

Pre-chewed Politics

Does the UK need a codified constitution?

Yes – Our uncoded constitution makes it difficult to learn about our rights, and how government works.

In America it is relatively easy for school pupils to learn about their system of government and their constitutional rights because all of the necessary information is contained in their codified constitution. The first articles establish and explain the powers of the different branches of government, while the Bill of Rights explains the rights of the people. In contrast, our uncoded constitution has so many different sources, including statute laws, common law, unwritten conventions, EU law and authoritative texts, that it is much harder for the public to understand.

However... the introduction of the Cabinet Manual in 2011, and Human Rights Act (1998) has helped.

The Cabinet Manual has unofficially codified many of the most important rules and conventions that the government operates by, and, while it has not been approved by Parliament and does not have clear legal standing, it is the most official resource produced. It was particularly useful when the media was speculating over the outcome of a hung Parliament in the build-up to the 2010 general election. Similarly, the Human Rights Act (1998) has given UK citizens a clear and concise list of rights, which can be defended in UK courts. However, these rights are not fundamental law, and the UK Supreme Court cannot strike down any laws that undermine them.

Yes - We are overly reliant on unwritten conventions that are not legally enforceable, and few understand.

The Government argued that the House of Lords had broken multiple unwritten conventions, including the Salisbury Convention and the Commons' 'financial privilege', when the House voted to block its tax credit reforms in 2015. Many in the Lords, however, took an entirely different view, leading to a brief constitutional crisis in which, ultimately, the Government backed down. As the 2015 Strathclyde Report argues, the problem with relying upon unwritten conventions, rather than a legally enforceable codified constitution, is that "Parliament itself sometimes forgets why particular conventions exist or the implications of casting them aside." While many unwritten conventions have been observed and followed for centuries, they are not legally enforceable. It is arguably unacceptable that matters as important as the role of the monarchy, the use of ancient prerogative powers, and the circumstances in which the UK enters into armed conflict, are left to unwritten conventions that could ultimately be broken. In recent years there has been a developing convention that the prime minister seek Parliament's approval before ordering military action overseas. Yet, in 2015, David Cameron ordered drone strikes in Syria without first consulting Parliament.

However...conventions are not often broken, offer a degree of flexibility, and are arguably inevitable.

The strength of many conventions in the UK is evident by how rarely they are broken – they often stand the test of time and are respected and upheld. It is not necessarily the case that a codified constitution would be more reliable, or that it would prevent conventions from developing in the first place. The US constitution, whilst codified, does not cover absolutely every eventuality. As such, many conventions have developed, some of which are so significant that many Americans believe that they are in the constitution. For example, the Constitution does not mention the US Cabinet. The fact that presidents meet the heads of the 15 executive departments is governed entirely by convention.

Yes – A codified constitution is needed to establish a proper separation of powers.

The US Constitution establishes a clear separation of powers. Any members of the executive branch cannot also be members of the legislative branch, meaning the President can propose bills, but is unable to vote in Congress. Both Houses of Congress must agree on bills for them to become law, and the Supreme Court can strike down laws that conflict with fundamental constitutional laws. In contrast, our executive and legislative branches are fused, with the prime minister and other government ministers able to sit and vote in the House of Commons. The House of Lords can only delay bills, and has even more limited power over 'money bills'. The Supreme Court cannot strike down laws due to Parliamentary sovereignty and our lack of fundamental laws. A new codified constitution could more clearly separate power between the three branches of government, creating new, stronger, checks and balances.

However... a stronger separation of powers could lead to gridlock and judicial activism.

The US has a much clearer separation of powers, but this can soon lead to unproductive gridlock when the president and Congress, or the two houses of Congress, cannot reach an agreement. Any attempt to weaken the government's influence in the House of Commons, or to strengthen the House of Lords, could make it much harder for elected governments to carry out their manifesto. A codified constitution would also politicise the judiciary, which would need to interpret the language of the static, codified constitution, and determine whether laws are constitutional. This could lead to accusations of judicial activism, where unelected judges are accused of using questionable interpretations of the constitution to promote their own political agenda. As many of the US Supreme Court's decisions have proven to be extremely divisive, it may be better for our democratically elected politicians to lead in policy making.

No – The flexibility of our uncodified constitution is an important asset.

The US codified constitution has only been amended 27 times since 1787, and ten of these amendments were made in 1791, to include the Bill of Rights. In contrast, the UK constitution has evolved throughout history, and, due to Parliamentary sovereignty, continues to be regularly amended, to meet the changing expectations of citizens. Since 1997 there have been a wide range of significant constitutional reforms made in response to public pressure, including the devolution of power to Scotland, Wales and Northern Ireland, and the passage of the Human Rights Act (1998). Our uncodified constitution also gives Parliament the flexibility to respond to crises, without being limited by higher constitutional laws. In America, the constitutional right to own weapons has made it difficult for Congress to respond to an increasing number of mass shootings. In contrast, Parliament reacted to the 1996 Dunblane School shooting by swiftly banning the majority of handguns in England, Scotland and Wales, as supported by a majority of the public. As society continues to change at a rapid pace, a codified constitution could soon become out of date.

However... this flexibility arguably allows Parliament to make significant constitutional reforms too easily.

The US Constitution is intentionally difficult to amend, requiring a two-thirds vote in both Houses of Congress, and three-quarters of States to approve. The Founding Fathers of the US wanted to ensure that amendments would receive intensive scrutiny and would not undermine the Constitution's fundamental principles. They wanted to entrench particular ideas and principles that many Americans consider to be as relevant today as they were back in the 18th Century. In contrast, the UK Parliament can amend the constitution by simply passing a bill. An unwritten convention has begun to develop where referendums are held to approve significant constitutional reforms. However, as a convention, there is no guarantee that this additional step will always be taken. Eurosceptics might argue that reforms as significant the 2009 Lisbon Treaty should face a much more rigorous approval process than other bills.

No - The Human Rights Act (1998) has already strengthened our rights.

The Human Rights Act (1998) allows the Supreme Court to issue a "declaration of incompatibility" when laws undermine human rights. Parliamentary sovereignty means that it is then up to Parliament to decide how to respond. However, past experience has shown that, politically, it is not easy to ignore these declarations, and Parliament has tended to swiftly approve whatever changes are necessary to make the law compatible. Therefore, while the UK lacks fundamental laws, the courts are able to use the list of rights contained in the ECHR to challenge legislation. Similarly, just as US legislators must ensure that bills comply with the US Constitution, UK Ministers must submit a 'statement of compatibility', explaining how their bill is compatible the ECHR. Although these statements are not legally binding, it still suggests that Parliament is *behaving* as if the HRA is fundamental law, even if legally it is the same as any other.

However... these rights are not entrenched, and could soon be changed Parliament.

In the US, the Bill of Rights lists the rights belonging to the people and the Supreme Court can strike down laws that undermine them. But, in the UK, our Supreme Court cannot strike down laws that are 'unconstitutional' because we lack a codified constitution and Parliament is sovereign, able to pass or repeal any law. Some critics argue that this makes it hard for the Supreme Court to uphold our rights. Judges can issue declarations of incompatibility, but it is then up to Parliament to decide how to respond. Equally, campaigns to 'save' the Human Rights Act (1998) are a reminder that while the law usefully codifies many of our rights, it does not entrench them. Some campaigners argue that whilst the UK has an uncodified constitution, a majority government can amend our rights all too easily.

No – Our constitution has yet to provoke a national crisis; it is an unnecessary risk to abandon it now.

Most of the codified constitutions that exist in other nations were written at a time of revolution, national crisis, or the granting of independence. None of these circumstances currently exist in the UK, and, as a result, we would be choosing to abandon a constitution that has served us well for centuries at a time of relative calm and prosperity. When our main political parties cannot even agree on how to reform the House of Lords, what chance is there that the officials drafting the new constitution would be able to swiftly and effectively agree on issues as contentious as the role of the monarchy, human rights, or the EU? Given the sheer amount of time and resources that would be required to write and debate a new constitution, which would then require lengthy consultations and likely a referendum, would our time would be better spent focussing on other pressing issues, like the economy, and threats to national security?

However... the rate of recent constitutional reforms has arguably increased the need for a new constitution.

While the UK is not on the verge of revolution, it is arguable that recent constitutional reforms, such as devolution, our membership of the EU, and the Human Rights Act, have fundamentally undermined core principles of the UK constitution (Parliamentary sovereignty and the unitary state). It is arguably time to draw up a new, clear codified constitution that can make sense of these incomplete reforms, and their unintended consequences – like, for example, the West-Lothian Question.