

Aarif Abraham



Balkan Politics and Society

**A CONSTITUTION OF  
THE PEOPLE AND HOW  
TO ACHIEVE IT**

What Bosnia and Britain  
Can Learn From Each Other

With a foreword by Philippe Sands QC  
and an afterword by Sir Geoffrey Nice QC

*ibidem*

Aarif Abraham

**A Constitution of the People  
and How to Achieve It**

«Автор»

## **Abraham A.**

A Constitution of the People and How to Achieve It / A. Abraham —  
«АВТОР»,

Britain does not have a written constitution. It has rather, over centuries, developed a set of miscellaneous conventions, rules, and norms that govern political behavior. By contrast, Bosnia's constitution was written, quite literally, overnight in a military hanger in Dayton, USA, to conclude a devastating war. By most standards it does not work and is seen to have merely frozen a conflict and all development with it. What might these seemingly unrelated countries be able to teach each other? Britain, racked by recent crises from Brexit to national separatism, may be able to avert long-term political conflict by understanding the pitfalls of writing rigid constitutional rules without popular participation or the cultivation of good political culture. Bosnia, in turn, may be able to thaw its frozen conflict by subjecting parts of its written constitution to amendment, with civic involvement, on a fixed and regular basis; a 'revolving constitution' to replicate some of that flexibility inherent in the British system. A book not just about Bosnia and Britain; a standard may be set for other plural, multi-ethnic polities to follow.

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In tribute to my teachers

—past, present and future—

with particular gratitude

for my mother, aunty, and uncles

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Although the suggestions and comments of these readers greatly improved the final manuscript, I alone am responsible for the interpretations appearing in this book and for any flaws, errors or omissions that remain.

Aarif Abraham  
Garden Court North Chambers

Manchester, February 2021

## FOREWORD

Fifteen years of involvement in international cases that followed the collapse of the Socialist Federal Republic of Yugoslavia, or SFRY, made me acutely aware of the particularities of the constitutional situation that faced Bosnia and Herzegovina, the sovereign State which emerged from that collapse. It also left me cognisant of the apparent differences with the situation faced by the United Kingdom of Great Britain and Northern Ireland.

I recognised that matters of history and politics, of culture and identity, will combine to weave distinguishable constitutional arrangements. Yet I also knew, not least from the research that went into my book *East West Street*, that a situation which exists at one moment in time can, within just a few years, change very radically. That was the case for the city of Lemberg, which had, in the late 1920s, a diverse and multinational population, but within two decades found itself with a totally different population.

As a part of the Austro-Hungarian empire, and then the SFRY, Bosnia was largely made up of three majority communities—Bosnian Muslims, Catholics and Orthodox Christians. There were other minority groups too. As the SFRY dissolved, a violent conflict in Bosnia exposed all populations to such unimaginable horrors that—eventually and belatedly—the international community was catalysed into action. A ‘peace’ was negotiated, then concluded in 1995 at a military base in Dayton, Ohio. Out of this process a new constitution emerged.

Britain’s unwritten constitution, by contrast, is said to be ancient, one that establishes a parliamentary democracy that threads together the four ‘nations’ of Scotland, England, Wales and Northern Ireland. The composite constitution goes back many centuries, through and beyond empire. It is said to be unwritten and characterised by a particular flexibility.

The differences between Bosnia and Britain appear stark. What might be learned from an exercise in comparison?

Bosnia’s constitution was imposed. It is codified, rigid, difficult to amend. The people had no direct say in its creation, on the basis that they harboured “ancient ethnic hatreds.” The constitution is seen by some to institutionalise divisions that many believe to be debilitating. It seeks to ensure a formal equality of the three main ethnic groups, with strict rules on elite power-sharing, which some consider to undermine the freedoms and rights of individuals. Aarif Abraham poses some important and searching questions about a constitutionally-imposed system of group segregation, one that arose in the context of international crimes. If the people of Bosnia do not harbour supposed ancient hatreds but have a political culture that is democratic, tolerant and accommodating, he asks, might another constitutional future be envisaged? What circumstances might cause the different groups and their elites to abandon this structure for a different one? Can the people of Bosnia truly control their own democratic destiny within the current constitutional straightjacket within which they now exist?

With its different model, Britain claims, by contrast, a high degree of constitutional longevity and slow evolution. Yet it has faced its own challenges, all the more so today, following its departure from the European Union and the real possibility that Northern Ireland and Scotland may, within the foreseeable future, leave the Union. Such a fundamental change to the system has not happened for 350 or so years, but new divisions and polarisations appear to be eating away at some constitutional fundamentals. There is contestation over devolution and independence of the four nations, as well as the various regions, over distributions of wealth and socio-economic entitlements, and in respect of human rights (and, it might be asked, who would have imagined, just a few years ago, that Scotland would be able to shut its border to visitors from England, in the face of a health pandemic?) Such developments cause Mr Abraham to raise other questions, equally significant. Has a practise of moderate constitutional tinkering put the entire structure at risk? Has there been a fracture in the

delicate balance between executive, legislative and judicial power and authority? Can the British constitution resist the challenges of extreme nationalisms and populisms?

This important and original book seeks to unwrap these and more challenging questions. Mr Abraham embarks on a comparative exercise, one that contrasts what some view as a pre-conflict society (Britain), on the one hand, and a society viewed as having frozen and embedded a conflict (Bosnia), on the other. As readers, we are invited to reflect on a most fundamental issue of our times: the relationship between a country's political culture and its constitution.

Mr Abraham sees the cultures of both countries as increasingly moderate and inclined to a broad and democratic political participation. He is maybe optimistic, or right. If he is right, the discrepancy between elite preferences and people's preferences becomes acute, a space in which the constitutional rules will play themselves out, and the forces for change will be overwhelming.

Could Bosnia adopt some of the flexibilities of the British system? Mr Abraham imagines a *revolving constitution*, one that would subject existing constitutional arrangements to fixed and regular public debate, to the deliberation and approval of succeeding generations. Properly institutionalised, and with procedural safeguards, he argues, no one should be worse off. At best, everyone might have an opportunity for an enhanced constitution than is currently the case. He seeks a coincidence between the people's and elite's preferences.

In a certain sense, Britain already has a revolving constitution, one in which elites are regularly confronted with constitutional issues in the hurly burly of generational day-to-day of politics. Yet, Mr Abraham argues forcefully that some of the conventions, rules and practises that allowed fair and measured constitutional changes are no longer functional. On his view, Britain need not make its constitution as fixed and rigid as Bosnia's in order to represent all of its communities. It can, however, imagine a more inclusive national debate and process of deliberation, and a four-nation settlement around a new constitutional statute, one that all of Britain's people might have contributed to.

The book argues that a constitutional settlement owned by all the people will have a greater authority and stability. Mr Abraham offers no prescription on the content of a constitutional settlement but a road map as to how it may be achieved. As such, he succeeds in inviting us to think about our individual and collective roles in constitution-making. He encourages us to be more creative and careful. He asks us to reflect seriously about a people's political culture, and to cultivate, maintain and enrich that culture so people can contribute to change the way in which they are governed. Such transformation, he argues, requires practice and action, and not just words.

Professor Philippe Sands QC

University College London & Matrix Chambers

London, January 2021

“Words abound in everything

So words are everything but everything is bound by words

For just one word we wait and pray

An ancient word from far away

But we have heard a new word

Verily we have heard a word so new

That be it but whispered the heavens ring”

## - Mak Dizdar, *The Stone Sleeper* 1 INTRODUCTION

Britain has an almost unique constitutional position among States. It is a long-established democracy, comprising four diverse nations, with an uncodified, non-federal constitutional arrangement. The constitution itself is a miscellaneous collection of flexible conventions, norms and rules governing political behaviour. It cannot be found written down in a single place and some aspects of it are not written down anywhere at all. To the ‘outsider’, as well as the most intimate of ‘insiders’, it can be difficult or even impossible to comprehend. The current monarch of the United Kingdom, Queen Elizabeth II, is reported to have remarked that “the British constitution has always been puzzling and always will be.”<sup>2</sup> While that may be the case, the constitution has endured for almost three and a half centuries without armed conflict threatening its core structure. The foundation on which the constitution is built goes back further still to the Kingdom of Athelstan, over a thousand years ago. That thousand-year period was punctuated by armed conflict and bloodshed. Even Britain’s recent history saw armed conflict at its periphery and within its imperial dominions. Its constitutional structure, however, has had an undeniable longevity and continuity.

Bosnia and Herzegovina, by contrast, is a relatively recent democracy with an ethnically diverse population (though perhaps less diverse than Britain’s).<sup>3</sup> Bosnia emerged in 1995 from three and a half years of devastating inter-ethnic armed conflict. The Bosnian constitution is not in any sense conventional, drawn up, as it was, as Annex IV to the Dayton Peace Agreement.<sup>4</sup> With the signatures of the war’s main protagonists, the Dayton Peace Agreement successfully ended the war that ravaged Bosnia following its declaration of independence from the former Yugoslavia.

Neither the Dayton Peace Agreement nor the Bosnian constitution within it, however, created the successful democratic and functioning State envisaged by its chief proponents.<sup>5</sup> Instead, it set out complex procedures for governance that have institutionalised ethnic division and led to governmental paralysis. Bosnia, for instance, is composed of two devolved entities, three ‘constituent peoples’, and five layers of governance which, together, count among them a tripartite State presidency, two entity presidents, and fourteen prime ministers and governments.<sup>6</sup> In a country of no more than 3.53 million inhabitants (AfS 2013), Bosnia has the highest number of presidents, prime ministers, and ministers *per capita* in the world. Such a proliferation has made streamlined and efficient government difficult (Belloni 2010, 99). The Bosnian constitution has no popular mandate and lacks any features that may allow future democratic legitimacy. It has been imposed on the people and like other constitutions created in—or mostly *for*—seemingly ‘divided societies’, it has proved immune from change.

Most written constitutions are a product of war or revolution and are imposed by political elites who do not formally consider the views of ‘their’ people, even if they occasionally invite them to ratify the new arrangements. The absence of popular participation is not *always* fatal to the working of a constitution, but it *can* be if the political culture of the people differs from these rules-that-create-all-rules which the people are then required to respect.

This book seeks to contrast the two very different models of constitutional design in Britain and Bosnia. They sit at very different ends of a spectrum. The comparison goes to the heart of what a constitution is understood to be. Is it imbued with meaning, culture and history and, as such, is the soul of a State and its people? Or is it merely a functional, abstract and prescriptive set of rules which create the practical environment in which the people go about their everyday business?

In Bosnia, abstract and prescriptive constitutional rules have real world consequences. The Bosnian constitution has maintained and reinforced ethnic division and led to governmental deadlock. There are critical aspects of the constitution that require reform and there has been no shortage of proposals for reform.<sup>7</sup> All reform proposals since 2005 to amend the Bosnian constitution, however, have been driven by political elites and have failed. These failures are to the immense detriment

of individual human rights,<sup>8</sup> and amount to at a colossal economic cost to the electorate. Up to 55 per cent of the entire State budget,<sup>9</sup> some 3 per cent of the country's GDP, is spent on government administration, largely as a result of Bosnia's highly complex system of government (PIC 2020). By comparison, the cost of the Britain's central government administration is approximately 1.36 per cent of the State budget, some 0.5 per cent of the country's GDP.<sup>10</sup>

Why has reform not succeeded? As this book will seek to show, efforts have been impeded by intransigent, narrow, and nationalist positions adopted by the political representatives of Bosnia's three official 'constituent peoples': Bosniaks (Muslims), Bosnian Croats (Catholic Christians) and Bosnian Serbs (Orthodox Christians). These representatives sit in a number of constitutionally created institutions: the Parliamentary Assembly, the State Presidency and the two federal entities of Bosnia (Republika Srpska and the Federation). Intransigence is made possible due to vetoes, strict ethnic quotas and decentralised powers accorded exclusively to the three constituent peoples, all at the expense of such individuals or groups as are not specifically recognised by the Bosnian constitution. The constitution collectively and dismissively describes, although does not define, those not falling within the three constituent groups as "Others" or "Citizens". Others loosely comprise those identifying as "Bosnians and Herzegovinians" or those refusing to politically affiliate with any of the three constituent groups and the corresponding ethno-national political parties.

The Bosnian constitution was premised on the notion that the people, harbouring 'ancient hatreds', are divided, meaning that it is preferable to leave decision-making in the hands of political elites.<sup>11</sup> Meanwhile, experts warn about the latent desire of political elites for renewed armed conflict. In the international arena, powerful countries like Russia, China and Turkey are pursuing their own narrow self-interests in the Balkans and this has exacerbated local ethno-national competition. The economic and political manoeuvring of these powers demonstrates their intention to rescind the international communities' guarantee to maintain the peace in Bosnia. In the domestic arena, ethno-nationalist elites in Bosnia are vying with each other for support in their secessionist ambitions by appealing to predatory neighbours, namely Croatia and Serbia. These international and domestic pressures are compounded by US dis-engagement from the region over the past decade. This has created a power vacuum in the region for other international actors to fill.

In Britain, the constitutional arrangements seem to have worked relatively well historically in maintaining stability and adapting to needed political as well as socio-economic change.<sup>12</sup> The British constitution does not have a formal mechanism to give priority or permanence to one piece of legislation above another.<sup>13</sup> This is generally true of statutes that have constitutional significance and means that, where political practice is accommodating and respectful of traditions, adapting the constitution in accordance with changes in society is evidently much easier. A number of recent crises, however, have put the constitution to the test. These crises include: the process leading to the UK withdrawal from the European Union ("Brexit"); constant appeals for secession from Scotland and Northern Ireland; the breakdown of centuries-old conventions as seen with the unlawful prorogation of Parliament by the Prime Minister in 2019; the placing of limits on Parliamentary scrutiny by the government; and a lack of adherence to important international norms and rules as seen by a sustained government campaign to dilute people's human rights protections.<sup>14</sup>

On one view, these crises have all been resolved precisely *because* Britain has a flexible constitution and a sovereign, representative Parliament. The current government maintains that there are checks and balances between the branches of government, that human rights protections for the individual under common law go back centuries, and that arrangements for devolved and local decision making has ensured continued responsiveness to local needs. Ironically, the same government had planned radical changes to the British constitution because they believed changes were needed to address "trust" and a "destabilising and potentially extremely damaging rift between politicians and the people" (Conservative Party Manifesto 2019).

On another view, however, these recent crises have emanated precisely from a lack of formalised rules which could provide some clarity. The political opposition, for instance, characterise as ambiguous the arrangements for power distribution between institutions (horizontal power), power sharing between the central government and regional administrations (vertical power), and the human rights protections accorded to individuals under domestic legislation. Human rights legislation can be repealed by an express majority vote, as in the case of European Union rights post-Brexit and as the government has threatened with the European Convention on Human Rights.<sup>15</sup> There have been calls for a far deeper entrenchment of constitutional rules in respect of some of the existing arrangements seen to be under threat. In respect of horizontal power distribution, there is said to be a strong case for institutional checks and balances on the executive through greater legislative and judicial scrutiny. In respect of vertical power distribution, this might mean securing a firmer statutory footing for the devolution settlements of three of the four nations of the United Kingdom. In respect of human rights, this would mean a permanent statute guaranteeing certain socio-economic, civic and political rights that cannot be repealed by a simple parliamentary majority. The debate has centred on whether it is finally time for Britain to codify and entrench its constitutional foundations as almost all other modern democracies have done.

What might Britain and Bosnia learn from each other, and what might other countries learn about the process of creating or amending constitutions by considering these two contrasting cases?

This book challenges the acceptance and proliferation of overly legalistic and/or entrenched constitutional models. Those models are largely characterised by abstract, prescriptive, and mechanical rules created in a single constitutional moment.<sup>16</sup> They have gained almost universal acceptance in both developed countries and countries transitioning to democracy. But these models have sometimes created and reinforced the very divisions and polarisations that they were intended to resolve. If, however, the culture of the people is conducive to accommodation, trusting of difference, and democratically oriented, then introducing the capacity to change the constitution need not be feared.

In Bosnia, informed public participation and deliberation in a constitutional design process, on a fixed and repeated basis, with some procedural safeguards, could introduce a flexibility in political life in Bosnia that was, perhaps still is, present in long-evolved democratic polities like Britain. The capacity to change the constitution every new generation (a ‘revolving constitution’) could allow, with careful calibration, the possibility of catalysing evolutionary outcomes in the short run. Britain itself may be reminded of its own tradition.

Unlike Britain, Bosnia cannot afford to wait to evolve towards a new constitutional settlement. One unfortunate and very real pathway out of the current deadlock in Bosnia is collapse and the other is a return to violent conflict. If the people in Bosnia are much more accommodating than the ethno-nationalist political elites representing them, then the presumption upon which the current constitutional arrangements were built were incorrect. Furthermore, that presumption has helped to perpetuate a collective socio-economic and political malaise from which there is, seemingly, no escape.<sup>17</sup>

This book’s suggestions for reform are predicated on the fact, as demonstrated, that the people are accommodating, human rights oriented and tolerant. The political culture of the people in Bosnia is conducive to democratic reform. It is, contrary to popular opinion, open to popular participation and retains the capacity for inter-ethnic cooperation and engagement. One of the tests for this claim is whether or not there is evidence proving that political culture in Bosnia is as democratic as its close EU neighbours’ culture. If so, the second test is whether both Bosnia and Britain respectively have political cultures conducive to greater democratic participation. If they do not, then surely this needs immediate and critical attention. If they do, then the objective is to introduce context and an ear for justice into fixed and rigid legalistic constitutional documents by involving the people in

key constitutional decisions.<sup>18</sup> The aim, ultimately, is to reorient political life towards an inherently democratic political culture.

The current debate in Bosnia is on reforming the *content* of the constitution by tweaking or changing specific constitutional provisions. The paradox is that reform continues to be unlikely given the special constitutional guarantees accorded to the three constituent peoples. There are few incentives for political elites to compromise their intransigent positions. If anything, the reality is the opposite. Any attempt at reform by one group of elites is seen as an attempt to undermine one group at the expense of the other (at least that is how ethno-nationalist leaders present proposals for reform to their respective ethnic constituencies). It is a classical “beggar thy neighbour” problem. Political elites explain that this conflict, and their own intransigence, is because of the political culture. They claim to behave as they do in the name of ‘their people’ in their respective Bosniak, Bosnian Croat and Bosnian Serb electoral silos. The irony is that the electoral silos correspond closely to ethno-territorial silos created by ethnic cleansing during the war. The same people indicted for international crimes, as a result of responsibility for the ethnic cleansing, were the principal negotiators of the Bosnian constitution.<sup>19</sup>

It has been taken for granted, by political commentators and academics alike, that conflict between elites in the constitutional structures of Bosnia is a mirror reflection of the latent desire for conflict within the population-at-large. The people of Bosnia are characterised as anti-democratic and pro-ethno-nationalist. Political apathy and deadlock within State institutions, therefore, are held to be a consequence of a lack of citizen initiative and will. A lack of will that emanates from an apparently intrinsic, non-participant political culture.

But this narrative is not supported by Bosnia’s variegated, multi-ethnic and thousand-year history. For much of their history, the Bosnian people have come under the strong influence of foreign powers depriving them of agency. Despite that, Bosnian history is, in fact, predicated on participation, accommodation and tolerance. This book will seek to show that the contrary view is not supported by the evidence including data relating to people’s political preferences since at least 1992. If the people are momentarily apathetic, intransigent, or intolerant, this is because that orientation is a consequence of the war rather than being endemic to the political culture. Later that orientation has been strengthened directly by the constitutional structure agreed—or rather imposed—by the Dayton Peace Agreement. Either way, this Dayton-driven emanation of poor political participation has no reason to remain fixed or unchanging. There is always a possibility for change where there is the capacity, as there is in Bosnia. Such change is imperative before it is too late.

The example of Bosnia is of immediate significance to the British constitution. The constitution of the former provides a cautionary lesson that written codification, federalisation and entrenchment of some rules above others cannot be, in and of itself, a panacea. This book considers whether the lesson from Bosnia is that misunderstanding political culture, ignoring the preferences of people in all their manifestations, and *imposing* rather than *agreeing* constitutional arrangements will simply lead to failed institutions and instability.

There is no doubt that dissatisfaction exists in Britain. Dissatisfaction is prevalent among the devolved powers, among the regions, among the haves and have-nots, in the quality of political elites, and in the manner in which political elites carry out their duties and how they are elected (or not, as in the case of the House of Lords—Parliament’s upper chamber). There is a clear need for *something* other than the status quo to address constitutional issues in Britain outside the day-to-day of parliamentary politics. The classic British fudge, muddling through with partisan, ad hoc, changes to its constitution are not sustainable. The underlying constitutional issues have precipitated many crises and have resulted in attacks on judges by the media and the executive. The executive has failed to understand the significance of fundamental unwritten rules and practices and the consequences of attacking them for short-term political gain. With a rise of nationalism, different political parties, have precipitated centrifugal and centripetal forces which wrestle with secession from the Union,

or, on the contrary, further centralisation. Meanwhile, there are calls for a reassertion of nativism, originalist or ‘orthodox’ (depending on your view) interpretations of people’s fundamental rights. These calls compete against international norms that Britain is bound faithfully to interpret, apply and fulfil either by treaty or custom.

This book demonstrates that, when it comes to constitutional issues, there is a significant discrepancy between the preferences of the elites and those of the people in both Britain and Bosnia.

In Bosnia, constitutional structures, when combined with the legacy of the war, have tended to favour the election of ethno-nationalist elites. The Bosnian constitution, and by extension its institutions, is the most significant impediment to the bridging of societal divides. Its reform, therefore, must be the priority. But such reform must have a popular mandate. Elites, isolated from the people,<sup>20</sup> are unable and/or unwilling to undertake reform that is conciliatory, moderate and accommodating. These elites are seemingly locked in revolving doors without an exit. Using adaptations from game theory (mechanism design and implementation theory) and behavioural economics (prospect theory) a ‘revolving constitution’ is proposed to break the impasse. A revolving constitution would subject parts of the constitution—as opposed to ordinary legislation—to greater civic participation and input (through, referendums, civic initiatives and deliberative assemblies) on a fixed basis every new generation.<sup>21</sup> Fixed and repeated interaction between elites and the people would introduce a flexibility and democratic legitimacy into political life that is currently lacking these characteristics. A widely agreed constitutional covenant would ensure such a process would be transparent, properly institutionalised, and contain procedural safeguards. These safeguards would ensure no one is cut out of the process or that current arrangements are not simply torn-up by one group. This can be achieved with: rules requiring joint and concurrent referendums in all significant entities, municipalities and cantons; civic initiatives that cut across ethnic lines; and inclusive constitutional conventions for deliberation. With these safeguards, it is clear that the people and elites would be no worse off than under the status quo; even if the people might be as intransigent as elites. A revolving constitution would guarantee that the outcomes of reform would accord with the median or average voter. Elites in the constitutional reform space, currently interacting only with each other in the parliamentary or presidential arena, would be incentivised or ‘nudged’ towards considering the preferences of the people in the electoral arena.<sup>22</sup> If the people are just as intransigent as the elites then current constitutional arrangements will remain in place. If it is true, however, as the evidence suggests, that the people are more accommodating than political elites then regular interaction between elites and the people can lead to far greater constitutional change than is currently possible and a far greater likelihood of accommodating behaviour amongst elites. The revolving constitution can help publicly manifest the underlying political culture of the people: democratic, tolerant and accepting.

The revolving constitution is far from being a revolutionary construct. It does not, like revolutions in general, impose a winner takes all solution by immediately empowering or disempowering one group over another in the political game. Repeated interaction and engagement by the people and elites in the constitutional reform arena would tend to speed-up constitutional evolution, recreating a *process* that allows flexibility to be established in polities like Britain. If it is right that the people are more conciliatory and accepting than political elites (as this book demonstrates they are) then this evolution will stand in bold defiance of exclusive ethno-nationalism. The possibility of regularly (though not too frequently) amending the constitution, with civic involvement, would set in motion a process rather than determine an outcome. A process whereby political elites are incentivised to pursue moderate and accommodating reform could, incrementally, alter the shape of everyday politics in Bosnia. A standard may even be set for other plural, multi-ethnic polities to follow—both to help regulate existing conflict and avert conflict in the future.

In Britain, it is evident that piecemeal and partisan constitutional changes and the use of modes of decision making that are outside the accepted rules and norms has had a corrosive effect on the

institutions of parliamentary democracy. Parliamentary democracy is predicated on representative institutions rather than institutions of direct democracy. It is evident that there is a need for inclusive, participatory and deliberative processes to reform aspects of the British constitution so that a fairer settlement can be achieved to address disparities in: wealth and regional equality; the equality of the four nations; the application of human rights and the international norms thereof; and the representation of the people in Parliament. There is a strong case for a constitutional covenant to begin a process: to inform the electorate and elites, to understand the significance of reform and where it might be really needed through consultation; and, ultimately to open an informed national debate and deliberation—among political elites and the people—in order to form a cross-party consensus as to which aspects of Britain’s unwritten constitution are fundamental. This might include the production of an impartial code or guide to the current arrangements to facilitate understanding and debate (HoC 2014). The process towards a covenant is not utopian in nature but rather a practical mechanism: the people can be nudged into this process given the preferences they have expressed in favour of more involvement, participation and a need for a change from the status quo.

The Bosnian experience shows that there are some principles which must be at the forefront of any constitutional reform endeavour in Britain. The process of any reform proposal is all critical. Measuring political culture is as important as carrying out polls on the day-to-day issues that concern the electorate. This enables a better understanding of where the electorate stands on the fundamentals of democracy, participation and the idea of living together. Public participation in the process must be provided for and ought to be genuine and meaningful to help nurture, consolidate, and develop good political culture. And, finally, pragmatic buy-in of political elites is necessary to avoid spoilers and to avoid scenarios where it is perceived that at the end of the process the winner will take all. With some of these principles it may well be possible to consider whether the British people, across all four nations and in all their diversity, may come to new political understanding, perhaps towards a kind of Magna Carta of the People, around which political elites, stakeholders and the people may coalesce.<sup>23</sup> There will be no shortage of questions requiring answers, for example:

How do you accommodate different national interests in a union of nations without descending into a nationalist “race to the bottom”?

How should constitutions deal with veto rights on decisions by national or minority communities?

What are the risks of entrenching some rights above others, in particular, the rights of whole groups or nations?

What are the pitfalls of using referenda in a blunt manner (as was done in the referendum to leave the EU) and what might be more ‘sensible’ ways of ascertaining people’s preferences?

Why is constitutional change without considering the preferences of the people doomed to fail?

Should political culture (both civic and political values) be given equal, if not more, attention as proposals for reform of constitutional rules?

This book aims to provide those answers and an opportunity to re-evaluate Britain’s current uncodified constitution. In doing so, it provides some insight as to a possible transparent, inclusive, participatory pathway around current impediments. It posits a recurring but controversial question: is Britain’s historical unwritten arrangement really worth defending? Any such defence, if it is to occur, would be made through a re-development of core political and civic virtues through greater political interaction between political elites and the people. Reliance simply on written rules, duties and responsibilities is not enough. Some form of social entrenchment of human rights (if not legal and political) is clearly necessary to allow the unrestricted cultivation of good political culture. Game theory and behavioural economics suggest that, where the conditions are right, the British model,

with certain adaptations, could be favourable to better constitution-making. The British model may make less confrontational a process by avoiding any ‘constitutional moment’. It allows, not unlike a ‘revolving constitution’, inter-temporal bargains to lessen the ‘winner-takes-all’ effects of a new or amended constitution. It also encourages an active constitutional culture to develop across generations so that new generations may *feel* that they have something at stake and a genuine solidarity and fraternity with others who decide the new rules.

Britain though may need a way to reset the terms of its political arrangement. A one-off constitutional covenant leading to a constitutional convention to deliberate on key constitutional problems may provide a truly participatory and deliberative constitutional statute to renew, reinvigorate and revitalise political relationships. Such a constitutional statute could ensure that Parliament, the Government as well as the devolved administrations benefit from greater popular legitimacy rather than suffer collective malaise, disdain and apathy.

The book is organised as follows. Chapter 1 provides an overview of what a constitution is and the debate that surrounds its nature. An outline is provided of the British unwritten or uncodified constitution: its operation, its historical origins, and the recent trends challenging its unwritten status. The Chapter also provides an outline of the Bosnian constitution: its creation, the hopes of its drafters, its imposition, and the practical reality of its operation. It explains why comparing these two particular States is important and what we might hope to gain by questioning their design and amendment processes. It emphasises that no *particular* constitution is paradigmatic. An unwritten one is not necessarily superior to a written one. The *process* of creation or change, however, necessarily entails a consideration of political culture and history.

Chapter 2 introduces theoretical ideas about political culture, what it is and how it can be measured. It explains falls in political participation in Bosnia and Britain and the variables that can help explain why people are (or can become) apathetic in a given constitutional structure. In particular, the Chapter looks at how people form views that are not conducive to democratic engagement, as well as views that are hostile to a democratic form of government. The sub-chapters define concepts such as ‘political culture’, ‘political apathy’, ‘political participation’, and proposes a working model for analysis. The Chapter presents the findings of quantitative research (see Appendix A) in respect of political apathy in Britain and Bosnia, with Croatia as a reference point.

Chapter 3 presents the detailed findings of quantitative research in respect of political culture in Bosnia. The Chapter, in particular, considers whether a ‘poor’ political culture (defined in Chapter 2) is the main variable explaining Bosnia’s political problems or whether there are more persuasive explanations such as institutional failure stemming from foundational constitutional structures. The Chapter roots the questions of constitutional design and amendment in the context of the real political culture of the Bosnian people and sets out why the failure to consider this culture may be helping to perpetuate conflict and simply freeze violent conflict. If Britain and Bosnia have pro-democratic political cultures, the question is posed as to what they may learn from one another in terms of their design and amendment processes.

Chapter 4 sets out the literature and theoretical principles of institutional design and amendment. It explains why changing formal rules when the underlying beliefs or values of societies remain rigidly opposed will result in failed institutions; and why a failure to change the formal institutions when belief systems are conducive to change imperils those institutions. The sub-chapters set out the three major proposals that have been made to date to reform the Bosnian constitution and the reasons for their failure. The sub-chapters will contrast that experience with the outlier case of the unwritten constitution in Britain and various reforms made to it (with a focus on those made since 1997). The sub-chapters focus on Brexit, Scottish and Northern Irish secessionism, and the unlawful constitutional practices of recent British governments. They interrogate whether it is the existing unwritten constitution (which creates a system of representative parliamentary democracy) that is the source of these crises or, rather, the by-passing of existing constitutional conventions, rules,

and institutions. In the one (Britain) it poses the question of whether abandonment of its traditional unwritten constitution is the problem and in the other (Bosnia) it asks whether the foundational moment of the imposed constitution is the source of all the problems. In essence, what can one State learn from the other as calls for reform ring loud?

Chapter 5 draws on the literature in the fields of game theory and behavioural economics to model the impasse in Bosnia in light of the practical operation of Britain's flexible constitutional arrangements. It uses game theory to present how ethno-nationalist political elites play a 'zero-sum' game in the current Bosnian institutions. Suggestions are made as to how they may be incentivised to give-up their strong ethno-nationalistic decision-making in the current system by introducing a third and critical actor: the people. The Chapter then suggests a solution to the impasse in Bosnia: a *revolving constitution*.

Chapter 6 develops the practical lessons for two disparate constitutional reform debates—that in Britain where codification is being increasingly talked about, and that in Bosnia where any hope of reform is marred by the actions of ethno-nationalist elite spoilers who benefit greatly from the current constitutional status quo. The Chapter sets out the mechanics of how a revolving constitution for Bosnia might operate and the careful calibration that is required to ensure safeguards for minority groups, human rights and stability. The Chapter also looks at how Britain may address current and future constitutional crises that clearly require redress. A model for greater deliberation and participation of the public is proposed which is in true keeping with British political culture and tradition.

The concluding remarks suggest how best to characterise a constitution and draws together the wide scholarship consulted in writing this book. The remarks identify the main lessons learned in comparing Bosnian and British constitution-making and design; some practical policy suggestions are provided on possible reform of the British and Bosnian constitutions. General lessons are drawn from the comparison made between Bosnia and Britain for both post-conflict and pre-conflict States.

#### Technical Methodology

This book makes use of two research methods to answer the primary research questions: (a) quantitative research to understand political culture, political apathy and political division in Bosnia and Britain; and (b) the use of rational choice models (game theory and veto player theory) and behavioural economics (prospect theory) to analyse the behaviour of political elites and the people (together 'players') in the current constitutional framework.

The quantitative analysis uses value-based surveys produced by the *World Values Survey (WVS)* and *European Values Study (EVS)* to make operational the terms 'political culture', 'political participation' and 'political apathy'. Croatia is used as a comparative case study.<sup>24</sup> The dataset produced by WVS and EVS conducted seven waves of studies with four each of Bosnia, Croatia and Britain in the period from 1990—2020 (Bosnia 1998 ( $N=800$ ), 2001 ( $N=1200$ ), 2008 ( $N=1512$ ), 2019 ( $N=1735$ ), Croatia (1996 ( $N=1196$ ), 1999 ( $N=1003$ ), 2008 ( $N=1525$ ), 2017 ( $N=1493$ ) and Britain (1990 ( $N=1484$ ), 1999 ( $N=994$ ), 2008 ( $N=1561$ ), 2018 ( $N=1794$ )).<sup>25</sup> WVS and EVS are used as they are the only dataset that collated time-series data cross-nationally on issues concerning political participation over a significant period of time. Given the lack of any other serious time-series data, and gaps in the datasets which exist, the analysis is supplemented by data obtained from other local studies where available and relevant.

The quantitative analysis forms the basis for the rest of the study. The quantitative data together with the case study on Bosnia's institutional failure (Chapter 4) is necessary to form some of the assumptions about players' substantive preferences and institutional structures in the rational choice analysis that follows (Chapter 5). These assumptions give empirical content to the theory and hence make it testable (Ganghof 2009). Rational choice models have explanatory power and predictive potential: in Bosnia they serve to elucidate why substantive proposals for constitutional reform are failing and suggest possible ways to break the reform impasse. The Bosnian case study allows a

clearer comparison with constitutional reforms suggested for Britain. The game theory approach helps to explain complex political behaviour in a systematic way; why the behaviour of political actors is an optimal response to conditions of their political environment and the behaviour of others. Changing the context or institutions (the ‘rules of the game’) leads to changes in preferences and, therefore, outcomes. The models, therefore, provide theoretical clarity and strong explanatory power by eliminating chance or ad hoc explanations whilst acknowledging that the model is only an approximation of reality although a relatively good approximation (Tsebelis 1990, 40-47). They also explain why certain conditions and behaviour prevail, as equilibria, in a State such as Bosnia. The veto player approach, in particular, can integrate a number of approaches to institutional analyses by focusing on actors within institutions that actually matter—those that can set, alter and veto legislation (Tsebelis 1999; 2002; Ganghof 2009; Hallerberg 2010, 21).

The game theory and veto player approaches are used to model the game played by the elites in the parliamentary arena in Bosnia. The preferences of elites, however, are influenced in another important space: the electoral arena where interaction with the people (or the electorate) can alter preferences and, therefore, outcomes. The objective of the study is not to discuss the shortcomings and benefits of various institutional structures generally for Bosnia but to compare all of these structures consistently with respect to one particular objective (Tsebelis 1995): the capacity for meaningful constitutional change.

Given that the use of such models has been neglected in the study of Bosnia’s political paralysis, this book aims to add to existing work by identifying the precise causes of failure in the institutional structures in Bosnia inhibiting meaningful constitutional reform and civic participation in politics. That would go some way to creating a Bosnia based on individual rights and equality rather than the presumed collective equality of ethnic groups. For Britain, this book seeks to draw together disparate thinking on suggestions for constitutional reform and attempts to reconcile competing models. The analytical models deployed allow a pathway out of constitutional paralysis, contestation and crises. Practical proposals are provided as to how States can enjoy higher civic participation in politics, fairer bargains between groups and increased democratic legitimacy. Britain and Bosnia may benefit, but so might others. ☺

“And when we saw this script we’d never seen before In front of our very eyes from far-off times of yore A long silence Fell between Us	And half Amazed
This stillness was broken by a voice that was calm but outspoken – No scribe wrote this text for sure It looks like someone Was trying to Draw	Look it’s a secret text from the darkest days of old Rising it seems from the depths of our murkiest Dreams Its signs are like writing Seen in a mirror— Mutters A mouth Calm and Cold
And then a second says racking his brains— Look at the right that might be where it begins And it’s merrily flowing leftwards Widdershins Who was such writing Written for	The fifth with clenched fists and trembling fingers tries to hold This mirror of clear redeeming grace But it slips To the Floor
Those who insist on reading from right to left Are wrong all along— A third one says half crazed	For in it that instant he recognises His own Ancient Forgotten Face.”

—Mak Dizdar, *The Stone Sleeper* 26

<sup>1</sup> An extract of a poem called “BBBB” by Mak Dizdar [1917-1971] (2009, 50).

<sup>2</sup> These, possibly apocryphal, remarks were widely reported to have been made by the Queen at a lecture being delivered by Prof. Peter Hennessy at Queen Mary College, London. See further, Hennessy’s (1995) own account of the event. Bogdanor (2009) gives an account of another incident. The Queen attended an event at University College London where she came upon a book called *The*

*Changing Constitution*, edited by Prof. Jeffrey Jowell. She reportedly said to Jowell, who was standing nearby, “Changing, Professor Jowell, what changes? I haven't noticed any changes!” Jowell replied, “Well, evolving, Ma'am, evolving.” She responded, “Yes, but in what direction?”

3 Bosnia and Herzegovina is referred to throughout as “Bosnia”.

4 The State constitution was agreed as Annex IV of the *General Framework Agreement for Peace in Bosnia and Herzegovina*, initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. It is referred to throughout as the “Bosnian constitution”.

5 Richard Holbrooke, the principal negotiator of the Agreement, maintains that “on paper, Dayton was a good agreement; it ended the war and established a single, multi-ethnic country.” His caveat is that “the results of the international effort to implement Dayton would determine its true place in history.”

6 There is also the self-governing district of Brčko in the North of Bosnia which is under international supervision.

7 There have been three substantial reform processes since 2005 all of which have failed as a result of intransigent, ethno-nationalist positions taken by the elected representatives. There have also been two missives for reform that are very significant. These are all addressed in Chapter 4.

8 The constitution contravenes international law in a number of ways. For instance, only members of the three main ethnic groups are allowed to run for the office of president; members of the country's many minorities, such as Roma and Jews, are excluded as candidates. Also, individual rights are subservient to ethno-national group rights which permit vetoes, quotas, and exclusive ethno-national representation to the elected representatives of the groups.

9 Approximately 613.22 million USD in 2019 (PIC 2020).

10 The comparison between Bosnia and Britain is not straightforward as the accounting for the cost of government administration is different in the two countries. The figure for Britain is a composite of the following: costs of government administration for the state at 10.1 billion USD, 2019 (HM Treasury 2019); cost of running both Houses of Parliament at 766.25 million USD, 2019 (IfG 2020); cost of the running the central government estate at 3.56 billion USD, 2018 (Cabinet Office 2018); total budgetary receipts 1,054.21 billion USD (OBR 2020). The UK GDP for 2019 was 2,829.10 billion USD (World Bank 2020).

11 This issue is touched upon in Chapter 1 and further elaborated upon in Chapters 3 and 4.

12 This claim in no way relates to policy issues and the very severe crises that emanated over the past 350 years. It also does not discount the violations of rights by the British state, whether domestic or international.

13 The common law, however, does provide that certain statutes that are deemed, by the courts, to have constitutional significance may only be repealed, amended or abrogated if done so expressly by Parliament. This is further discussed in Chapters 4 and 6.

14 This is notwithstanding the fact that it was Conservative politicians who helped pioneer and draft the international instruments that protect fundamental rights including the European Convention on Human Rights (“ECHR”).

15 In leaving the European Union, British citizens lost a host of rights that have not been directly transposed into domestic law, the most significant of which were rights enshrined in the Charter on Fundamental Rights. In respect of the ECHR, it has been a Conservative Party Manifesto commitment, since 2010, to leave the ECHR.

16 See further Ackerman (1991, 1992). Constitution moments are understood to “emerge from an exceptional moment of higher-order law-making under the liberal constitutional paradigm” (Bali and Lerner 2016).

17 This is based on the case study of elite behaviour in the State institutions (Chapters 4 and 5) together with the quantitative analysis (Chapters 2 and 3) demonstrating the scope for accommodation amongst the population at large.

18 See the very cogently argued piece by Bonnie (2001, 801).

19 The incentive structures built into the peace agreement is, unsurprisingly, to the advantage of those negotiators (Bassuener 2020, 225).

20 On the issue of constitutional reform, at least, and arguably on almost all policy issues given the way the electoral laws and districts operate.

21 The term ‘deliberative’ has helpfully been defined by Ghai and Galli (2006) to mean “a process of negotiation which is based on clear goals (of the national interest and social justice) and sufficient information and knowledge, aimed at exchanges of ideas, clarification of differences, persuasion and agreement. This requires a degree of facilitation, and a critical question is who does this and under what procedures.”

22 The idea that political elite’s decision-making is in the name of ‘the people’ would no longer ring hollow and the people would find it more difficult to blame political elites alone for intransigence given that all the people will now have an opportunity to participate.

23 Another title may be the *Millennium Magna Carta* or the *Charter of the People*.

24 Given the different paths Croatia and Bosnia have taken following the war and the relative political ‘success’ of Croatia the comparison is immensely useful in analysing variations, if any, in ‘culture’ and levels of apathy.

25 The *World Values Survey* is a global database for social scientists studying changing values and their impact on social and political life. The WVS has been carried out in close collaboration with the *European Values Study* and encompasses data of representative national surveys from ninety-seven societies around the globe, containing almost 90 percent of the world’s population. These surveys show pervasive changes in what people want out of life and in what they believe. In order to monitor these changes, the EVS/WVS has executed seven waves of surveys, from 1981 to 2019. Data set sources: World Values Survey 1981-2019.

26 A poem called “A Text About A Text” by Mak Dizdar [1917-1971] (2009, 71).

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