Response to Jason Edwards’s Comment

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WE READ Jason Edwards’s comment with interest and are delighted that our paper ‘International best practice and the Constitution, Democracy and Rights Commission’ is sparking debate and discussion, because the question that we address is consequential: if far-reaching constitutional reform is proposed, what is the most appropriate way, organisationally, to tackle it? Boris Johnson’s government is envisaging major constitutional reforms, and the procedures used to develop these reforms matter because they are likely to have consequences for the substantive decisions that will follow. The substantive outcomes that are probably going to be affected include the extent to which these reforms will be joined up; whether they will have cross-partisan support; whether they are likely to be viewed as legitimate by the wider public; and whether the government achieves its goal of ‘restoring public trust in politics’ through these reforms.

Our paper proposed that the process used to develop these reforms—the Constitution, Democracy and Rights Commission envisaged in the government’s manifesto—should build on three key principles: impartiality, expertise, and public participation. In practice, we suggested these principles might be best furthered if the Commission was to organise ‘a citizens’ assembly that involved both the public and political parties’. Edwards’s comment sets out a range of observations on our paper. In this short rejoinder, we outline aspects of his commentary that we agree with and explain why we disagree with his three main objections to our argument.

We entirely agree with Edwards that the principles that we set out are ‘too vague and ambiguous to offer any real guidance about how a constitutional reform body should operate’. We do not agree. Normative principles are inherently general and contestable. They engage with the question of what ought to be done and what desirable features of the process would be. Conceptually, there is a difference between normative principles and organisational blueprints. Our paper explicitly acknowledges that difference. As we write, ‘[I]nternational experience shows that constitutional reform bodies like the Commission can be organised according to four broad types of models, each offering a different balance of these normatively desirable features.’ We then go on to describe each of these models in more detail. We therefore set out the three normative principles as broad guidelines, which will inevitably require operationalisation and implementation. Our argument is not that there is only one way to operationalise these principles, but that several independent reviews with narrow, issue-specific remits. Two such review commissions have been appointed so far, to investigate judicial review and the Human Rights Act, respectively. Both of these reviews have taken the form of expert panels. They are thus organised in a manner that provides impartiality and expertise, but no direct public participation, which contrasts with our recommendations. That the government has chosen to proceed in this manner does, of course, not render the question of whether this is the most appropriate way to proceed irrelevant.

Edwards’s commentary raises three main objections to our argument that major constitutional review should be organised to reflect the principles of impartiality, expertise and public participation. Below we cite each of his objections and explain why we disagree.

First, Edwards argues that the principles that we set out are ‘too vague and ambiguous to offer any real guidance about how a constitutional reform body should operate’. We do not agree. Normative principles are inherently general and contestable. They engage with the question of what ought to be done and what desirable features of the process would be. Conceptually, there is a difference between normative principles and organisational blueprints. Our paper explicitly acknowledges that difference. As we write, ‘[I]nternational experience shows that constitutional reform bodies like the Commission can be organised according to four broad types of models, each offering a different balance of these normatively desirable features.’ We then go on to describe each of these models in more detail. We therefore set out the three normative principles as broad guidelines, which will inevitably require operationalisation and implementation. Our argument is not that there is only one way to operationalise these principles, but that several independent reviews with narrow, issue-specific remits. Two such review commissions have been appointed so far, to investigate judicial review and the Human Rights Act, respectively. Both of these reviews have taken the form of expert panels. They are thus organised in a manner that provides impartiality and expertise, but no direct public participation, which contrasts with our recommendations. That the government has chosen to proceed in this manner does, of course, not render the question of whether this is the most appropriate way to proceed irrelevant.

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constitutional reform bodies can strike the balance between the principles in different ways. Hence, the advantages and disadvantages of each model should be borne in mind when establishing a constitutional reform body. Given the documented effects of constitutional reform processes on the substantive choices that result, it is important to consider what principles ought to inform those procedural choices, rather than giving no consideration to normative principles at all.

Second, Edwards suggests that we ‘overlook the significance of the fact that such constitutional reform bodies are always politically constituted’. Quite the reverse is true. The objective of our paper is precisely to consider which principles politicians ought to take into account when setting up a process to develop major constitutional change. Undeniably, the process of selecting the members of a review body (whether political actors or experts) involves difficult decisions about which interests should be represented or excluded. But these important questions of implementation are distinct from the simpler point made by our paper: that such bodies should not be dominated by any one political group or perspective and should aim to balance various political and institutional interests.

Third, Edwards suggests that we conceive of citizens’ assemblies as ‘constituent powers’, and thereby commit ‘a constitutionalist anachronism that fails to acknowledge the complexities of governance in post-sovereign societies’. This criticism seems to flow from a straightforward misreading of our justification for public involvement in constitutional reform processes. We highlight several such justifications, and particularly stress that it increases the probability that the public will view any resulting reforms as legitimate, have confidence in them, and accept them. We suggest that, in turn, this enhances the durability of constitutional reforms.6 Interestingly, Edwards, appears to agree with this argument, at least partially, as his closing words suggest that citizens’ assemblies are valuable because they can help to reach ‘widely accepted agreements’. In sum, we welcome the discussion and hope that this rejoinder has clarified our argument.

Notes
1 P. Schleiter and T. Fleming, ‘International best practice and the Constitution, Democracy and Rights Commission’, The Political Quarterly, this issue, 2021, and early view; https://onlinelibrary.wiley.com/doi/10.1111/1467-923X.12960 (accessed 11 February 2020).
2 Conservative and Unionist Party, The Conservative and Unionist Party Manifesto 2019, London, Paragon, 2019, p. 48.
3 Schleiter and Fleming, ‘International best practice’, p. 78.
4 For a recent summary of these developments, see A. Walker, ‘The Constitution, Democracy and Rights Commission: death by independent review’, The Constitution Society Blog, 9 December 2020; https://consoc.org.uk/the-constitution-democracy-and-rights-commission-death-by-independent-review/ (accessed 27 January 2021).
5 Schleiter and Fleming, ‘International best practice’, p. 77.
6 Ibid., p. 76.