the United Kingdom have and will continue to impact the rule of law in years to come. The rule of law is central to democracy in the United Kingdom and to the shared values that unite Europe.<sup>337</sup> In the twenty-first century, when the values of democracy are being challenged, greater attention is being given to the rule of law. When the rule of law is in effect, there are: meaningful and enforceable laws where decisions are transparent, fair, and predictable; enforceable contracts that promote business and commerce; basic security with personal safety; protection of individual and property rights, and an independent judiciary that safeguards both; and access to justice with concrete ways to invoke rights and protect them.<sup>338</sup>

If these elements are present, the state can regulate the economy and empower private individuals to contribute to economic development by confidently engaging in business, investments, and

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334. STATE OF AUTONOMIES, *supra* note 287, at 3–4.

335. *Id.* at 4. The fast track autonomous communities are covered by Article 151, and the slow track communities are covered by Article 143 of the 1978 Constitution. *See id.* at 4–5; Constitución [C.E.] art. 155 (Spain).

336. STATE OF AUTONOMIES, *supra* note 287, at 4. While there are some reserved powers, each autonomous community included in its constitution the areas for which it wanted responsibility. *See id.* at 3–4.

337. *See* HOUSE OF LORDS COMMITTEE ON THE CONSTITUTIONAL REFORM BILL, WRITTEN EVIDENCE FROM THE SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS AND LORD CHANCELLOR 14 (2004) [hereinafter WRITTEN EVIDENCE].

338. *See* Maria Dakolias, Keynote Speech to the European Union Judiciaries Representatives: The Role of the Judiciary for Economic and Social Development 1 (Nov. 13, 2003), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/MDHague-RuleofLaw.pdf>.

other transactions. This economic development in turn fosters domestic and foreign investment and the creation of jobs. In addition, the state provides a framework in which individuals can live with dignity and can equally contribute and participate in society. Making this framework succeed requires protection of individual and property rights, the ability to walk the streets without fear, and the use of real estate for collateral to borrow money. All of this means that there is support for a prosperous democratic society. Studies show that the rule of law contributes positively to democracy,<sup>339</sup> from a development point of view, and economic growth.<sup>340</sup>

As a consequence, it has also been shown that the rule of law is a basic ingredient for enhanced quality of life.<sup>341</sup> We only have to look to one element—changes to the education system that lead to a legal entitlement and legal obligation on parents to send children to elementary school.<sup>342</sup> This development of rights and obligations over time contributes to a fair and well-functioning society. When these rights are effectively enforced, there is greater trust and confidence, but without trust and confidence rules and law are increasingly ignored.<sup>343</sup> As a result, with a greater concern for democracy and public confidence in government and institutions, attention to the rule of law is a must.

The recent constitutional reforms in the United Kingdom seek to enhance the legitimacy of the legal system in the eyes of society as a whole. Some of these reforms support independent organizations designed to promote legal rights, such as rights designed to prevent gender or racial discrimination. Such efforts assist historically excluded and disadvantaged groups to enforce rights and build human capital. Other reforms create clearer separation of the

339. Roberto Rigobon & Dani Rodrik, *Rule of Law, Democracy, Openness and Income: Estimating the Interrelationships* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 10750, 2004), available at <http://www.nber.org/papers/w10750.pdf>.

340. See generally Daniel Kaufmann et al., *Governance Matters* (World Bank, Policy Research, Working Paper No. 2196, 1999) (positing the rule of law as one of six governance factors that caused better development outcomes in a cross-section of more than 150 countries). See *infra* Appendix 1j.

341. It has been shown that an increase in rule of law leads to increased life expectancy. Peter Boettke & J. Robert Subrick, *Rule of Law, Development, and Human Capabilities* 9 (George Mason Univ. Dep't of Econ., Working Paper No. WPE 02.19, 2002), available at [http://www.gmu.edu/departments/economics/working/WPE\\_02/02\\_19.pdf](http://www.gmu.edu/departments/economics/working/WPE_02/02_19.pdf).

342. Amartya Sen, Speech at the World Bank Legal Conference: What is the Role of Legal and Judicial Reform in the Development Process? 16–17 (June 5, 2000), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf>; see also Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1, art. 14 (providing an example of a fundamental legal entitlement to education).

343. The Future of Democracy, *supra* note 28, at 33.

judiciary from the other branches of government. The rule of law and judicial independence are for the first time stated in a piece of legislation, the Constitutional Reform Act, and as such are clearly stated constitutional principles in line with international best practice.<sup>344</sup> International standards recommend that judicial independence be guaranteed and “enshrined in the constitution” or other legislation of the country.<sup>345</sup> While the government and society have an obligation to the rule of law, the Lord Chancellor and the judiciary have a special duty to uphold the rule of law. The judiciary and judges are the custodians of the rule of law, and as such are central to a functioning democracy. The executive is subject to the rule of law.<sup>346</sup>

The same is expected from countries that await entry into the European Union. Many requirements are made of those states to bring their systems up to “European” standards. These standards, known as the Copenhagen criteria, relate to democracy, rule of law, human rights, respect for and protection of minorities,<sup>347</sup> and they establish general principles without dictating the exact reforms. The result is that new member states comply with the standards, and older member states have a chance to reflect on their own systems. For example, one of the standards set for new member states include that “states should consider creating independent judicial councils to administer the judiciary.”<sup>348</sup> While the United Kingdom does not have a judicial council in name, it has recently established a Judges Council, even though it does not have any formal functions or the same responsibilities as other judicial councils. Training is handled by the Judicial Studies Board now headed by the Lord Chief Justice,

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344. See Constitutional Reform Act, *supra* note 7, c. 4, § 1, 3–4.

345. Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Aug. 26–Sept. 6, 1985, *Basic Principles on the Independence of the Judiciary*, at 60, U.N. Doc. A/CONF.121/22/Rev.1 (1985) [hereinafter *U.N. Basic Principles*]; accord Council of Europe, *Recommendation of the Comm. of Ministers to Member States on the Independence, Efficiency and Role of Judges*, Principle 1, Recommendation No. R (94), 12 (1994).

346. See WRITTEN EVIDENCE, *supra* note 337, at 14. “The Government is of course subject to the law, and government action or inaction is liable to be overturned by judicial review.” *Id.*

347. European Council in Copenhagen 21–22 June 1993, Conclusions of the Presidency, No. SN 180/1/93 REV 1, at 13, available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/72921.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf) [hereinafter *Copenhagen Criteria*]. The European Union is developing a checklist for the judiciary that includes issues related to structure, remedies, trial, legal aid, and presumption of innocence. *Id.*

348. EUROPEAN UNION ACCESSION MONITORING PROGRAM [EUMAP], OPEN SOCIETY INSTITUTE, MONITORING THE EU ACCESSION PROCESS: JUDICIAL INDEPENDENCE 67 (2001), available at [http://www.eumap.org/reports/2001/judicial/sections/overview/judicial\\_accession.pdf](http://www.eumap.org/reports/2001/judicial/sections/overview/judicial_accession.pdf).



selection by the Judicial Appointments Commission, and administration by Her Majesty's Court Service.

In addition, when one considers globalization and economic and social progress, attention to the rule of law becomes absolutely paramount. History shows that progress without the rule of law results in failure. Promoting the rule of law becomes more incumbent on all countries because a financial crisis in one country can spell financial problems in many others. Part of this interdependence means that others will be looking to the United Kingdom as a model for their work. The U.K.'s influence is not limited to greater Europe or the Commonwealth, but can be felt worldwide. For this reason, attention to both the real and perceived independence of the judiciary is central to achieving success. The question then is do the constitutional reforms foster the rule of law, and do they contribute to international best practice? The transformation of the Lord Chancellor's Office and a clearer statement of institutional roles are enhancing judicial independence and the separation of powers. The Lord Chief Justice is taking on the role as head of the Judiciary of England and Wales. And the Law Lords are being removed from the legislature and placed in a clearly named Supreme Court. Best practice would dictate no less.

#### A. *Independence of the Judiciary*

*The aim is that the judiciary has clearer separations from the legislative and executive branches, whose judges better reflect society, and whose appointments are done in a way that is transparent and meritorious.*

Judicial independence is an international principle and is "of fundamental constitutional importance"<sup>349</sup> in the United Kingdom. It is also a requirement for a democratic state that allows people the freedom to participate.<sup>350</sup> Many of the constitutional reforms have aimed to enhance the independence of the judiciary. The question then is what is long-term success? It is a judiciary with clearer separation from the legislative and executive branches, whose judges

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349. *Millar v. Procurator Fiscal, Elgin*, [2001] UKPC D4, ¶ 80 (P.C.) (appeal taken from Scot.) (U.K.), available at <http://www.scotcourts.gov.uk/opinions/C85799.html>; see also *Starrs v. Procurator Fiscal, Linlithgow*, [1999] ScotHC 242, ¶¶ 26–27 (discussing precedent that establishes judicial independence and impartiality as traditional constitutional principles). It should be noted that part-time judges that are paid per day are now called fee paid.

350. See Sen, *supra* note 342, at 22.

better reflect society, and whose appointments are done in a way that is transparent and meritorious. Many of the reforms were passed through legislation in 2005, and their implementation is now underway. Measuring progress on implementation through the judicial appointments process, diversity of judges, and the new roles of the Supreme Court and the Lord Chancellor are just some ways to enhance understanding of the reforms and ensure that they are having the desired effect. Increased transparency and diversity of the judiciary should increase public confidence, which in turn affects the legitimacy and independence of the judiciary.

Outcomes that contribute to achieving the goal of a judiciary clearly separated from the legislature and executive are the commencement of the U.K. Supreme Court in 2009; a Lord Chancellor who no longer holds judicial office or heads the judiciary; and the Judicial Committee of the Privy Council, which removes the right of ministers to sit as its members.<sup>351</sup> A new building is underway to provide a suitable image of justice. And a Chief Administrator will be appointed to work with the President of the Supreme Court in managing the budget, though the Lord Chancellor remains responsible for the administration of the courts and is accountable to Parliament for the efficiency and effectiveness of the court system.<sup>352</sup> This responsibility is like many civil law countries where the Minister of Justice is responsible for the administration of the courts. Independence includes these elements and more, but not all were in need of attention in the United Kingdom.

Historically, the United Kingdom has enjoyed the benefit of judicial independence, which has made a positive contribution to its democracy. Judicial independence has not been questioned in recent times.<sup>353</sup> Yet, history and custom created a framework that complicated judicial independence. The Act of Settlement of 1701 resulted in judges being provided with life tenure under good behavior,<sup>354</sup> but there was no structural independence.<sup>355</sup> In the

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351. See generally WRITTEN EVIDENCE, *supra* note 337 (discussing how the Constitutional Reform Bill should aim to achieve these three outcomes).

352. The Lord Chancellor is responsible for the management of the courts and judiciary, and the Secretary of State handles elections law, legal aid, human rights, data protection, FOI, and the regulation of the legal profession.

353. See WRITTEN EVIDENCE, *supra* note 337, at 11, 20. The Law Lords rely on their own judgment whether to vote in the House of Lords. *Id.*

354. The 1701 Act of Settlement specifically includes: (1) security of judicial tenure (holding office during good behavior); (2) appropriate mechanisms for removal (requiring agreement of both houses); (3) salaries provided from public funds. Act of Settlement, 1701, 12 & 13 Gull., c. 2 (Eng.).

355. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND 204 (2001):

developing world, it is the opposite—many countries have structural independence but struggle with functional independence.<sup>356</sup> To enhance the principle of judicial independence, it is important that structural as well as functional independence be present.<sup>357</sup> The fact that the Lord Chancellor was a member of the cabinet, a judge, the speaker of the House of Lords, and head of the judiciary in England and Wales does not meet any of the international standards. Furthermore, he is appointed by the Prime Minister without any approval process or electoral accountability.<sup>358</sup> In addition, part-time judges and lay magistrates were only granted security of tenure in 2000.<sup>359</sup> The new ethics code does not prevent part-time judges from also being lawyers.<sup>360</sup> As a result, independence of the judiciary has depended to some degree on the behavior of judges, the executive, and the legislature, rather than structure.

The structural reforms have enhanced the United Kingdom's compliance with international standards for guarantees of

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public's liberty which cannot subsist long in any state, unless the administration of justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinions and not by any fundamental principles of law: which the legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative . . . Nothing is more to be avoided in a free constitution than uniting the provinces of a judge and a minister of state.

356. Studies show that actual independence is more important, and it is de facto independence that affects GDP growth per capita. See Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators* (Nov. 18, 2002) (unpublished paper), available at <http://www.isnie.org/ISNIE03/papers03/voigt.pdf>. Ken Dam discusses the difference between structural and behavioral independence. See Kenneth W. Dam, *Institutions, History and Economic Development* 12–14 (John M. Olin Law & Economics, Working Paper No. 271, 2006).

357. MARIA DAKOLIAS, *THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM* 7–9 (1996).

358. See WRITTEN EVIDENCE, *supra* note 337, at 3, 5 (indicating that the Lord Chancellor is responsible for a department budget of more than 3 billion pounds and a staff increased to 13,000).

359. See *Starrs*, ScotHC 242, ¶¶ 47–49 (establishing that the current policy of executive discretion and a one-year term did not provide sufficient security of tenure for temporary sheriffs to remain impartial and independent); see also *Millar*, UKPC D4, ¶ 3.

360. See JUDGES' COUNCIL, *GUIDE TO JUDICIAL CONDUCT* 16 (2004), available at [http://www.judiciary.gov.uk/docs/judges\\_council/published\\_guide.pdf](http://www.judiciary.gov.uk/docs/judges_council/published_guide.pdf) (advocating a balance between the demands of judicial dignity and the "reasonable requirements of a legal practice").

independent judges and hearings. In fact, the Council of Europe identified them as issues for the United Kingdom to consider in 2003.<sup>361</sup> The government circulated a Consultation Paper that addressed these issues.<sup>362</sup> The object was to create structural independence to avoid any real or perceived undermining of the judiciary's independence by the Lord Chancellor's roles, the Law Lords location in the House of Lords, or the lack of an independent judicial selection body. It also considered that the principle of an independent, fair, and impartial hearing could not be questioned.<sup>363</sup> Regardless of whether or not there was a perceived or real threat to judicial independence, "clarifying responsibilities is in itself constitutionally desirable," and "clearly setting out the respective responsibilities of the executive and the judicial branches of government is a requirement of the modern democracy."<sup>364</sup>

In addition, these structural reforms should help the public (in the United Kingdom and internationally) better understand the judicial system in the United Kingdom, which should contribute to an increase in public confidence. There may not be hard data, but most people would find it difficult to understand how judges can be both legislators and judges at the same time.<sup>365</sup> It will also mean that future legislation will not need to say "Parliament' does not include

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361. See EUR. PARL. ASS., *Report of the Comm. on Legal Affairs and Human Rights*, 46th Sess., Doc. No. 9798 (April 28, 2003), available at <http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9798.htm>.

362. See DEPT FOR CONST. AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM 8–44 (July 2003), available at <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> [hereinafter SUPREME COURT FOR U.K.] (discussing various proposals regarding the establishment of a Supreme Court that would cure structural problems with judicial independence).

363. The sixth article of the European Convention on Human Rights, incorporated into English law by the Human Rights Act of 1998 sets forth this principle. See Human Rights Act, 1988, c. 42, § 1(1)(a) (Eng.), available at <http://www.opsi.gov.uk/ACTS/acts1998/19980042.htm#aofs> (incorporating Article 6 of the European Convention on Human Rights [hereinafter Human Rights Act]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 222 [hereinafter European Convention of Human Rights] ("Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.")).

364. JUDGES' COUNCIL, RESPONSE TO THE CONSULTATION PAPERS ON CONSTITUTIONAL REFORM 10 (2004), available at <http://www.dca.gov.uk/consult/supremecourt/responses/sc081.pdf>.

365. See CATHERINE FAIRBAIRN & SALLY BROADBRIDGE, THE CONSTITUTIONAL REFORM BILL [HL]: A SUPREME COURT FOR THE UNITED KINGDOM AND JUDICIAL APPOINTMENTS 34–36 (2005), available at <http://www.parliament.uk/commons/lib/research/rp2005/rp05-006.pdf> (reviewing statements by the government and members of Parliament regarding possible public confusion over the current dual function of the Law Lords); WRITTEN EVIDENCE, *supra* note 337, at 9 (finding that "the appointment system is not well understood across the legal profession, let alone in wider society").

the House of Lords in its judicial capacity.”<sup>366</sup> But there is data about what the public thinks of the judiciary. Seventy-five percent of the respondents to the 1998 British Crime Survey had a positive opinion of judges,<sup>367</sup> but the percentage of public respect for the judiciary’s ability to uphold the rights of one accused of committing a crime depends on the race of the respondent: whites have a 70% confidence level, while blacks have a 52% confidence level, and Asians have a 66% level.<sup>368</sup> This confidence level may be based on the perception of how race played a part in determining the sentence in the case and whether there is a perception of bias in the courts.

A second way to contribute to the achievement of the goals is through appointments that include more women and minorities. The judiciary does not reflect the demographic makeup of the United Kingdom, but there has been some improvement. In 1998, 10% of judges were women, and about 1% were black or Asian.<sup>369</sup> As of March 31, 2004, more than 15% were women.<sup>370</sup> There is still more work to do, and it is important that diversity reach all levels of the judiciary. For example, it was less than two years ago that the first ever woman was appointed as a Law Lord.<sup>371</sup> She not only was the first woman but also came from an atypical background as an academic before becoming a judge.<sup>372</sup> The increase in diversity on the bench should have greater impact on the overall need for public confidence. During the consultation process, 74% of people were in

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366. See Human Rights Act § 6(4), *supra* note 364 (providing an example of such language).

367. See Joanna Mattinson & Catriona Mirrlees-Black, *Attitudes to Crime and Criminal Justice: Findings from the 1998 British Crime Survey 3* (Home Office Research, Development & Statistics Directorate 2000), available at <http://www.homeoffice.gov.uk/rds/pdfs/hors200.pdf> (combining “Fair” and “Excellent or Good” responses in order to arrive at generalization that respondents had a positive opinion of judges). In 2003 trust in judges was higher than in top civil servants and MPs. Eighty percent of judges were generally trusted to tell the truth, compared to 37% of top civil servants and 27% of MPs. Committee on Standards in Public Life, *Survey of Public Attitudes Towards Conduct in Public Life: Summary of Key Findings 5* (Sept. 2004) (unpublished report, on file with the author).

368. Office for Nat’l Statistics, *Confidence in the Criminal Justice System: By Ethnic Group*, <http://www.statistics.gov.uk/STATBASE/Expodata/Spreadsheets/D5077.xls>.

369. L.C. DEP’T, JUDICIAL APPOINTMENTS ANNUAL REPORT 1998–1999, 1999, Cm. 4449, at 74, available at [http://www.dca.gov.uk/judicial/ja\\_arep1999/judapp.pdf](http://www.dca.gov.uk/judicial/ja_arep1999/judapp.pdf).

370. Also, 2% were either Black or Asian. L.C. DEP’T, JUDICIAL APPOINTMENTS ANNUAL REPORT 2003–2004, 2004, available at <http://www.dca.gov.uk/judicial/ja-arep2004/parttwo.htm#inpost>.

371. Lady Brenda Hale was appointed in January 2004. See Clare Dyer, *The Guardian Profile: Lady Brenda Hale*, THE GUARDIAN, Jan. 9, 2004, available at <http://society.guardian.co.uk/crimeandpunishment/story/0,8150,1119488,00.html>.

372. *Id.*

favor of greater judicial diversity.<sup>373</sup> To improve diversity in the judiciary, the pool of solicitors and barristers must also be sufficiently diverse. The overwhelming majority, however, are both white and male, while 9% are of another ethnicity.<sup>374</sup> Training is also a central issue as to the way a lawyer's career takes shape, and opportunities for pupillage need to be open to those who are not well-connected and from Oxbridge.<sup>375</sup>

The process through which the independent Judicial Appointments Commission appoints members of the judiciary should provide greater transparency in judicial appointments.<sup>376</sup> The independent Commission commenced in 2006, and its members include judges and lawyers as well as lay members who will evaluate the applications for those seeking to become judges.<sup>377</sup> While the establishment and broad membership is a substantial move forward, it should be noted that international standards suggest that the majority of members on the Commission should be judges.<sup>378</sup> However, very few countries meet this standard. As of this year, the appointment process is no longer by invitation. No longer will the

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373. This is the result of the consultation process of Judicial Appointments Commission Constitution Reform Act 2005. Constitutional Reform Act, *supra* note 7, c. 4.

374. BARRISTERS & SOLICITORS DATA (2004). Barristers in 2004 were 68% male and 77% white, while solicitors were 58% male and 80% white. *Id.*; see also Robert Walker, *Sentence First, Verdict Afterwards—Constitutional Change in the United Kingdom Justice System*, 7 THE JUD. REV. 133, 142 (2005) (quoting a Department for Constitutional Affairs consultation paper for the proposition that the judiciary in the United Kingdom is “overwhelmingly” white and male).

375. See generally Stephen Sedley, *The Future of Advocacy*, in DISCRIMINATING LAWYERS 1, 1–18 (Philip Thomas ed., 2000) (describing the necessity of a pupillage and the possibility of discrimination in assigning them).

376. For instance, the Commission must submit a report to the Lord Chancellor. This report will state who has been selected; then, the Lord Chancellor can accept, reject, or require the selection panel to reconsider the selection. See Constitutional Reform Act, *supra* note 7, §§ 72–73 (laying out these procedures). This process will help with accountability and transparency. It will also keep the Lord Chancellor accountable to the parliament for appointments.

377. The Commission has fifteen members (five judges: Chief Justice or nominee will also be Deputy, one Court of Appeal or High Court, one High Court, one Circuit Judge, one District Court; two lawyers; one solicitor; one barrister; one tribunal master; one magistrate; and six lay people appointed for fixed terms not to exceed five years at a time). *Id.* at sched. 12, §§ 1–2, 4, 6, 13. The chairperson will be one of the lay members appointed by Chief Justice and Lord Chancellor. *Id.*

378. See INDEPENDENCE & ACCOUNTABILITY OF JUDGES, *supra* note 269, at 44–45 n.19 (pointing out that legitimate doubts about a tribunal's independence occurred in a case where a tribunal consisted of two civilian judges and three military officers). Under the Constitutional Reform Act, while the appointment body is independent of the executive and the legislature, one half of the members are not judges. See Constitutional Reform Act, *supra* note 7, sched. 12, §§ 1–2, 4, 6.

Lord Chancellor select judges without transparency.<sup>379</sup> Instead the Commission will select and recommend candidates to the Lord Chancellor for appointment, thereby removing much of his discretion.<sup>380</sup>

The judges will be selected and appointed on the basis of merit and regardless of gender, ethnic origin, marital status, sexual orientation, political affiliation, religion, or disability.<sup>381</sup> These criteria are consistent with best practice.<sup>382</sup> Results should be seen in the intermediate term since the appointments are numerous. In 2003 alone, two thousand judges and magistrates were appointed.<sup>383</sup> In addition, the impact should be great given that there is one ethnic minority judge in the High Courts, and none in the Court of Appeal or Appellate Committee of the House of Lords.<sup>384</sup> However, this depends on whether candidates are considered from outside the courts. To this end, an ombudsman will be in place to address any questions with regard to procedures and outcomes of judicial appointments.<sup>385</sup> If the process is conducted as designed, it is expected that there will be few complaints. Therefore, a third way to measure the long-term goal of an independent judiciary is through the number of complaints about the new appointment process. These reforms address the Law

379. See Constitutional Reform Act, *supra* note 7. In the early twentieth century, when there was less transparency, it was not uncommon to reward liberal lawyers in the Commons with judgeships. See WRITTEN EVIDENCE, *supra* note 337, at 9.

380. See Constitutional Reform Act, *supra* note 7. As was pointed out, the report by the Commission will state who has been selected, and then the Lord Chancellor can accept, reject, or require the selection panel to reconsider the selection. See *supra* note 376 and accompanying text.

381. See SUPREME COURT FOR U.K., *supra* note 362, at 34 (“The principles will be that selection must be made from a pool of properly qualified candidates on merit alone.”). For more information on measures designed to increase judicial diversity, see the Department for Constitutional Affairs’ Judges Diversity website at <http://www.dca.gov.uk/judges/diversity.htm>, which provides governmental strategy reports and statistics.

382. See INDEPENDENCE & ACCOUNTABILITY OF JUDGES, *supra* note 269, at 38–42 (stating that international law “excludes selection criteria such as a person’s political views, race or colour,” and noting that organizations in regions such as Europe, Asia, and Africa have adopted this practice); see also NEW ZEALAND MINISTRY OF JUSTICE, APPOINTING JUDGES: A JUDICIAL APPOINTMENTS COMMISSION FOR NEW ZEALAND? 11, 41–43, 45–46 (2004), available at <http://www.justice.govt.nz/pubs/reports/2004/judicial-appointment/Judicial%20appointments%20commission%20consultation%20paper.pdf> (stating that a requirement of a judicial appointments system is appointment on the basis of merit, and reviewing similar appointment procedures in parts of the U.K. and North America).

383. Of that number, seven hundred were judges and tribunal members; the rest were lay magistrates. See WRITTEN EVIDENCE, *supra* note 337, at 9.

384. See *id.* at 38.

385. See Constitutional Reform Act, *supra* note 7, §§ 62, 99–105 (establishing how the Conduct Ombudsman handles and reports on complaints regarding maladministration by the Appointments Committee).

Society's call to improve transparency in the appointment process, increase the diversity of judges, and strengthen judicial independence—all in an effort to reduce political influence and increase public confidence.<sup>386</sup>

Overall, these reforms are changing the relationship between the judiciary, the executive, and the legislative branches. The future relationship will primarily depend on cooperation and a healthy tension between the different branches of government. For example, cooperation will be central to the shared responsibility between the Chief Justice and the Lord Chancellor for judicial discipline. What is becoming clear is that this healthy tension can be eroded by unfounded criticism of the judiciary, individual judges, and their decisions. Such criticism can undermine public confidence in the judiciary and result in cutting away at the independence of the judiciary. There has been concern about the level of criticism from the Ministers that was also reflected by the Special Rapporteur from the U.N. Commission on Human Rights.<sup>387</sup> This concern is especially true if the criticism calls into question impartiality and integrity. And improper judicial behavior in the United Kingdom is an exception.<sup>388</sup> This is not to say that all criticism is inappropriate because constructive criticism can be positive. However, criticism that tries to influence judicial decision-making or threaten judges is dangerous and can undermine independence.<sup>389</sup>

It is clear that Ministers have a specific duty to uphold judicial independence and must not seek to influence judicial decisions.<sup>390</sup> This duty is consistent with international standards that require government to “respect and observe the independence of the

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386. See FAIRBAIRN & BROADBRIDGE, *supra* note 365, at 47–48.

387. In 1996, the Special Rapporteur noted with “grave concern” some of the reports by Ministers and other government officials, most notably by the Chairman of the House of Commons Home Affairs Select Committee’s statement: “it is inevitable that we shall statutorily have to restrict judicial review.” U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Special Rapporteur on the Independence of Judges and Lawyers*, ¶ 226, U.N. Doc. E/CN.4/1996/37 (Mar. 1, 1996).

388. No English judge has been removed since 1830. See Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT’L L.J. 353, 390 n.239 (2000). Now the Lord Chancellor will share the role of addressing disciplinary matters with the Chief Justice instead of handling responsibilities alone. See WRITTEN EVIDENCE, *supra* note 337, at 10.

389. Stephen Sedley, *What’s Happening to the Constitution?*, 26 LONDON REV. OF BOOKS (2004).

390. See Constitutional Reform Act, *supra* note 7, § 3(1) (“The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.”).



judiciary.”<sup>391</sup> The media, law society, and the bar should also contribute to this discussion, but the judiciary should actively participate as well.<sup>392</sup> This charge serves two purposes: to explain to the public the role of the judiciary and to allow the public to have a better understanding of judges. With this effort, public understanding of the independence of the judiciary should increase, and it would be interesting to follow and measure the progress, especially before and after 2009 when the U.K. Supreme Court takes on its new form. This outreach will be a cultural change for judges who are accustomed to being represented in the public eye by the Lord Chancellor.<sup>393</sup>

With structural independence clearly set out, the judiciary will begin to adjust to this change in roles. In addition, the relationship between the judiciary and the executive will evolve during the implementation of the reforms. In the future, when a new Lord Chancellor is appointed with new responsibilities, the critical issue will be whether the reforms continue to be carried out as described in the Constitution Reform Act and the Concordat.<sup>394</sup> For example, while the Chief Justice has responsibility over the placement of judges, the number of judges necessary is decided together with the Lord Chancellor.<sup>395</sup> Given current realities and the tensions among independence, due process, and human rights on the one hand and anti-terrorism procedures on the other, discussions will only increase.

391. See *U.N. Basic Principles*, *supra* note 345, at 60 (“The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary.”).

392. Open day held in courts is one opportunity for the public to get to know the work of judges. See, e.g., Brecon Law Courts Open Day, [www.hmcservice.gov.uk/cms/5598.htm](http://www.hmcservice.gov.uk/cms/5598.htm) (last visited Sept. 10, 2006) (providing an example of such an event).

393. In addition, judges were instructed by the Kilmuir Rules in 1955, issued by the Lord Chancellor, not to speak in public because “every utterance which he makes in public, except in the court of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism.” Lord Harry Woolf, Lord Chief Justice of Eng. & Wales, Eighth RTÉ/UCD Law Faculty Lecture: Should the Media and the Judiciary be on Speaking Terms? (Oct. 22, 2003), *available at* <http://www.dca.gov.uk/judicial/speeches/cj221003.htm>. These rules were revised by a future Lord Chancellor and by a Lord Chief Justice to allow judges to use their own discretion. Simon Brown, *Judicial Independence and the Judiciary’s Relationship with the Executive* 22 (Sept. 28, 2005) (unpublished paper for the Canadian judicial exchange, on file with the author).

394. A “Concordat” is an agreement between two or more parties to perform some action. The Concordat between the Lord Chancellor and the Lord Chief Justice has constitutional effect. Glenn Dymond, *Appellate Jurisdiction of the House of Lords Paper* (updated March 2006) 19 (March 20, 2006), *available at* <http://www.parliament.uk/documents/upload/HLLAppellate.pdf>.

395. See SELECT COMMITTEE ON THE CONSTITUTIONAL REFORM BILL, REPORT, 2003–4, H.L. 125–I, at 206, 209, 219–22.

Public confidence in the judiciary may erode during this period as well as in the legislative and executive branches. Judges may enter into more political debate.<sup>396</sup> If such confidence declines, the judiciary may be perceived as becoming less rather than more of a constitutional safeguard. What is important is that the long term is considered in these discussions and how these changes will be viewed twenty years from now.

The rule of law reforms clarified constitutional arrangements in the United Kingdom and should contribute to the overall understanding of the constitution. Better visibility of a U.K. Supreme Court will help the public's understanding, build awareness by the public, and increase respect for the rule of law as a whole as well as for the judiciary specifically. This awareness will increase with an image of a new physical institution—a building that is not Westminster—and a President of the Supreme Court who is not a Lord. Perhaps public knowledge may increase even more if proceedings are televised, a decision within the President's discretion. The judges then may be publicly recognized, though court proceedings do not tend to have high television ratings. This relationship between visible and public knowledge should be even more true as the U.K. Supreme Court begins to hand down decisions on the Human Rights Act moving more and more into judicial review based on "constitutional grounds." Since the 1960s, the judiciary has been increasingly active in its review of government's decisions and abuse of discretion. It will be interesting to see whether these new functional arrangements to enhance judicial independence will further increase and expand judicial review. It will be important to see that the government responds to these judicial reviews and they are enforced.

### B. *Due Process*

*The aim is transparency, efficiency, and confidence in the judicial process, that people will be treated fairly, and that judges will be impartial.*

One of the underpinnings of the rule of law is that effective due process is in place. The judicial system relies on impartiality and

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396. See Lord Justice Brooke, *Judicial Independence — Its History in England and Wales*, in FRAGILE BASTION: JUDICIAL INDEPENDENCE IN THE 90S AND BEYOND (Helen Cunningham ed., 1997), available at [www.jc.nsw.gov.au/fb/fbbrook.htm](http://www.jc.nsw.gov.au/fb/fbbrook.htm).

integrity to ensure due process. It also requires efficient and effective handling of cases. Both affect due process and how court users view the judiciary. The long-term goal is transparency, efficiency, and confidence in the judicial process that ensures people will be treated fairly and judges will be impartial. This goal can be measured by the following indicators: an increase in the efficiency of measures that protect defendants, victims, and the vulnerable; an increase in the efficiency of cases generally that are processed through the system; and a decrease in the number of miscarriages of justice.

How the courts manage cases and protect defendants, victims, and the vulnerable has an affect on the fairness, efficiency, and perception of the judicial system. Delays “impede the public’s access to the courts, which, in effect, weakens democracy, the rule of law and the ability to enforce human rights.”<sup>397</sup> Efficiency also has an impact on the public’s confidence in the civil and criminal justice system. Therefore, one of the ways to achieve the goal is to measure efficiency of the courts.<sup>398</sup> The efficiency of the courts is also the easiest to measure and can give an indication of the functioning of the system.<sup>399</sup> In England and Wales, the time from filing a case to trial had been greatly reduced to only two months by 2002.<sup>400</sup> While efficiency is not the entire story when it comes to due process, it is certainly one factor in addition to transparency, impartiality, and quality. It is one element that will contribute to public confidence. For example, in civil and family courts, the percentage of satisfaction by users of the system is 84%, which exceeds the targeted expectations.<sup>401</sup>

In criminal justice, it is clear that both the rights of the victims and suspects need to be protected. The tension is between being

397. DAKOLIAS, *supra* note 21, at 2.

398. See Courts Act, 2003, c. 39, § 1 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2003/20030039.htm> (“The Lord Chancellor is under a duty to ensure that there is an efficient and effective system” to support the business of the courts); see generally HOME DEP’T, L. C. & ATTY GEN., JUSTICE FOR ALL, 2002, Cm. 5563 (discussing recommendations made by Sir Robin Auld in 2001 that would improve the efficient operation of the courts). Before the Courts Act of 2003, there were forty-three separate court services, creating inefficient and ineffective organizational boundaries. See *id.* at 148.

399. See DAKOLIAS, *supra* note 21, at vii (choosing efficiency as a research variable because “it can be quantitatively measured using objective data”).

400. Specifically, in 2002–2003, filing-to-trial timing was two months for a half-day trial and seven months for a three-week trial. DEPT FOR CONST. AFFAIRS, EXPORTING EXCELLENCE: A GUIDE TO LEGAL SERVICES 35 (2005).

401. The 2003–2004 target was 77%, and the satisfaction of court users in civil family courts reached 84%. THE COURT SERVICE, ANNUAL REPORT AND ACCOUNTS, 2003–4, H.C. 788, at 14. The 2002–2003 target of a 2% increase in level of satisfaction of court users from 79% to 81% was not met. In fact the level of satisfaction fell to 78%. THE COURT SERVICE, ANNUAL REPORT AND ACCOUNTS, 2002–3, H.C. 1089, at 14.

tough on crime and protecting due process. This tension would result in leaning towards protecting the rights of the defendants against those of the victims. With the threat not just of crime but also of terrorism, this balance becomes even more delicate. Greater police powers are being conferred<sup>402</sup> and the challenge is to ensure that due process continues to be not only protected but also ensured. The tactics of police come into the spotlight as well as the ability of the courts to treat suspects impartially. Both processes need to be handled within a reasonable time limit.<sup>403</sup> This is especially important for young defendants, as they are a particular vulnerable group. A second way to achieve the goal is to measure the efficiency of processing young offenders' arrests. For example, the number of days from arrest to sentence for young offenders decreased between 1999 and 2004 by an average of thirty-four days.<sup>404</sup> This increase in efficiency occurred at the same time the number of cases increased by about seven thousand.<sup>405</sup> Further efficiency is expected through new rules and procedures for managing criminal cases by the judiciary.<sup>406</sup>

A third outcome measurement that contributes to due process is the level of miscarriages of justices that occur.<sup>407</sup> Miscarriages are usually revealed by later investigation or the surfacing of new evidence. As a result of the Royal Commission on Criminal Justice—the Runciman Commission—a Criminal Case Review Commission was established to retrospectively reinvestigate claimed miscarriages

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402. Serious Organized Crime and Police Act 2005, available at <http://www.opsi.gov.uk/acts/acts2005/20050015.htm>; see also Terrorism Act 2006 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2006/20060011.htm>.

403. See Human Rights Act, *supra* note 366, at art. 6(1) ("Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

404. In Magistrate courts in 1999, the average number of days from arrest to sentence for persistent young offenders was ninety-six days, and in 2004 it was sixty-one days. See Dep't for Const. Affairs, Nat'l Statistics: Average Number of Day from Arrest to Sentence for Persistent Young Offenders in England and Wales by Type of Sentencing, <http://www.statistics.gov.uk/STATBASE/xsdataset.asp?More=Y&vlnk=3140&All=Y&B2.x=64&B2.y=11> (last visited Sept. 21, 2006). The total number of cases in 1999 was 18,851, and in 2004 there were 24,698 cases. *Id.* The Crown courts went from 212 days in 1999 to 186 days in 2004, but the cases decreased from 2,271 cases in 1999 to 1,653 cases in 2004. *Id.*

405. The number of cases between 1999 and 2004 increased by roughly 7,000. *Id.*

406. See Dept. for Const. Affairs, Criminal Procedure Rules, Consolidated Criminal Practice Direction (2005), available at [http://www.dca.gov.uk/criminal/procrules\\_fin/contents/practice\\_direction/pd\\_consolidated.htm](http://www.dca.gov.uk/criminal/procrules_fin/contents/practice_direction/pd_consolidated.htm).

407. See generally BOB WOFFINDEN, MISCARRIAGES OF JUSTICE (1987) (examining at least fifteen cases in which the author argues there was a miscarriage of justice).

of justice.<sup>408</sup> The reports from the Commission as well as its recommendations go directly to the Court of Appeal.<sup>409</sup> As a result of the Auld Report, the Crown Prosecution Service (CPS) was to have more oversight and influence over the initiation of prosecutions.<sup>410</sup> Some of the CPS staff are now located in police stations,<sup>411</sup> but the Auld Report recommendation of making prosecutors responsible for making the charges in cases is only being implemented now. While the police are now obligated to disclose evidence to the defendants (even that evidence which undermines the prosecution), intelligence evidence is not often disclosed, and this omission can add to the challenge of ensuring due process.<sup>412</sup>

The determination that miscarriage of justice has occurred undermines the reputation and image of the criminal justice system, not only for the specific parties involved but also for the public at large. This damage is not only for the system as a whole but also the individual judges and police officers who were involved. Judges are expected to ensure that the evidence is sound and that there is no prejudice in favor of the prosecution. Given that police may be given greater discretionary powers, it is even more critical that the prosecution and the judiciary provide a safeguard for due process, the rule of law, and democracy. In an effective democracy with the rule of law, abuse by police, the prosecution, or judges cannot be ignored. Special attention has to be paid to interviews and confessions, often the sources of miscarriages of justice.<sup>413</sup>

408. The Commission was appointed in 1991 and reported in 1993. The Criminal Cases Review Commission, Our History, [http://www.ccrc.gov.uk/about/about\\_28.htm](http://www.ccrc.gov.uk/about/about_28.htm) (last visited October 24, 2006).

409. See Criminal Cases Review Commission, About Us, <http://www.ccrc.gov.uk/about.htm> (last visited Sept. 21, 2006).

410. Since 1985, a separate prosecution authority (the Crown Prosecution Service) has been established independent of the police in England and Wales. See British Broadcasting Corp. [BBC], CrimeFighters: Justice, Crown Prosecution Service, <http://www.bbc.co.uk/crime/fighters/cps.shtml> (last visited Sept. 21, 2006). In Scotland there had been Procurator Fiscal. See BBC, CrimeFighters: Justice, Crown Prosecution Service, <http://www.bbc.co.uk/crime/fighters/scotscrownoffice.shtml> (last visited Sept. 21, 2006). Before then, the police decided if and when to prosecute a case. See JOHN ALDERSON, LAW AND DISORDER 61 (1984) (“[W]henever the commission of an offence comes to the notice of a police officer he has to report it; the decision to prosecute rests with legal officials.”).

411. DEP’T FOR CONST. AFFAIRS, LEGAL AID: VISION, ANALYSIS AND STRATEGY (DRAFT), 15 (2005) [hereinafter LEGAL AID].

412. The 1996 Criminal Procedure and Investigation Act required police to disclose evidence to the defense. See Criminal Procedures & Investigations Act, 1996, c. 25 (Eng.). Special procedures for counter-terrorism require full disclosure of evidence. *Id.*

413. See generally Saul M. Kassin & Gisli H. Gudjonsson, *Why Do Innocent People Confess to Crimes They Did Not Commit?*, SCI. AM. MIND, June 2005, at 24–31, available at <http://www.martytankleff.org/PDF/TrueCrimesFalseConfessions.pdf> (indicating

Miscarriages of justice and abuse of power or discretion are closely linked with respect for human rights. There were 297 cases brought under the Human Rights Act in 2000.<sup>414</sup> As a result, it is important to look at police standards of conduct, their training on human rights, as well as how police are recruited, promoted, and rewarded.<sup>415</sup> Public perception of police in England and Wales is positive, with 73% very or fairly confident in the police and only 25% not very or at all confident.<sup>416</sup> Like many other European countries, Finland's law enforcement is one of the most trusted of public institutions.<sup>417</sup> Given that the police are the first point of contact in the criminal justice system, they have a tremendous impact on public perception of the judicial and legal system as a whole. As a result, efforts to improve the criminal justice system also consider the functioning of the police and its role.

### C. Access to Justice

*The aim is that the system of dispute resolution mechanisms provides adequate access for the poor and the more vulnerable segments of society.*

The rule of law is not just about having state of the art legal rules or norms. It is also about independent legal institutions that protect individual and property rights on behalf of individuals who lack political and economic power. The private sector often has various options to enforce rights both through litigation and international commercial arbitration. The dispute resolution alternatives for the individual and especially the disadvantaged are often limited. Access to justice aims to redress this imbalance.

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that "a disturbing number of cases have involved defendants who were convicted based only on false confessions").

414. See Politics.co.uk, Debate—Issue Briefs, Human Rights, [http://www.politics.co.uk/issue-briefs/domestic-policy/civil-liberties/human-rights/human-rights-\\$366607.htm](http://www.politics.co.uk/issue-briefs/domestic-policy/civil-liberties/human-rights/human-rights-$366607.htm) (last visited Sept. 21, 2006).

415. See AFTER MACPHERSON: POLICING AFTER THE STEPHEN LAWRENCE INQUIRY 26, 136–37 (Alan Marlow & Barry Loveday eds., 2000). Her Majesty's Inspectorate of Constabulary (HMIC) has discovered that selection and promotion procedures indicated that the system rewarded officers who exhibited characteristics. See *id.* at 15–27.

416. Of those surveyed, 54% are very or fairly confident in judges; 76% are very or fairly confident in the police in England and Wales. HOME OFFICE, FINDINGS 243 - CONFIDENCE IN JUSTICE: AN INTERNATIONAL REVIEW (2004).

417. Eurobarometer 59: Public Opinion in the European Union, [http://europa.eu.int/comm/public\\_opinion/archives/eb/eb59/eb59\\_rapport\\_final\\_en.pdf](http://europa.eu.int/comm/public_opinion/archives/eb/eb59/eb59_rapport_final_en.pdf) (last visited Sept. 21, 2006).

Access is critical because legal rights available to the disadvantaged can empower them to take advantage of opportunities and provide them with security against arbitrary and inequitable treatment. For this reason an effective and independent judiciary is critical. Some of the recent reforms aim to enhance access and build on the Woolf Report and other proposals.<sup>418</sup>

The rule of law also depends on people having access to justice. This access undergirds the principle of fairness. Increasing access to justice was a goal of the reforms, a goal that has universal acceptance. Access is usually defined as the ability to take one's case to court, as well as being treated equally before the court. However, it also means having causes of actions in the first place,<sup>419</sup> as well as having alternatives to resolve disputes. One such alternative is the use of small claims courts, which has been a successful innovation making use of electronic filing of documents.<sup>420</sup> Last year there were more than 45,000 cases filed in the small claims courts; however, in 1999 there were more than 88,000 cases.<sup>421</sup> While there has been a 10% reduction in justiciable problems overall in the United Kingdom, this figure does not explain the decrease in the small claims courts, especially since jurisdiction expanded during this time.<sup>422</sup> But litigation is not the only avenue. In fact, the trend is now either to prevent disputes or to resolve them earlier.

Access also refers to overcoming physical, psychological, emotional, and language barriers.<sup>423</sup> Removing barriers means that the disabled can enter the court building, non-English speakers can understand what is being said in their own language, and children can feel safe in a courtroom environment. Eliminating these barriers is critical. It is no longer acceptable to have barriers that prevent people from legitimately using dispute resolution to enforce

418. See DEP'T FOR CONST. AFFAIRS, WHITE PAPER ON MODERNIZING JUSTICE, 1998, Cm. 4155, at 39.

419. See Domestic Violence, Crime and Victims Act, 2004, c. 28, §10 (U.K.) (making common assault an arrestable offense); see generally National Plan for Domestic Violence, <http://www.crimereduction.gov.uk/domesticviolence51.htm> (last visited Aug. 30, 2006) (discussing the increased support and protection of domestic violence victims provided by the Domestic Violence, Crime and Victims Act).

420. Her Majesty's Courts Service, Money Claim Online, <https://www.moneyclaim.gov.uk/csmco2/index.jsp> (last visited Aug. 30, 2006) (providing electronic filing information for claims for a fixed amount).

421. In 1999, there were 88,389 cases; in 2002, there were 55,719 cases; and in 2004, there were 46,100 cases. DEP'T FOR CONST. AFFAIRS, JUDICIAL STATISTICS ANNUAL REPORT 2002, 44 (2003), available at <http://www.official-documents.co.uk/document/cm65/6565/6565.pdf>.

422. PUBLIC SERVICE AGREEMENT, *supra* note 101.

423. Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform* (World Bank Publications 1996).

fundamental rights and address problems that contribute to social exclusion (welfare benefits, housing, etc.).<sup>424</sup>

Access is often more difficult for the poor and the disadvantaged, and it is up to the court system to protect minority interests and ensure a level playing field. The object is to ensure that those with equal need have equal access to resolve their disputes. Reaching this goal requires financial resources, human capital, clear understanding of where the needs are, and judicial capacity. The United Kingdom has all these elements except unlimited resources to fund all cases, but no country has these means. The universal goal of access is always balanced with available resources. The challenge in the United Kingdom has been to ensure that the neediest people with the most serious cases receive assistance. But even this goal poses difficulties. So, long-term success can be measured by a system of dispute resolution mechanisms that provides adequate access for the poor and the more vulnerable segments of society. This goal extends beyond the courts and responds to the 83% of the people who believe that the law should be more easily available to the public.<sup>425</sup> The goal can be measured by the following indicators: an increase in options for dispute resolution by those who cannot otherwise afford legal representation, an increase in advice and assistance to resolve disputes earlier, and the application of a means test which is balanced with the interests of justice.

Achieving this goal means going beyond what many associate with access to justice—legal aid. In 2004, government legal aid amounted to more than £2 billion.<sup>426</sup> While the budget has increased every year since 1999, every year there has been a budget deficit of £100 million or more,<sup>427</sup> and 1% of the cases take up more than 50% of the criminal legal aid budget.<sup>428</sup> Although quality is not sacrificed because people are poor, the legal aid budget cannot accommodate many of the poor and most vulnerable. The priority is providing legal

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424. See LEGAL AID, *supra* note 411, at 31 (indicating a desire to ensure people have access to dispute resolution regardless of financial and social circumstances).

425. DEP'T FOR CONST. AFFAIRS, CONSUMER STRATEGY PHASE ONE REPORT 53 (2004) (on file with author).

426. In 2003–2004, the criminal legal aid budget was £1.2 billion, £220 million more than in 1998–1999. DEP'T FOR CONST. AFFAIRS, A FAIRER DEAL FOR LEGAL AID 5 (2005), [hereinafter FAIRER DEAL].

427. New recommendations have been developed to address the rise in costs. Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform* (July, 13 2006), available at <http://www.legalaidprocurementreview.gov.uk/publications.htm>.

428. One percent of the Crown Court cases is 1,300 cases, which consumed 50% of the 2003–2004 budget. "The top .01% of the cases (13 cases in all) cost £48m (in cash terms), which is 7.5% of the crown court expenditure." These are fraud cases, which have increased from 174,742 in 1991 to 317,900 in 2003 and cost the economy £14 billion per year. LEGAL AID, *supra* note 411, at 18.



representation, most notably in criminal cases because representation is part of the basic principles of the right to due process and a fair and impartial trial.<sup>429</sup> The United Kingdom did not need the European Convention of Human Rights (Convention) to promote legal aid, as it has been supporting legal aid for fifty-six years already.<sup>430</sup> Currently efforts are underway to reform the way criminal legal aid is focused and managed.<sup>431</sup> These reforms will reintroduce means testing, and decisions to fund cases will be based on whether there is financial necessity as well as whether a case is in the interests of justice.<sup>432</sup> On the civil legal aid side, legal aid has a greater impact because 77% of the requests for legal aid were approved in 2001.<sup>433</sup> This percentage has increased over the years.<sup>434</sup>

A second measurement is the advice that can help people resolve disputes earlier and use the courts only as last resort. This option can be quicker and less costly, both financially as well as emotionally, and with more effective remedies. A national telephone service began in 2004 to help people resolve disputes. In its first year, the service had more than 12,000 cases, and 10,000 more are projected for this year.<sup>435</sup> The Community Legal Service Direct (CLS Direct) is also a successful innovation, and its advice is expected to reach 60,000 people.<sup>436</sup> It should be mentioned that free advice is available to every defendant at police stations.<sup>437</sup> Overall, 1.3 million people received assistance from the Consumer Direct in 2004.<sup>438</sup> Providing legal advice through call centers can be very effective, primarily by giving people information about their rights and by giving them options to resolve a problem. Given the large number of lawyers from the commonwealth countries trained in the United Kingdom, there may be opportunities for increasing this kind of advice to people. If

429. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1050, art. 9, U.N.T.S. 221 (as amended Nov. 1, 1998) (stating "if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require").

430. The first legal aid system was introduced through the 1949 Legal Aid and Advice Act. FAIRER DEAL, *supra* note 426, at 3.

431. See Criminal Defence Service Act, 2006, c. 9 (Eng.).

432. *Id.* §§ 2, 3.

433. Civil Legal Aid: Applications Received and Granted, <http://www.statistics.gov.uk/statbase/expodata/spreadsheets/D5089.xls> (last visited Sept. 21, 2006).

434. In 1997–1998, 66% of the requests were approved, and in 2000–2001, 77% were approved. *Id.*

435. This telephone service began in 2004, and in that year there were 12,424 cases. In 2004–2005, it was expected there would be 22,624 cases. PUBLIC SERVICE AGREEMENT, *supra* note 101, at 8.

436. *Id.* at 9.

437. LEGAL AID, *supra* note 411, at 26.

438. Calls received per year total 1.5 million by Consumer Direct. An average of 1,300,000 people received acts of "suitable assistance" per year. PUBLIC SERVICE AGREEMENT, *supra* note 101, at 4.

call centers in India, Canada, Australia, and New Zealand were established with lawyers accredited and trained in the United Kingdom, the cost would be cheaper, and centers would be able to assist the U.K. lawyers in meeting increasing demand. Building capacity would yield greater access, but doing so may mean that the average income coming from the legal aid budget for U.K. lawyers would be reduced (on average one third of the income for lawyers in the United Kingdom comes from legal aid).<sup>439</sup> It would also be a good example of a “practice what we preach” approach when promoting liberalized legal services in other countries.

Cost can also be addressed by examining those cases that cost the most, especially lengthy fraud cases. A review of fraud is taking place<sup>440</sup> and should address whether the costs of mounting these cases is commensurate with the benefits, presumably punishing fraud and deterring others from committing fraud. Two key issues are incentives and rational expectations. The risk of apprehension by a police officer for fraud and the risk of successful prosecution with jail time are currently very low and something to consider. “There are two optimization problems: maximizing deterrence within given resources (choosing the best mix of police, judicial processes, and penalty); and finding the level of total resources that equates the marginal benefits of deterrence with the marginal cost of investigating and prosecuting this crime.”<sup>441</sup> The wider issue is the place of fraud investigations and prosecutions within the overall resources devoted to crime. How big a priority is fraud compared with, say, crimes of violence or burglary? This depends on the relative harm to society of those crimes.

#### D. Protection of Basic Rights

*The aim is to embed human rights in public services; to develop a human rights culture in society; to consider human rights implications in the legislative process; to have a government commitment to human rights and public trust in the government’s ability to protect individual privacy and rights.*

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439. FAIRER DEAL, *supra* note 426, at 25.

440. *Id.* at 47–50.

441. Legal Vice Presidency, The World Bank, *Legal and Judicial Reform: Strategic Directions*, at 19 (2003), available at <http://www4.worldbank.org/legal/leglr/GreyBookFinal2003.pdf#search=%22%22legal%20and%20judicial%20reform%3A%20strategic%20directions%22%20world%20bank%22>.

The constitutional reforms included the Human Rights Act, which was passed by Parliament in 1998. It brought the European Convention on Human Rights into domestic legislation. The United Kingdom had participated in drafting the Universal Declaration of Human Rights and was the first member of the Council of Europe to ratify the Convention in 1951. It also brought constitutional principles into legislation, including rights for life, liberty, fair trial, private and family life, free speech, free assembly, religious expression, and freedom from degrading treatment and discrimination. The United Kingdom had these human rights protections before this legislation, but since 1966, to enforce one's rights, a case was usually brought before the European Court for Human Rights rather than before the national courts.<sup>442</sup> The right to a fair trial before an independent and impartial tribunal is also customary international law and therefore had been in effect already in the United Kingdom and could be effectively enforced in national courts.<sup>443</sup> In order to ensure consistency between common law and the Convention, it was important to domesticate the Convention.<sup>444</sup> Overall, the goals are that human rights are embedded in public services; that a human rights culture is developed in society; that human rights implications are considered in the legislative process; that there is government commitment to human rights; and that there is public trust in the government's ability to protect individual privacy and rights.

The role of the courts expanded with the passage of the Human Rights Act, enabling courts to declare legislation incompatible with the Act.<sup>445</sup> However, courts cannot strike down primary legislation or declare it unconstitutional. When the judiciary reviews a case on the basis of human rights, it also considers case law from the European Court for Human Rights.<sup>446</sup> The response to the court's declaration of incompatibility requires nothing from Parliament or the government; it does not require the government to change the legislation,<sup>447</sup> but if there is no change to the legislation, the United Kingdom would risk being in violation of its obligations under the Convention. Therefore, if the judiciary does declare legislation to be incompatible with the Human Rights Act, one measurement for achieving the goal of protection of human rights is judicial decisions that consider such case law and what actions the government takes to rectify the

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442. Human Rights Act, *supra* note 364, § 2.

443. INDEPENDENCE & ACCOUNTABILITY OF JUDGES, *supra* note 269, at 7.

444. Human Rights Act, *supra* note 364, § 3.

445. *Id.* §§ 3–5.

446. *Id.* § 2.

447. *Id.* § 4.

inconsistency.<sup>448</sup> When the House of Lords ruled against the government over the Belmarsh detainees in December 2004, the government changed the law in an attempt to address the judiciary's findings of incompatibility with the Convention.<sup>449</sup> These actions indicate government commitment that will gain public trust in government's ability to protect human rights.

A second measurement of the protection of human rights is the process of handling proposed legislation that affects human rights. The legislative process now requires that human rights must be considered as well as a statement by the responsible minister that the bill complies with human rights.<sup>450</sup> Impact assessments are carried out for all relevant proposed legislation to determine whether the legislation is consistent with the Human Rights Act. In addition, there is a Joint Committee on Human Rights established in 2001 with membership from both houses of Parliament that has chosen to review proposed legislation.<sup>451</sup> The Committee's comments and recommendations should be incorporated into draft bills. If the government chooses to propose legislation that restricts human rights, it must justify the restriction on the basis of proportionality and consistency with four critical criteria: the changes are lawful, for a legitimate purpose, necessary for a democratic society, and not discriminatory.<sup>452</sup> This test and process have become increasingly more important given the recent acts of terrorism. The current situation has raised many issues in the United Kingdom and around the world about how to uphold the rule of law without sacrificing values of democracy. The debate brings to the forefront the different responsibilities between the executive and the judiciary and the extent to which judicial deference should be given to the government. The Belmarsh case is one example of where the judiciary draws the

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448. For example, there were approximately 316 cases where ECHR was cited in domestic courts over two decades prior to the ECHR's being incorporated. FRANCESCA KLUG, PUBLIC LAW 650 (P.L. Winter ed., 2002).

449. See *A (FC) & others (FC) v. Sec'y of State for the Home Dep't* [2004] UKHL 56, available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd04126/a&oth-1.htm>.

450. Human Rights Act, *supra* note 364, § 19.

451. See Joint Committee on Human Rights Home Page, [http://www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm) (last visited on Sept. 1, 2006).

452. European Convention on Human Rights, Art. 8(2) specifically envisages circumstances in which interference with the rights contained in Article 8(1) are permitted. See also *See A (FC) & others (FC) v. Sec'y of State for the Home Dep't* [2005] UKHL 71, available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm>.

line.<sup>453</sup> Many other countries are addressing these difficult questions too.<sup>454</sup>

Another change is that the government and its public authorities must ensure that human rights are protected.<sup>455</sup> Human rights do not merely exist in the abstract; they are principles implemented across government and in services provided to the public. So, a second measurement of the achievement of the protection of human rights is that they are factored into business plan strategies and that government departments meet their targets. Each government department is developing its own strategy to implement human rights together with performance indicators and training measures.<sup>456</sup> Such measures should have a positive impact on the quality of services.<sup>457</sup> Reviewing ministerial codes and the civil service code would also be in line. One of the focal points for human rights will be the Commission for Equality and Human Rights, which will come into being in the near future.<sup>458</sup> It will report on implementation of human rights and discrimination, ensure compliance of strategies by government departments, and take active measures to raise awareness of both human rights and discrimination.

One of the central challenges for the future Commission for Equality and Human Rights is to raise awareness within the government as well as in the public at large. There is virtually no awareness by the public of the Human Rights Act and what it means.<sup>459</sup> Many people assume human rights are only about respecting one another. And on the issue of discrimination, understanding is hindered by the fact that the discrimination law is in thirty-five Acts of Parliament, fifty-two statutory instruments, and

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453. See *A (FC) & others*, at UKHL 56.

454. See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp.2d 443 (D.C. Cir. 2005) (addressing whether detainees held at Guantanamo Bay were entitled to Fifth Amendment protection).

455. Human Rights Act, *supra* note 364, § 6.

456. FRANCIS BUTLER, *IMPROVING PUBLIC SERVICES: USING A HUMAN RIGHTS APPROACH* 37–40 (2005).

457. *Id.* at 41.

458. "The Government intends to appoint the Chair and Commissioners by 2006 so that the body will be up and running in 2007. A process of phased entry is anticipated for the existing Commissions, with all of them being incorporated by 2008/09." *Changes Bring Strong Single Equality and Human Rights Body a Step Closer*, Gov't News Network, *Changes Bring Strong Single Equality and Human Rights Body a Step Closer*, Nov. 18, 2004, <http://www.gnn.gov.uk/content/detail.asp?ReleaseID=135961&NewsAreaID=1738&NavigatedFromSearch=True>; Equality Act, 2006, c. 3 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2006/20060003.htm> [hereinafter *Equality Act*].

459. DEP'T FOR CONST. AFFAIRS, *HUMAN RIGHTS CONSUMER RESEARCH* 9 (2005).

sixteen directives.<sup>460</sup> Legislation that consolidated the various discrimination laws into one law was passed in 2006.<sup>461</sup> In a time when many European countries are experiencing anti-immigrant attitudes and an aging population, this consolidation provides an opportunity for greater awareness of human rights and discrimination as well as what can be expected from the individual and the state.<sup>462</sup> A third measure of progress for protecting human rights is a functioning Commission that reports on objective measures of human rights implementation and non-discrimination. Part of these reports would include the number of human rights claims. The number of cases asserting human rights claims in employment tribunals, for example, is not monitored.

Another central issue for the Commission for Equality and Human Rights is how to mainstream human rights into government departments. Experience from overseas may be instructive. Sweden is using a two-step approach.<sup>463</sup> The first step is to develop education and training in human rights in each government department.<sup>464</sup> This approach requires establishing goals and setting indicators. The second step is to base activities on human rights and democracy.<sup>465</sup> An assessment was conducted on the state of human rights in the country.<sup>466</sup> The result was a Human Rights National Plan,<sup>467</sup> with a focus on education and raising awareness to address a lack of information both in schools and in government.<sup>468</sup> The Swedish Government is proposing that human rights should be included in university curricula.<sup>469</sup> One of the objectives is to convey both the principles of democracy and human rights at all levels of education—in government as well as the judiciary.<sup>470</sup> To conduct the assessment

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460. Janet Gaymer, *Discrimination 15* (Aug. 25, 2005) (unpublished paper, Simmons & Simmons Law Firm) (on file with author).

461. The Employment Equality (Age) Regulations, 2006, 1031 (Eng.); Equality Act, *supra* note 458. Age discrimination has also been addressed by the Employment Equality (Age) (Amendment) Regulation. Explanatory Memorandum to the Employment Equality (Age) (Amendment) Regulations, 2006, available at [http://www.opsi.gov.uk/si/em2006/uksiem\\_20062408\\_en.pdf](http://www.opsi.gov.uk/si/em2006/uksiem_20062408_en.pdf).

462. “Consistently in all Council of Europe countries, the typical perpetrators of racist crimes are young (18–26) males with low levels of education.” *Future of Democracy, supra* note 28, at 38.

463. Written Communication: A Swedish Human Rights Action Plan – Summary 2001/ 02:83, at 51 [hereinafter Action Plan].

464. *Id.*

465. *Id.*

466. See Ministry of Justice, *Human Rights in Sweden – a Baseline Study*, 2001:10 (Swed.) [hereinafter Human Rights - Sweden].

467. Action Plan, *supra* note 463, at 4.

468. *Id.* at 51–58.

469. *Id.* at 55–58.

470. An effort to compile all educational and training material on human rights is currently underway. This material will assist the independent commission at the

on human rights, 360 different stakeholders were consulted.<sup>471</sup> Now a new process has begun, and the new national action plan was presented to Parliament in March 2006.<sup>472</sup>

A fourth measure contributing to a “practice what we preach” approach is the government’s responsiveness to international reports on the United Kingdom’s performance of its obligations under international agreements. Many of the reports cite issues at the margin for improvement. Taking the recommendations under consideration and responding in a timely fashion only further advances the United Kingdom’s international standing. For example, the government responded to the Organization for Security and Cooperation in Europe (OSCE) and Office for Democratic Institutions and Human Rights (ODIHR) report on elections within four months and was met with a positive reaction.<sup>473</sup> The United Kingdom is taking the point that while its laws may not be “broke,” there may be reasons to adjust and comply with international best practice. While the government has yet to respond to the Joint Committee on Human Rights Reports from the United Nations, these reports raise very complex issues.<sup>474</sup> Given the increasing tension between preserving human rights and addressing terrorism, such international reports may provide a greater opportunity to demonstrate a commitment to human rights.<sup>475</sup>

The United Kingdom is one of several countries that has addressed human rights recently. Sweden, for example, incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms in domestic law in 1995.<sup>476</sup> Under Article 23 of the Swedish constitution, no act of law or other provision may be adopted that contravenes Sweden’s undertakings under the European Convention for the Protection of Human Rights and Fundamental

national level, which is being established to provide technical assistance to the local level. *Id.* at 63–64.

471. Interview with Lena Mirow, Ministry of Foreign Affairs, Division of Democratic Issues, Human Rights, and Non-Governmental Organizations (Aug. 10, 2005).

472. MINISTRY OF JUSTICE, A NATIONAL ACTION PLAN FOR HUMAN RIGHTS, 2006–2009, FACT SHEET, No. 06.05e (2006) (Swed.), available at <http://www.sweden.gov.se/content/1/c6/06/14/47/68dfda6b.pdf>.

473. DEP’T FOR CONST. AFFAIRS, UNITED KINGDOM GOVERNMENT RESPONSE TO THE OSCE/ODIHR ASSESSMENT MISSION REPORT ON THE UK GENERAL ELECTION 5 MAY 2005, at 3 (2005).

474. See HOUSE OF LORDS, HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, PROTOCOL NO. 14 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, FIRST REPORT, 2004–5, H.C. 106, at 17–19, available at <http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/8/8.pdf#search=%22review%20of%20human%20rights%20protocol%2014%22> (discussing economic and cultural rights).

475. See *infra* Appendix 1k.

476. Human Rights – Sweden, *supra* note 466, at 9.

Freedoms.<sup>477</sup> Sweden, too, is taking international concerns seriously and is also considering ways to disseminate findings by international committees on human rights by sharing them with NGOs and translating them into minority languages.<sup>478</sup> In addition, Canada's constitutional reform of 1982 included human rights provisions.<sup>479</sup> The courts have since developed their role as guardians of the constitution and human rights in particular. The public in Canada has come to understand that the courts were not usurping the role of the legislators, but carrying out a role that was given by parliament and by the people through a new constitution.

The U.K. courts have been given a new role through legislation, which will mean a change in culture that will affect all branches of government. The public should begin to better understand the role as the courts hand down more decisions. It is very likely that the cases submitted to the courts in the future will focus on the balance between human rights and civil and political rights. While human rights require the right to a fair trial and liberty, civil and political rights may be restricted when necessary to respect the rights of others, to protect national security, and to obtain public order.<sup>480</sup> It is on this basis that police powers are being expanded, thus creating tension between police effectiveness and accountability.<sup>481</sup> As regionalism and globalization continue, there will be greater cooperation among judiciaries and police—whether for arrest warrants or enforcement of judgments—which may lead to greater convergence of laws and interpretations among countries.<sup>482</sup> Overall, the public in the United Kingdom is very satisfied with its quality of life, and with the passage of the Human Rights Acts, it can only improve.<sup>483</sup>

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477. Regeringsformen [RF] [Constitution] 2:23 (Swed.).

478. Human Rights – Sweden, *supra* note 466, at 16.

479. See Canada Act, 1982, c. 11 sched. B. Schedule B is referred to as the Constitution Act of 1982.

480. EUR. CONSULT. ASS., THE EUROPEAN CONVENTION ON HUMAN RIGHTS, art. 5, 6 (1966); Int'l Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 21, U.N. GAOR, Supp. (No. 16), U.N. Doc. A/6316 (Dec. 16, 1966).

481. See Police Reform Act, 2002, c. 30 (Eng.); Terrorism Act, 2000, c.11 (Eng.).

482. In the Finnish and Swedish Constitutions, the clause that no citizen shall be deported, extradited, or transferred out of the country to another against his will is being revised to comply with the European Union. Regeringsformen [RF] [Constitution] 2:7 (Swed.); Constitution of Finland, c. 2, § 9.

483. In 1998, public perception of quality of life was 86%, and in 2001 it was 89%. See Eur. Comm'n, Eurobarometer: Life Satisfaction, [http://ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) (last visited Aug. 30, 2006) (access survey by selecting "UK" and the appropriate date).



## VI. CONSTITUTIONAL REFORM PROCESS

The processes by which constitutions are amended or rewritten are taking on increasing importance, not just the formal procedures used but also the degree of engagement and participation by civil society in the country. With written, codified constitutions, there are established processes that are required when a constitution is amended. As seen by the chart below, each country has its own mechanism by which to make changes to the constitution. These are written and known, and thus provide predictability to society as well as safeguards in amending a constitution. In the United Kingdom, there have been historical constitutional changes since 1997, but the process of change has not always been consistent. Constitutional changes can be made just like any other piece of legislation; there are no special processes.<sup>484</sup> However, the government in 1997 set out to use referenda for critical parts of the reform agenda.<sup>485</sup> This is consistent with the idea that changes to a constitution should be done “by some authority above and beyond the ordinary legislative bodies.”<sup>486</sup> For example, referenda were used for the consideration of devolution in Scotland and Wales and for the establishment of a mayoral system and regional assemblies, and they would have been used for the European Union Constitution had it gone forward.<sup>487</sup> But referenda were not used for reforms to the House of Lords,<sup>488</sup> the establishment of the Supreme Court,<sup>489</sup> and enactment of the Human Rights Act.<sup>490</sup> It is not clear what criteria were used to arrive at this decision. The first and only regional assembly referendum did not pass in the United Kingdom.<sup>491</sup>

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484. House of Lords, *Briefing: The Constitution Committee 1* (2005), available at <http://www.parliament.uk/documents/upload/HofLBpConstitution.pdf#search=%22how%20o%20make%20changes%20to%20United%20Kingdom%20constitution%22>.

485. See *Britain Deserves Better*, *supra* note 26.

486. DICEY, *supra* note 11, at 146–47.

487. See, e.g., LABOUR PARTY MANIFESTOS, *supra* note 325 (“As soon as possible after the election, we will enact legislation to allow the people of Scotland and Wales to vote in separate referendums on our proposals, which will be set out in white papers.”).

488. See House of Lords Bill, 1999, H.L. Bill [34] (U.K.), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmbills/034/1999034.htm>.

489. See SUPREME COURT FOR U.K., *supra* note 362, at 19.

490. See HOME DEP'T, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997, Cm. 3782, at ¶¶ 2.2–2.3.

491. *Elected Regions Hit the Buffers*, MONITOR (THE CONST. UNIT BULLETIN), Jan. 2005, at 1, available at [http://www.ucl.ac.uk/constitution-unit/files/monitor/monitor\\_29.pdf](http://www.ucl.ac.uk/constitution-unit/files/monitor/monitor_29.pdf).

| Country       | Legislative Process  | Referendum Option | Required |
|---------------|--|-------------------|----------|
| Australia     | Absolute majority in both houses, majority approval by a majority of the states                | Yes               | Yes      |
| Austria       | 2/3 majority in both houses  | Yes               | No       |
| Canada        | Majority approval in both houses, 2/3 majority of provincial legislation                       | Yes               | No       |
| Denmark       | Two successive parliaments must pass un-amended  | Yes               | Yes      |
| Finland       | 2/3 majority of parliament   | No                | No       |
| France        | Majority approval in both houses   | Yes               | Yes      |
| Hungary       | 2/3 majority of parliament   | Yes               | No       |
| Ireland       | Majority approval in both houses   | Yes               | Yes      |
| Italy         | Majority approval in both houses (twice)   | Yes               | No       |
| South Africa  | Either 3/4 or 2/3 approval of assembly, possible approval of 6 provinces needed <sup>492</sup> | No                | No       |
| Spain         | 3/5 majority in both chambers  | Yes               | No       |
| Sweden        | Majority approval by two successive terms  | No                | No       |
| Switzerland   | Majority approval of parliament, majority approval of the cantons                              | Yes               | Yes      |
| United States | 2/3 majority in both houses, 3/4 approval of state legislatures                                | Yes               | No       |

Yet, there has been an increase in the use of referenda for some constitutional reforms. Has the use of referenda become customary? Internationally they are used quite often for constitutional reform. In Europe, only Belgium, the Netherlands, and Norway's constitutions do not include the possibility of using referenda.<sup>493</sup> Even some of

492. Depending on which part of the South African constitution is to be amended, 3/4 or 2/3 majority approval is needed in the National Assembly along with the approval of at least six provinces for some sections, though no provincial approval is needed to amend other sections.

493. CONST. ARRANGEMENTS COMMITTEE, INQUIRY TO REVIEW NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS, 2005, H.R. 1.24A, app. C, at 92, available at <http://www.clerk.parliament.govt.nz/NR/rdonlyres/575B1B52-5414-495A-9BAF-C905>

those countries whose procedures permit referenda have never used them, including the United States, Japan, India, and Germany.<sup>494</sup> And others have used them sparingly. For example, Sweden's consultative referendum option has only been used six times in the last hundred years,<sup>495</sup> and Finland's only twice.<sup>496</sup> It is difficult to say whether referenda should be required in the future, as there has not been consistent use of referenda for the reform program since 1997.<sup>497</sup> It could be argued that an increased use of referenda would encourage greater public understanding of the reforms being proposed and greater participation in the process.<sup>498</sup> Referenda provide additional legitimacy to the process. However, the use of referenda may also mean that minority views are overshadowed, that spending on advertising influences the outcome, and that some of these reforms would not have been undertaken absent the referendum. The most recent constitutional referendum in Australia reached a total cost of almost \$79 million.<sup>499</sup> Unlike Australia, Ireland does not provide funding equally to both parties, and thus private funding is critical.<sup>500</sup> In a recent Irish referendum, one side privately far outspent the other, which influenced the outcome.<sup>501</sup> So, while the rules whether to hold a referendum are not legislated, how referenda are held in the United Kingdom is regulated in terms of spending, campaign material, and the types of questions that can be asked.<sup>502</sup>

Even when a great deal of effort has been invested in participation and consensus building, a referendum can fail to approve the constitutional reform. One example of this failure is the

4195AF02/15160/DBSCH\_SCR\_3229\_2302.pdf [hereinafter NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS].

494. Editorial, *The People's Voice*, ECONOMIST, Aug. 14, 1999, at 45.

495. Sveriges Riksdag [Swedish Parliament], Consultative Referendums, [http://www.riksdagen.se/templates/R\\_Page\\_\\_\\_10871.aspx](http://www.riksdagen.se/templates/R_Page___10871.aspx) (last visited Sept. 5, 2006).

496. Seppo Tiitinen, Virtual Finland, *Reform of the Constitution* (1999), <http://virtual.finland.fi/netcomm/news/showarticle.asp?intNWSAID=25782>.

497. A Royal Commission in New Zealand did recommend the use of referenda for constitutional reform. NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS, *supra* note 493, at 92.

498. However, this could be questioned after the results thus far on the E.U. constitution referenda in France and the Netherlands.

499. *See id.* at 102.

500. *Id.* at 111.

501. Deaglan de Breadun, *Yes Side Spend Far Outweighs that of No Promoters*, THE IRISH TIMES, Oct. 7, 2002, at 7. A specific Referendum Commission is established for each referenda. NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS, *supra* note 493, at 112.

502. Political Parties, Elections & Referendums Act §§ 101–29. The Electoral Commission monitors the process, and government cannot publish material during the twenty-eight days prior to the referendum. *Id.* § 125. It should be noted as well that Parliament does pass an Act to hold a referendum. *Id.* § 101.

case of the 1992 proposed constitutional reform in Canada. This disappointment occurred after consulting more than 400,000 people in 1990—a consultation process which was the most inclusive in Canadian constitutional history.<sup>503</sup> What became known as the Charlottetown Agreement was carefully negotiated with the provincial and federal governments<sup>504</sup> and called for an elected Senate, guaranteed representation for Quebec, as well as written constitutional values and principles including parliamentary democracy, rule of law, and human rights.<sup>505</sup> The early signs from the public opinion polls were positive, but in 1992, 54% of the national population rejected the constitutional reforms through referendum.<sup>506</sup> In addition, the great majority of Australia's constitutional amendments have failed to gain the necessary votes.<sup>507</sup> The most notable failure was the 1999 attempt to establish a republic by replacing the Queen with a president appointed by Parliament.<sup>508</sup> While the public supported a republic by 56%, the majority did not support an appointed president.<sup>509</sup> Ireland has been a bit more successful in constitutional amendments with referenda.<sup>510</sup> Referenda are becoming more popular in Europe. Furthermore, the Council of Europe has recommended that countries consider using them.<sup>511</sup> Finland and Sweden are studying whether any reforms are

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503. CITIZENS' FORUM ON CANADA'S FUTURE: REPORT OF THE PEOPLE AND GOVERNMENT OF CANADA 29 (1990).

504. NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS, *supra* note 493, at 95–96.

505. GOV'T OF CANADA, PRIVY COUNCIL OFFICE, CONSENSUS REPORT ON THE CONSTITUTION (1992), [http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile&doc=charlottetwn\\_e.htm](http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile&doc=charlottetwn_e.htm) [hereinafter REPORT ON CONSTITUTION].

506. NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS, *supra* note 493, at 96. Some argue that Quebec voted no because it wanted more autonomy, and that other provinces voted no because Quebec received too much. *Id.* at 97. Others argue that the necessity to vote yes or no concerning the whole set of reforms was the deciding factor. *Id.*

507. Only eight out of the forty-four proposals have succeeded from 1906–1999. Australian Electoral Commission, Referendum Dates and Results: 1906 – Present, [http://www.aec.gov.au/\\_content/when/referendums/dates.htm](http://www.aec.gov.au/_content/when/referendums/dates.htm) (last visited Sep. 5, 2006).

508. *Id.*; see also Parliament of Australia, Bills Digest No. 207, Constitution Alteration (Establishment of Republic) Bill 1999, <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd207.html>.

509. Dennis Shanahan, *Poll Doom for Spirit of Change*, THE AUSTRALIAN, Nov. 2, 1999, at 6. Matthew Horan, *Doubt over republic*, SUNDAY TASMANIAN (Austl.), Oct. 31, 1999. See NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS, *supra* note 493, at 101.

510. Twenty-two referendums were successful of a total of twenty-seven referendums held on amendments to the constitution. See ElectionsIreland.Org, <http://www.electionsireland.org/results/referendum/index.cfm> (last visited Oct. 24, 2006).

511. Council of Europe, *Recommendation of the Committee of Ministers to Member States on Referendums and Popular Initiatives at Local Level*,

needed to the institution of the referendum to enhance opportunities for the population to influence decisions.<sup>512</sup> This consideration supports the argument that reform should not be an elite exercise carried out by a small number of experts. This focus on the many and not just the few was the hallmark of the success when countries such as Kenya gained independence in 1963.<sup>513</sup>

It could also be argued that the U.K. political party manifestos<sup>514</sup> in general elections provide an appropriate opportunity for the public to express its opinion. The Labour Party's manifesto in 1997 set out to devolve powers, modernize election law, reform the House of Lords, incorporate the ECHR into domestic law, increase the openness of government, and provide for a more effective local government system beginning with the election of city mayors.<sup>515</sup> This process then would give legitimacy to the government to carry forward the reform agenda if elected. Regardless of the manifesto, it is also customary to have white papers outlining the goals and objectives of the reform agenda for each specific area. For example, this was done for the House of Lords, devolution,<sup>516</sup> and FOI.<sup>517</sup> But there was no white paper for the constitutional reforms in the United Kingdom as a whole. Some have argued that this has resulted in a fragmented and ad hoc approach to reform.

Now that many changes have occurred since 1997 that will have a long-term impact on democracy, the rule of law, and good

Recommendation No. R (96), at 19–20 (1996), available at <https://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=538036&SecMode=1&Admin=0&Usage=4&InstranetImage=43067> [hereinafter *Recommendation on Referendums and Popular Initiatives*].

512. See OFFICE OF THE COMMISSION FOR HUMAN RIGHTS, FOLLOW-UP REPORT ON FINLAND 2001–2005: ASSESSMENT OF THE PROGRESS MADE IN IMPLEMENTING THE RECOMMENDATIONS OF THE COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS 17 (2006), available at [http://www.pakolaisneuvonta.fi/files/Follow-up\\_report\\_Finland\\_OCHR.pdf#search=%22follow%20up%20report%20constitution%20of%20finland%22](http://www.pakolaisneuvonta.fi/files/Follow-up_report_Finland_OCHR.pdf#search=%22follow%20up%20report%20constitution%20of%20finland%22) (“If it is considered necessary to strengthen the existing, voluntary and consultative referendum system, the solution will presumably be to change the system towards a decision-making referendum.”) [hereinafter FOLLOW-UP REPORT ON FINLAND]; Grundlagsutredningen, Terms of Reference: A Concerted Review of the Instrument of Government (2004), available at [http://www.grundlagsutredningen.se/templates/pages/StandardPage\\_258.aspx](http://www.grundlagsutredningen.se/templates/pages/StandardPage_258.aspx) (“Within the context of representative democracy, there is the possibility of holding consultative referendums on specific issues”) [hereinafter Terms of Reference].

513. A small group of experts negotiated at Lancaster House in London to define Kenya's new constitution. See Chanan Singh, *The Republican Constitution of Kenya: Historical Background and Analysis*, 14 INT'L & COMP L.Q. 878, 893–98 (1965).

514. This is also known as the “party platform” or “reform agenda” if elected.

515. Britain Deserves Better, *supra* note 26.

516. DEP'T FOR CONST. AFFAIRS, THE HOUSE OF LORDS: COMPLETING THE REFORM, 2001, Cm. 5291.

517. C. OF THE DUCHY OF LANCASTER, YOUR RIGHT TO KNOW, THE GOVERNMENT'S PROPOSALS FOR A FREEDOM OF INFORMATION ACT, 1997, Cm. 3818.

governance, it may be time to have the difficult discussion on the constitution as a whole. This discussion should involve more than constitutional experts; civil society stakeholders who may be still “mystified” by what is called the constitution should be involved. This next step would mean a long-term commitment to engage civil society including minorities (BMEs), the disabled, and those who were not born in the United Kingdom as to what the constitution means to them. If it becomes clear that there is a lack of understanding, the government may wish to consider greater emphasis on education and active engagement between government and society on constitutional issues. This emphasis could include beginning preparations for the celebration of the anniversary of the Magna Carta, which will be in 2015. A discussion of the 800 year history of the Magna Carta could be an excellent opportunity to improve society’s understanding of the document and how the constitution has evolved until today. A second option is to consider writing down shared constitutional values and principles as was proposed in Canada in 1992.<sup>518</sup> A third option is to entertain the idea of a written constitution. This may have some support since nearly 80% of those polled in 1995 and 2004 agreed that a written constitution was needed.<sup>519</sup> Making the constitution more understandable was also an objective of the Finnish constitution reform process.

In addition, while in other countries constitutional judicial review also may be a mechanism to adapt the constitution to changing circumstances, the United Kingdom’s situation is different. Courts in the United Kingdom do not have the ability to strike down legislation as unconstitutional.<sup>520</sup> The U.S. courts as well as the Austrian, Czech, German, French, and Hungarian Constitutional Courts do have this authority.<sup>521</sup> Austria and Czechoslovakia established constitutional courts in 1920, and other countries followed after World War II.<sup>522</sup> Sweden is currently considering whether a constitutional court is necessary.<sup>523</sup> However, with the enactment of the Human Rights Act, U.K. courts can determine that legislation is incompatible with the Act. This determination will most

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518. See REPORT ON CONSTITUTION, *supra* note 505, for a discussion of the “Canada Clause.”

519. See PATRICK DUNLEAVY ET AL., VOICES OF THE PEOPLE 74 (2005). Britain needs a written constitution, providing clear legal rules within which government ministers and civil servants are forced to operate. In 1995, 79% of those polled agreed, and in 2000 71% agreed to the question posed. *See id.*

520. *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645, 723 (P.C.).

521. *See, e.g.*, 1958 CONST. 61 (Fr.); Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No.1/1930, art. 89 (Austria).

522. Jyranki, *supra* note 245, at 7.

523. Terms of Reference, *supra* note 512.

likely result in an increased role for the judiciary in the future to ensure consistency of legislation and provide greater accountability of government in its respect of international obligations as well as the U.K.'s constitution. It will also mean that U.K. jurisprudence will be further developed in this area. With the incorporation of the ECHR into domestic law, the U.K. Parliament has accepted that the courts (both domestic and the ECHR) determine constitutional compatibility. It can be argued that Parliament and the judiciary could be sharing the interpretation role of the constitution. It will be interesting to see whether judicial review accelerates even further over time. For example, the Australian judiciary determined that law related to the Communist Party was contrary to the rule of law.<sup>524</sup> Given that the rule of law is for the first time inserted into an important piece of constitutional legislation in the United Kingdom, it may be that the judiciary will consider similar determinations, which would involve further scrutiny of executive and parliamentary decisions. If this change in role occurs, it may also enhance the effectiveness of the checks and balances in democratic governance. It would definitely require a change in culture by the judges who have not had this role and would require a change on the part of Ministers and Members of Parliament who are not accustomed to be second-guessed by the judiciary on constitutional grounds. After the Constitution Act of 1982, this change in culture has taken several years to take hold in Canada. In Europe, Norway and Greece were the first countries where the judiciary held a law unconstitutional, as was done earlier in the United States.<sup>525</sup> If such a cultural change occurs in the United Kingdom, it may result in the development of a standard that cannot even be breached by parliament.

Part of successful constitutional reform is the degree of participation by the population. The constitution is what underpins the relationship of the citizen with the state and thus requires behavior and understanding by the citizen for a constitution to function. Obviously, written legislation alone is less important than how society uses the legislation and how the legislation affects the culture of relationships. In fact, public participation in constitutional reform has formally been supported by the U.N. Committee on Human Rights (UNHCR) as a right and best practice.<sup>526</sup> The OECD

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524. NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS, *supra* note 493, at 87.

525. Jyranki, *supra* note 245, at 10.

526. See Human Rights Committee, *Marshall v. Canada, Communication No. 205/1986*, U.N. Doc CCPR/C/43/D/205/1986 at 40, ¶ 6 (Nov. 4, 1991) (acknowledging "the right of every citizen to take part in the conduct of public affairs without discrimination and without unreasonable restrictions"); see also VIVIEN HART, U.S.

states that there should be “broad-based inclusive dialogue” and that “no group should be marginalized” in post conflict constitutional processes.<sup>527</sup> The Council of Europe has recognized that citizens should participate in making long-term decisions.<sup>528</sup> This can take the form of formal committees or informal mechanisms to seek input. The United Kingdom's practice of public consultation on proposed legislation and policy, including constitutional reform, is one example and is consistent with best practice. The DCA distributed several consultation papers related to the Lord Chancellor, appointment of judges, the Supreme Court, and the Queen's Counsel.<sup>529</sup> Another example is the use of inquiries or independent commissions that were used to reform the electoral system and funding for political parties and resulted in the Political Parties, Elections and Referendums Act 2000. The Wakeham Commission Report on House of Lords Reform, however, has not resulted in a change in the Second Chamber or its composition.<sup>530</sup> These efforts may help to promote the argument in the United Kingdom that policies should be supported by society rather a specific political party. While it has used consultation papers more often, the United Kingdom has only had a Royal Commission on the Constitution once, in 1969, to consider possible changes to its governance system.<sup>531</sup> In most cases, like New Zealand, there have not been formal constitutional assemblies or commissions for these reforms as have been used in countries such as Australia, Indonesia, the Philippines, Ethiopia, Kenya, and Brazil.<sup>532</sup>

Clearly, there are lessons learned from various countries concerning constitutional processes. One of the key lessons is that process is as important as substance. Process is critical for legitimacy and public support and may provide a higher probability of

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INSTITUTE OF PEACE, DEMOCRATIC CONSTITUTION MAKING, SPECIAL REPORT 107, at 5–6 (2003), available at <http://www.usip.org/pubs/specialreports/sr107.pdf>.

527. OECD, TIPSHEET ON CONSTITUTIONAL ISSUES 2 (2005).

528. *Recommendation on Referendums and Popular Initiatives*, *supra* note 511, at 19–20.

529. For a listing of Consultation Papers, see Dep't for Const. Affairs, Consultation Papers and Responses, <http://www.dca.gov.uk/constitution/reform/pubs.htm> (last visited Sept. 6, 2006).

530. See HOME DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE VOTING SYSTEM, 1998, Cm. 4090; COMMITTEE ON STANDARDS IN PUBLIC LIFE, THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM, FIFTH REPORT, 1998, Cm. 4057, available at [http://www.public-standards.gov.uk/publications/reports/5th\\_report/index.asp](http://www.public-standards.gov.uk/publications/reports/5th_report/index.asp); Robert Hazell et al., *The Constitution: Consolidation and Cautious Advance*, 56 PARLIAMENTARY AFF. 157 (2003).

531. See ROYAL COMM'N ON THE CONST., REPORT 1969–1973, VOLUME I - REPORT, 2003, Cm. 5460; ROYAL COMM'N ON THE CONST., REPORT 1969–1973, VOLUME II - MEMORANDUM OF DISSENT BY LORD CROWTHER-HUNT & PROFESSOR A. T. PEACOCK, 2003, Cm. 5460-I.

532. See NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS, *supra* note 493, at 82-120.



acceptance and ultimately success. The emphasis now is on a process that promotes sustainability.<sup>533</sup> The most recent example of the constitutional reform processes in South Africa is considered best practice.<sup>534</sup> South Africa's process lasted seven years and ended with a new constitution in 1996 that had input from two million submissions.<sup>535</sup> Even with the benefit of hindsight, it is not clear whether a comprehensive constitutional reform program in the United Kingdom would have been any more successful than the approach taken by the government. International experience may suggest that a large constitutional reform program may have been too challenging.<sup>536</sup>

This conclusion was drawn by Finland in 1974 when considering the idea of a new constitution: a "process of piecemeal reform" was instead adopted.<sup>537</sup> The Finnish constitution was made up of four laws<sup>538</sup> and numerous amendments. In 1994, Parliament's Constitutional Law Committee recommended a redrafting of the constitution, and in 1995 a working group of experts was established to consider the idea.<sup>539</sup> It was agreed that the constitution needed updating and consolidating to be consistent and clear, but that the underlying principles did not need to be changed.<sup>540</sup> One objective was to strengthen the status of Parliament to counter-balance the status of the president.<sup>541</sup> A Parliamentary Committee was established in 1996 to draft the proposal, the Constitutional Law Committee endorsed it, and the new constitution came into force March 2000.<sup>542</sup> Twenty-five years passed from the time Finland first considered a comprehensive reform to the ratification of the new constitution. In Switzerland, calls for total revision of the

533. HART, *supra* note 526, at 3.

534. See NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS, *supra* note 493, at 159–60.

535. HART, *supra* note 526, at 7, 8. Much of the reform process took place under President Mandela between 1994 and 1996. *Id.* at 8. Seventy-three percent of the population received information on the process through newspapers, television, radio, websites, cartoons, etc. *Id.*

536. NEW ZEALAND'S EXISTING CONSTITUTIONAL ARRANGEMENTS, *supra* note 493, at 118.

537. Tiitinen, *supra* note 496.

538. These were the Constitution Act of Finland (1919), the Parliament Act (1928), the Act on the Right of Parliament to Inspect the Lawfulness of the Official Acts of the Members of the Council of State, the Chancellor of Justice and the Parliamentary Ombudsman—generally referred to under its shorter title of Ministerial Responsibility Act (1922), and the Act on the High Court of Impeachment (1922). See *id.*

539. *Id.*

540. *Id.* at 9, 11.

541. *Id.* at 15.

542. *Id.* at 12–13; Suomen Perustuslaki [Constitution], Jun 11, 1999, ch. 13 (Fin.) (stating that the constitution will enter into force on March 1, 2000).

constitution began in the 1960s,<sup>543</sup> while Switzerland's new Federal Constitution was not adopted until 1999, thus constituting a reform process of nearly forty years.<sup>544</sup> Constitutional reform proves to be a long-term process.

After fifteen years, Hungary is still in the reform process without a new constitution.<sup>545</sup> Hungary went through a dramatic transformation into a democratic state in 1989, the first from a former communist country. Several draft constitutions were prepared since that time, but none were enacted. Constitutional amendments to the 1949 constitution were passed instead.<sup>546</sup> In 1989, Hungary's Parliament approved key principles, including separation of powers, judicial independence, free elections, and free association—principles that would form the basis of the new draft constitution. But in response to the draft prepared, civil society groups wanted a more equal partnership with the government. The draft was published widely for public consideration and debate,<sup>547</sup> but failed in the referendum where only 14% of the citizens participated.<sup>548</sup> An amendment only requires two-thirds majority of parliament rather than the referendum required for a new constitution.<sup>549</sup> In 1995, the Committee on Constitutional Affairs prepared a new draft in which all political parties were represented.<sup>550</sup> This was a two-stage process that included government agreeing on the concept in 1995 with wide input and then drafting the concept of the new constitution in 1998.<sup>551</sup> This lengthy process meant that the Hungarian government did not have sufficient time to submit the draft before the expiration of the parliamentary period. The new political environment was not favorable to such reforms.<sup>552</sup> Currently there is work underway to

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543. Swiss Federal Archives, *The Federal State Since 1848: The State, the People, and the Authorities*, <http://virtor.bar.admin.ch/en/bun/sta.aspx> (last visited Sep. 6, 2006).

544. *Id.*

545. ANDREA MEZEI, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *THE ROLE OF CONSTITUTION-BUILDING PRACTICES IN DEMOCRATIZATION, CASE STUDY HUNGARY 2* (2005).

546. Twenty such amendments have been passed since 1989 with a two-third majority vote in Parliament. *Id.*

547. There were more than 1,000 contributors to the draft constitution. However, opinion polls showed that 40% of adult citizens were not aware of the process undertaken. *Id.* at 19, 24.

548. *Id.* at 25.

549. Alkotmány [Constitution], 1949, art. 24 (Hung.), available at <http://net.jogtar.hu/jr/gen/getdoc.cgi?docid=94900020.tv&dbnum=62>.

550. Istvan Somogyvari, *Report on Constitutionalization in Hungary, 1994–1998*, in *DEMOCRATIZATION AND EUROPEANIZATION IN HUNGARY: THE SECOND PARLIAMENT 94–95* (Attila Agh & Sandor Kurtan eds., 2001).

551. *Id.* at 96, 100. They received about 1,000 comments to the concept.

552. MEZEI, *supra* note 545.

consider a new draft constitution.<sup>553</sup> For Hungary, the need to have a new start, including a new constitution, was critical, although the new start is more symbolic than a dire need for constitutional change.

Sweden is also in the middle of a long-term process of reform.<sup>554</sup> It has recently established a parliamentary committee with representatives from all parties to review the needs and propose reforms by the end of 2008.<sup>555</sup> Even though it too has four basic laws<sup>556</sup> and no single document, the Committee may only propose revisions to one—the Instrument of Government—and it may not propose either a consolidated, single constitution or a change from a monarchy to republic.<sup>557</sup> With an 1809 constitution, the process of reform first began in 1954, but in 1963 there was no agreement on the reforms to warrant a revised Instrument of Government.<sup>558</sup> Several reforms were introduced in the 1970s and 1990s, including the historic separation of church and state in 1998.<sup>559</sup> The current objective is to “strengthen and deepen Swedish Democracy.”<sup>560</sup> There is also a desire to have a constitution that reflects the time and to increase voter turnout. Overall, there is interest in engaging the public on constitutional issues and increase awareness.

Consequently, it could be argued that in the United Kingdom, a white paper on constitutional reform may have provided a cohesive program.<sup>561</sup> On the other hand, it also may have resulted in a twenty-year discussion of what is the constitution. The difficult balance is always between process and achieving results. Regardless, one recommendation could be that the process in the future could be more predictable to allow the population to have greater understanding of it. Perhaps greater clarity as to when referenda will be used would also help. The establishment of Constitutional Committees in the House of Commons<sup>562</sup> (2003) and House of Lords (2001) as well as the DCA (2003) provides a clear indication that importance is being given to the constitution. In the DCA, this means that a group of professionals will gain expertise to follow the reforms

553. See Somogyvari, *supra* note 550, at 106–07.

554. Terms of Reference, *supra* note 512.

555. *Id.*

556. These four basic laws are: (1) the Instrument of Government, (2) the Act of Success, (3) the Freedom of the Press Act, and (4) the Fundamental Law on Freedom of Expression. See THE CONSTITUTION OF SWEDEN – THE FUNDAMENTAL LAWS AND THE RIKSDAG ACT 9 (Ray Bradfield, trans., 2003) [hereinafter CONSTITUTION OF SWEDEN].

557. Terms of Reference, *supra* note 512.

558. *Id.*

559. See CONSTITUTION OF SWEDEN, *supra* note 556, at 47.

560. Terms of Reference, *supra* note 512.

561. A white paper could have set out vision for the constitutional reform as well as the process.

562. This Committee was established to mirror and reflect the changes from the Lord Chancellor's Department to the Department for Constitutional Affairs.

and their implementation and provide institutional memory on how decisions were made to follow which processes. It also means that the population has a specific point of contact in Parliament and government on constitutional issues and that there is a government department responsible for constitutional outreach. One critical area is evaluating the reform process; this Article is just a start. While it is clear that the effects will be seen over time and in the long run, it is necessary to show what has been achieved thus far and measure impact. In Finland for example, an evaluation was conducted of the reform in relation to its objectives.<sup>563</sup> The evaluation concluded that it had met its objectives.<sup>564</sup> In fact, the reform has meant greater interest by the Finnish population and greater attention given to the constitution. This monitoring is important to the evaluation process and is one of the ways to ensure that reforms are moving in the desired direction.

## VII. CONCLUSION

After reviewing some key constitutional reforms, expected outcomes, and possible ways to measure progress, the obvious questions are “are we there yet?” and “what is the state of democracy today as a result of the constitutional reforms since 1997?”

To answer the first question, the framework of outcomes set forth in this Article allows an assessment of progress to ensure that the reforms are moving in the direction of the constitutional principles. While progress in meeting the outcomes should be further evident in the next three to five years, early signs indicate that progress is being made. There is greater structural judicial independence and opportunities for diversity in the judiciary as well as in national, regional, and local bodies and legislatures. There is a process in place to build a culture of openness in government and greater attention to efficiency and effectiveness in the courts and in how elections are carried out. There is an increase in dispute resolution mechanisms as well as increased attention to creating a human rights culture in society and enhanced civic engagement. But this progress does not mean that the work is done and constitutional principles have been attained. Continuous and pragmatic review is still required. For example, while there was some initial reform of the House of Lords, the need for future reforms continues to be the

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563. The main objectives were codification of the constitutional laws, modernization, and revision of the separation of powers. JAAKKO NOUSIAINEN, *THE FINNISH SYSTEM OF GOVERNMENT: FROM A MIXED CONSTITUTION TO PARLIAMENTARISM* 22 (2000).

564. FOLLOW-UP REPORT ON FINLAND, *supra* note 512, at 14.

subject of debate. What may have served democracy a century ago may not serve it today given current circumstances.

This Article establishes a baseline and proposes the kind of data that can give a basic picture of outcomes. The data supports that there is progress, and as with all reforms, time is needed to demonstrate outcomes and simultaneously review implementation. Public opinion regarding devolution indicates mixed results, even though research shows that bringing government closer to people is generally positive. Early results from devolution have been very positive for the percentage of women representatives in the Scottish Parliament and Welsh Assembly. While time is necessary to allow devolution to be fully implemented, greater attention is needed on the public's understanding of the new system of responsibilities. Too often any kind of reform is judged on the basis of the law or the regulation and not on implementation. But regardless of what is on paper, much of the experience depends on how well the reform is implemented. Generally, not enough attention is spent on sharing experiences of how the institutions work or how a government is carrying out reform. A good starting point for changing that is an examination of the successes, challenges, and hurdles surrounding the implementation. Such exchanges can take place with networks of professionals, NGOs, government policy teams, as well as other countries.

Measuring results is a key challenge during any reform implementation, and the more opportunity there is for cross-country comparison and learning, the greater the opportunity for understanding what success means for the United Kingdom in this area. So much that has been based on custom and tradition may not be obvious as a subject of reform until compared with other countries.

That is not to say there must be convergence. For example, postal voting succeeds in the United Kingdom without the degree of fraud that would result in many countries around the world. Granted, this success stems in part from a culture that does not promote corrupt behavior. Yet, behavior cannot always be relied upon, and even the appearance of conflict should be considered. For example, the fact that part-time judges are also practicing lawyers means that there is the possibility of the same person using an argument as an advocate in one case that he or she may also be called upon to decide as a judge in another case. While this system has allowed many in the legal profession to contribute to the rule of law as both advocate and judge, there may be a point when such a system no longer advances the principle of judicial independence. A similar argument

can be made for members of parliament who are also practicing lawyers.<sup>565</sup>

As for the second question and the state of democracy today as a result of the constitutional reforms since 1997, democracy continues to evolve, taking into account new national circumstances as well as international experiences and standards. The constitutional reforms undertaken since 1997 have been historic. Together they make up one of the largest reform programs of any government in the last century. Examined as a whole, they have positively contributed thus far to democracy, the rule of law, and good governance in the United Kingdom. The reforms have and will continue to impact the state of democracy, not just in the United Kingdom, not just in Europe and the West, but also in emerging democracies around the world and in places ripe for change for years to come. These reforms can also serve as a model for those countries where democracy has a solid foundation, offering a twenty-first century challenge to reexamine what works in democratic government and what does not, and to re-tool and re-cast as needed in light of the findings. So in a larger sense, the United Kingdom has a unique opportunity to adapt timeless principles cast and sealed by its own centuries-old Magna Carta and assist and inform the future for generations to come.

This historic effort goes forward with a full appreciation of the challenges that still exist. There is the challenge of terrorism; challenges posed from public demand for greater accountability of government, more effective checks and balances, and greater public consultation and voice; and challenges presented from a decrease in voter turnout and declining trust in governments. While terrorism poses serious challenges for the rule of law, it is a reality that this long-established democracy has encountered before. How terrorism affects the state of democracy in the future is yet to be seen. Part of the balancing effect is the constant assessment of progress in promoting the United Kingdom's constitutional principles. Such assessment allows a realignment to take place when necessary. A balancing of independence and accountability; a right to life, liberty, and free speech versus a right to due process; and a right to information versus the protection of individual and national data requires constant attention and scrutiny. Public demand for accountability is healthy for good governance—without it there would be no future opportunities for constitutional reforms. Given that

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565. Only about 5% are barristers. There was also a time when English judges were at the same time Members of Parliament. Robert Walker, *Sentence First, Verdict Afterwards—Constitutional Change in the United Kingdom Justice System*, 7 THE JUD. REV., J. OF THE JUD. COMM'N OF NEW S. WALES 133, 148 (2005).

democracy is in a constant state of change, public demand ensures that change will continue to occur in the future.

Part of the public demand comes from assessments done by civil society itself. As discussed, governments review the state of their reforms and democracy, but so does civil society. Governments look at the principles to be promoted, the outcomes that would contribute to such principles, and relevant data to measure progress. Civil society assesses its understanding of the reforms and how responsive they are to its demands. A Democratic Audit of the United Kingdom conducted by an NGO concluded in 2005 that “the condition of democracy in Britain improved a great deal between 1997 and 2001, but that it has now substantially regressed” due in part to a decrease in confidence in the representative process.<sup>566</sup> The decline in trust is consistent with a “downward trend of trust” of parliaments generally in Europe.<sup>567</sup> It may be that this conclusion depends in part on public expectations of what the reforms were meant to achieve and what further reforms were expected. It is not uncommon for major reforms like these in the United Kingdom to raise expectations for immediate results. However, these major constitutional reforms will demonstrate results over the intermediate and long term. Reforms related to human rights and devolution require in large part cultural change. Such cultural change can take time. Change management processes usually result in dips after an initial period of high expectations. The Democratic Audit’s bull’s eye report shows this dip because the methodology is based primarily on subjective expectations.<sup>568</sup> Regardless, such assessments initiated by civil society are a critical part of democracy.

Constitutional reforms like these undertaken in the United Kingdom create instability even for well-established democracies. When coupled with the threats of international terrorism, the reforms become increasingly vulnerable to not achieving success and possibly being reversed. Such an environment also makes assessing progress difficult. Part of addressing this instability and ensuring progress in the direction of strengthening democracy is communication with the public. To that end, one of the overall desired outcomes from the constitutional reforms is greater public understanding of the constitutional principles that support democracy. While there are opinion polls regarding public satisfaction with the way democracy works in the United Kingdom, there are no surveys concerning the public’s understanding of the constitution and its principles. It is difficult to assess democracy (or anything else) if one does not clearly

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566. *Democratic Findings No. 7, supra* note 40, at 1.

567. *Future of Democracy, supra* note 28, at 26.

568. *Democratic Findings No. 7, supra* note 40 at 3.

understand what the system is and how it is supposed to function. Even among those born and raised in the United Kingdom, there is confusion about whether there is a constitution. The question then becomes how does society adapt when the demographics of the United Kingdom change? One in twelve of the total current population of the United Kingdom was born overseas.<sup>569</sup> How do people who were not born in the United Kingdom understand what the constitution expects of them? Beginning in November 2005, new citizens will be required to take a citizenship test that is based on life in the United Kingdom.<sup>570</sup>

Communication and education are very common at the initiation of the reform process but not common after the constitutional reforms take place.<sup>571</sup> One positive example is from Finland: with the adoption of the new constitution, every household received a booklet of the constitution; however, it is said that most people relied on the media rather than on the distributed material.<sup>572</sup> In the United Kingdom, more emphasis is being placed on civic education in schools and for adults. A pocket guide to the constitution has been prepared, and this should be a positive contribution to the public's understanding.<sup>573</sup> Baseline information on the public's understanding today would be ideal to inform what educational steps need to be taken going forward. This information would allow monitoring of progress to take place over time. A common understanding of the constitutional principles will provide necessary knowledge and skills that may assist the public to contribute more effectively to good governance, the rule of law, and democracy. With increased skills and knowledge, citizens can be better equipped to participate in democracy and in consultation processes by articulating their desires and concerns. They can also demand and make use of their right to information to promote better government and adherence to the rule of law. Overall, citizens are then well equipped to vote, stand for elected office, and influence decision-making. Both the citizen as well as the government must take responsibility to balance effective consultation so that policies and reforms reflect the

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569. Of the United Kingdom's population, 8.3% was born overseas. This is almost double the proportion since 1951. Office of Nat'l Statistics, People & Migration – Archived in December 2005, <http://www.statistics.gov.uk/cci/nugget.asp?id=767> (last visited Sep. 6, 2006).

570. Press Release, Home Office, Immigration and Nationality Directorate, Removal of Failed Asylum Seekers Reach Record High, n.6 (May 23, 2006), available at <http://www.ind.homeoffice.gov.uk/aboutus/newsarchive/removalsatrecordhigh1>.

571. Ghai, *supra* note 18, at 6.

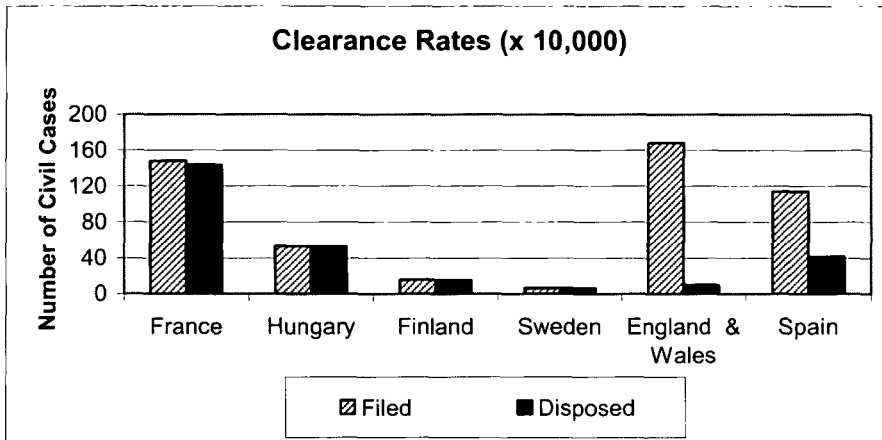
572. Ministry of Justice, *In Finland Sovereign Power Rests with the People* (2003), available at <http://www.om.fi/18854.htm>.

573. THE CITIZENSHIP FOUNDATION, *INSIDE BRITAIN: A GUIDE TO THE UK CONSTITUTION* (2006).



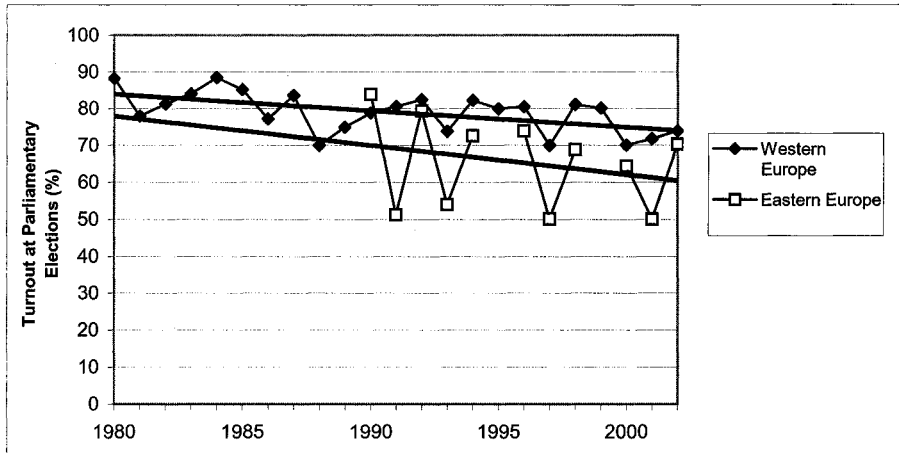
public's views, while at the same time moving the reform agenda forward. It is this partnership that will ensure a stronger democracy for the future. The government has a responsibility to explain its constitutional reforms to its citizens and discuss them against democratic principles and the rule of law. If approached in this way, the public will be more likely to support the many positive changes and the new institutions established since 1997.

### Appendix 1a: Clearance Rates as a Measure of Judicial Efficiency



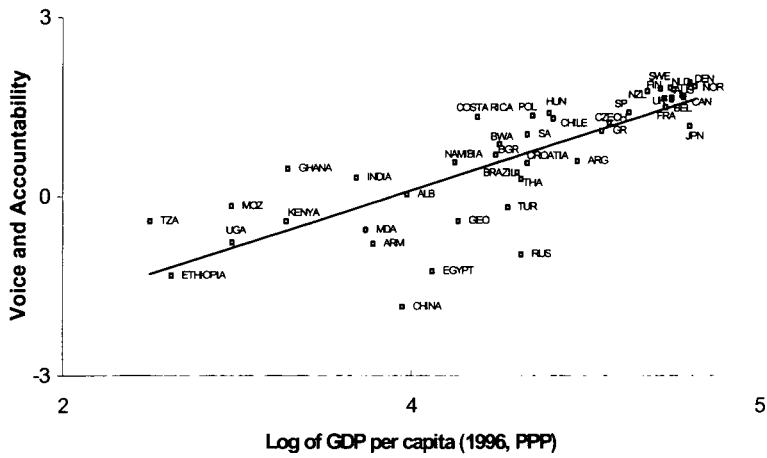
Source: The European Commission for the Efficiency of Justice (CEPEJ), under the Council of Europe, has published a pilot study compiling judicial statistics for forty Council of Europe members for 2002. See [http://www.coe.int/t/dg1/legalcooperation/cepej/default\\_EN.asp](http://www.coe.int/t/dg1/legalcooperation/cepej/default_EN.asp). The data for the United Kingdom are from the Department for Constitutional Affairs.

**Appendix 1b: Decreases in Voter Turnout: 1980-2000**



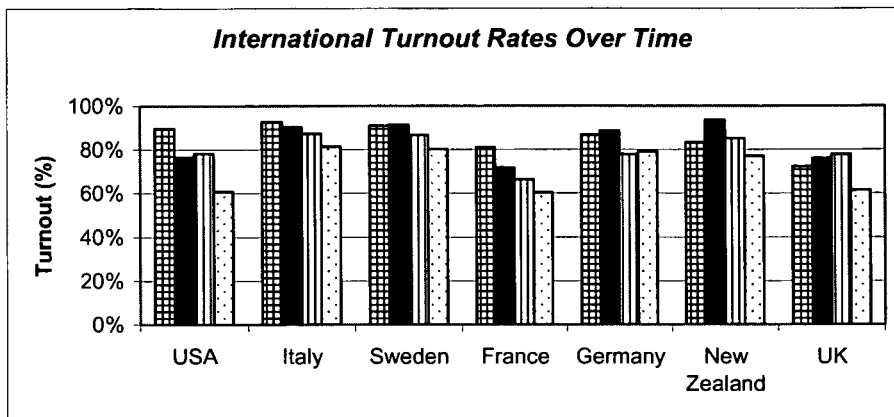
Source: Future of Democracy, supra note 28, at 27.

**Appendix 1c: Voice and Accountability**

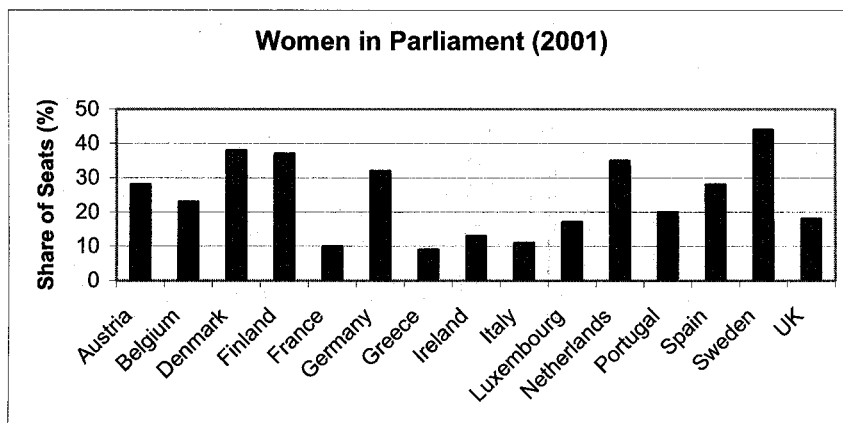


Source: <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/EXTWBIGOVANTCOR/0..contentMDK:20771165~menuPK:1866365~pagePK:64168445~piPK:64168309~theSitePK:1740530.00.html>.

### Appendix 1d: International Turnover Rates

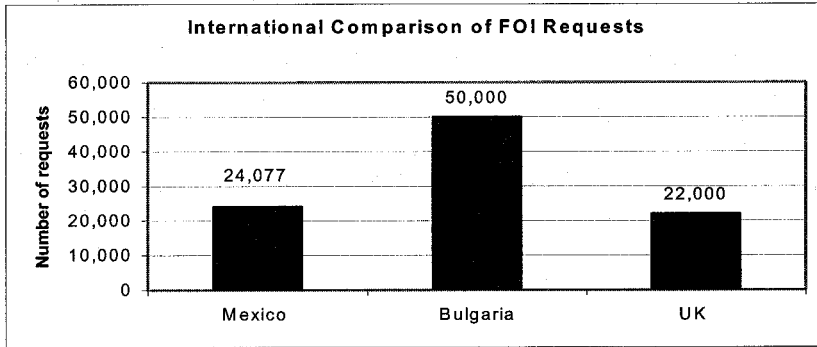


Source: [http://www.idea.int/vt/survey/voter\\_turnout\\_pop2-2.cfm](http://www.idea.int/vt/survey/voter_turnout_pop2-2.cfm). The turnout rates are from 1945 to 2005.

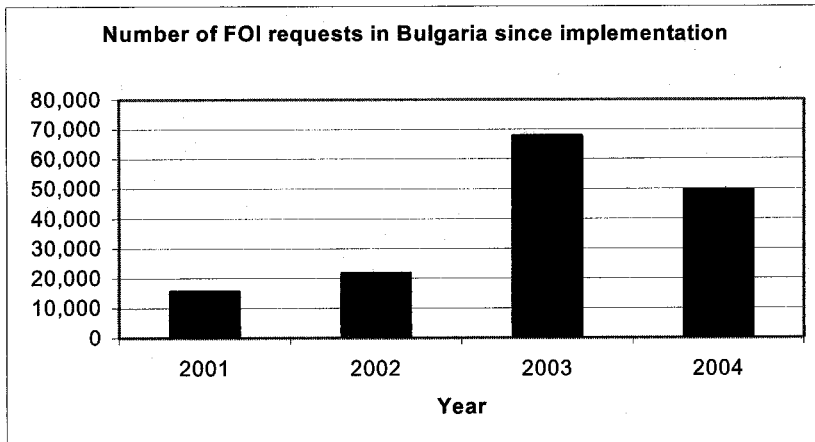
**Appendix 1e: Percent of Women in Parliament**

Source: <http://www.ipu.org/wmn-e/arc/classif.htm> (last visited October 27, 2006).

**Appendix 1f: International Comparison of FOI Requests**



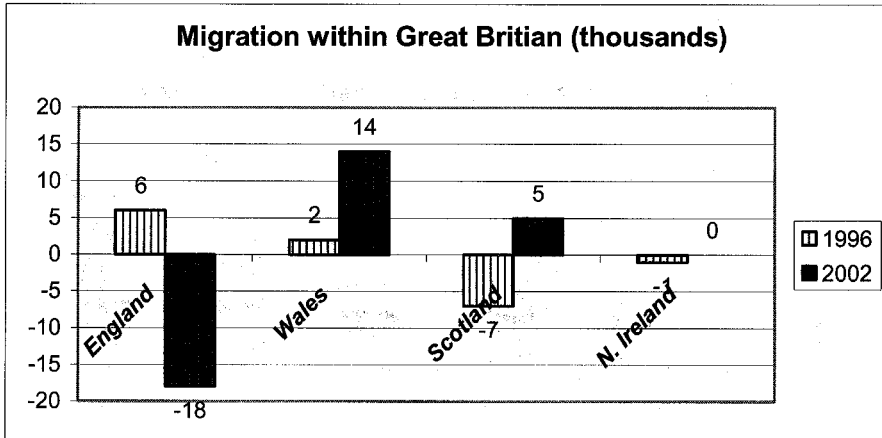
Sources: The number of requests in Mexico in 2003 was 24,077. Transparency and Access to Information 4, available at <http://www.ifai.org.mx/publicaciones/mexicotai.pdf>. The number of requests in Bulgaria in 2004 was 50,000. Access to Information Programme, Sophia, Bulgaria, [http://www.aip-bg.org/index\\_bg.htm](http://www.aip-bg.org/index_bg.htm). The number of requests in the United Kingdom in 2005 was 22,000. DEPT OF CONST. AFFAIRS, FREEDOM OF INFORMATION ACT 2000, STATISTICS ON IMPLEMENTATION IN CENTRAL GOVERNMENT JULY-SEPTEMBER 2005, 2 (2005).

**Appendix 1g: FOI Requests in Bulgaria**

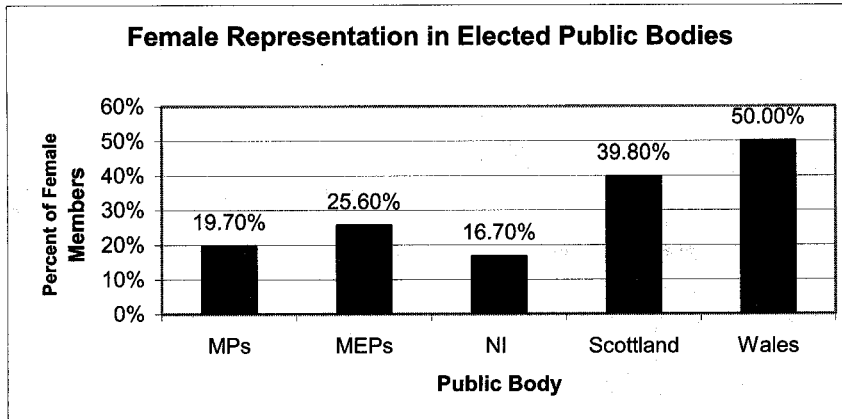
Source: Access to Information Programme, Sophia, Bulgaria, [http://www.aip-bg.org/index\\_bg.htm](http://www.aip-bg.org/index_bg.htm).



**Appendix 1h: Migration in Great Britain**

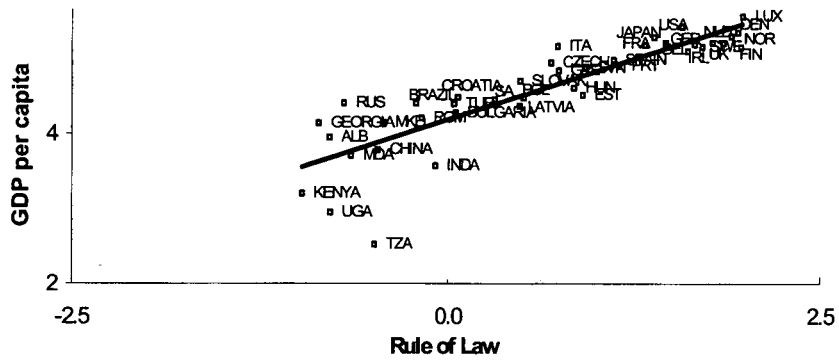


Source: National Statistics Office, Internal Migration, Population Trends 125, available at <http://www.statistics.gov.uk/STATBASE/ssdataset.asp?vlnk=9456>.

**Appendix 1i: Female Representation in Elected Bodies**

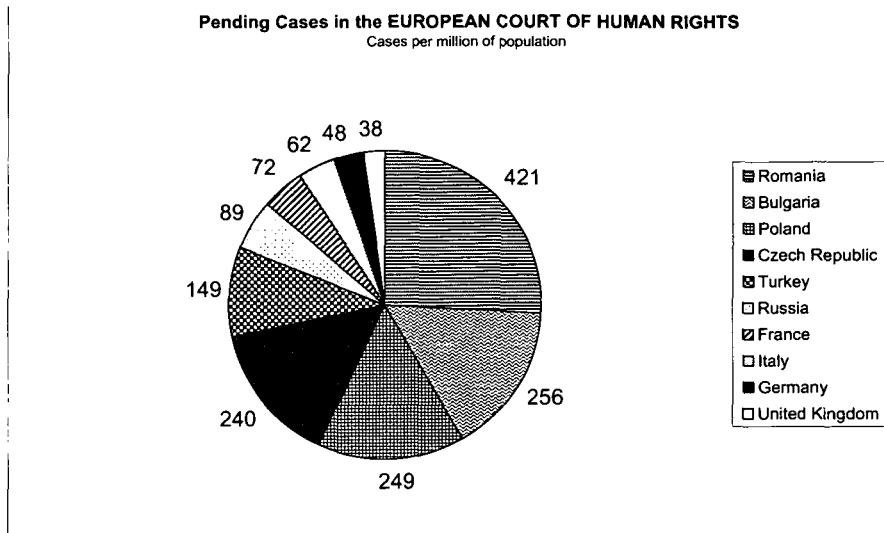
Source: Data based on female representatives in Parliaments: Scottish Parliament Fact Sheet, Female MSPs: Session 2, 30 September 2005, <http://scottish.parliament.uk/business/research/briefings-05/FemaleMSPs-Session2.pdf>; <http://www.wales.gov.uk/yourqwho/index.htm>; Membership of the Northern Ireland Assembly, <http://www.niassembly.gov.uk/members/membership03.htm>.

**Appendix 1j: Relationship Between Rule of Law and GDP per Capita**



Source: <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/EXTWBIGOVANTCOR/o..contentMDK:2077165~menuPK:1866365~pagePK:64168445~piPK:64168309~theSitePK:1740530.00.html>.

### Appendix 1k: Pending Cases in the European Court of Human Rights by Country



Source: European Court of Human Rights.

\*Chart of top 11 countries (81% of all cases).

\*\*Data is for the first 7 months of 2005.

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