

## **Should the United Kingdom have a written constitution?**

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### **Abstract**

A Constitution represents an indispensable facet of the organizational structure of a sovereign entity, encapsulating the foundational tenets and regulations that underpin its existence. A comparative analysis of the constitutional frameworks of the United Kingdom (UK) and Sri Lanka reveals a conspicuous distinction: Sri Lanka operates within the parameters of a Codified Constitution, while the UK lacks a Codified Constitution and instead relies on an amalgamation of statutory enactments, judicially established precedents, and regulatory provisions, constituting an Uncodified Constitution. This legal framework within the UK has elicited considerable discourse among scholars and entities advocating for the codification of the British Constitution. Proponents assert that codification would redress issues pertaining to the equilibrium of executive powers, enhance stability, and imbue clarity, thereby establishing a more perspicuous and unequivocal framework governing the foundational principles of the state. Conversely, detractors argue against codification, contending that it may foster conservatism and anti-rationalism within the Constitution, positing it as a potentially disruptive undertaking. The confluence of these perspectives has been further accentuated by pivotal events such as the 2016 EU referendum, subsequent EU withdrawal, and associated reforms. This article undertakes a meticulous examination and deconstruction of the ongoing discourse surrounding the potential codification of the UK Constitution.

**Keywords:** British Constitution; Codified Constitution; Uncodified Constitution

### **Introduction**

The term "Constitution" conventionally denotes a set of legal and political principles designed to govern the operations of a government, delineate the mechanisms by which a nation functions,

and establish the interconnection between the state and its populace.<sup>1</sup> The House of Lords Select Committee on the Constitution explained the term "Constitution" as "the set of laws, rules and

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<sup>1</sup> Beatson, J. "Reforming an unwritten Constitution". *Law Quarterly Review*, (2010). 48: 1-17.

practices that create the basic institutions of the state and its component and related parts and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.”<sup>2</sup> In other words, a Constitution simultaneously establishes, authorizes, and limits the bodies that govern the social order. The UK is widely known for its Uncodified Constitution, which has been subjected to ample scrutiny over the years. Some academics question whether changes need to be made to the current approach to the Constitutional framework within UK and whether it should be codified.<sup>3</sup> This study endeavours to investigate the feasibility of codification and engage in a comprehensive analysis of this matter. By doing so, it aims to offer readers an intricate perspective and a profound understanding of these intricacies.

## Materials and Methods

The objective of this research is to systematically examine and analyze the prevailing discourse concerning the potential codification of the United Kingdom (UK) constitution, with a specific focus on elucidating the author's position on this matter. The overarching hypothesis driving this investigation posits that, while the uncodified nature of the UK Constitution may appear satisfactory on a superficial level, a more in-depth consideration suggests that further

codification may be deemed necessary.<sup>4</sup> This research endeavor aims to provide the reader with a comprehensive and nuanced understanding of the existing framework of the United Kingdom (UK) Constitution.

This study adopts a qualitative research methodology, leveraging primary legal sources rooted in the legislative domain of the United Kingdom (UK). Primary legal sources encompass the statutory instruments within the UK jurisdiction. Furthermore, secondary legal sources employed in this investigation encompass scholarly journals and research accessible through online platforms, notably Westlaw, Lexis, and Google Scholar, serving as valuable repositories for legal information and data collection tools.

## The Uncodified Constitution

Unlike most nations like Sri Lanka who have Codified the laws of the Constitution in to written document, the UK lacks a sole legal document outlining the rules contained within the Constitution. However, the fact the laws are unwritten does not insinuate that the UK lacks a Constitution, but rather, as academics refer to it, the UK has an “Uncodified” Constitution. As Ivor Jennings claimed, “If a Constitution means a written document, then obviously Great Britain has no Constitution...But the document itself merely sets out rules...The phrase ‘British Constitution’ is used to describe those rules.”<sup>5</sup>

<sup>2</sup>House of Lords, “Select Committee on Constitution First Report”, (July 2001), <<https://publications.parliament.uk/pa/ld200102/ldselect/ldconst/11/1106.htm>> [accessed date 03/29/2022]

<sup>3</sup>AC Grayling, ‘Why the UK Needs a Written Constitution’ in DJ Galligan (ed), *Constitution in Crisis: The New Putney Debates* (IB Tauris 2017)

<sup>4</sup> Caulfield, M.. "Constitutional Conventions in the United Kingdom: Should They Be Codified." (Manchester Rev. L. Crime & Ethics, 2012) 1, p.42; GEÇER, R A A E. "Should The United Kingdom Adopt A Codified Constitution?." (Ver Tabanlarında Taranmaktadır, 2016)p 309. .

<sup>5</sup> Jennings I, “The Law and the Constitution”, (1959)

Vernon Bogdanor expanded that "the essence of the British Constitution is ... better expressed in the statement that it is a historic Constitution whose dominating characteristic is the sovereignty of parliament, than in the statement that Britain has an unwritten Constitution", highlighting the flexible nature of the British Constitution, allowing the parliament to modify and adjust provisions easily.<sup>6</sup> The House of Lords Select Committee on the Constitution 2002 also rationalized that the British Constitution is not 'unwritten but rather, it is uncodified.' To put in plain words, the laws of the Constitution have been composed but have not been assorted into a systematic code. Thus according to Jennings and Bogdanor conceptual clarity and minimize any potential co it is pertinent to explicate the usage of the term "uncodified" as opposed to the more commonly employed term "unwritten" when characterizing the UK constitution. By providing a precise definition of key terms at the outset, this research endeavor seeks to establish a firm terminological foundation, thereby facilitating subsequent discourse. It is essential to emphasize that, within the domain of constitutional law, "uncodified" and "unwritten" carry distinct connotations. While "unwritten" signifies a complete absence of written constitutional provisions, "uncodified" signifies a constitutional framework that lacks a singular, comprehensive, and formally enacted document. Consequently, the deliberate choice to employ the term

"uncodified" instead of "unwritten" serves to accurately convey the nuanced nature of the UK constitution's present state.

The academic Blick suggested that this uncodified nature of the Constitution could be a result of the lack of a defining historical event within Britain such as a revolution or gaining independence from the rule of another country, initiating Britain to reform the Constitution to the degree of codifying it into a single document.<sup>7</sup>

### Sources of British Constitutional Law

The British Constitution is an accumulation of statutory law, common law, royal prerogative, work of authority, legislation of the European Union and conventions. In addition the British Constitution is also built upon the historical traditions, the culture, customs, political practices and historic documents such as the Magna Carta. The progression of the British Constitution dates all the way back to 1215 with Magna Carta being the first official documentary evidence of establishment of liberties and the democracy of the society. The British Constitution has been constantly evolving<sup>8</sup> due to its Uncodified and un-cemented nature, in theory making it very flexible and easy for the parliament to revise and amend any of its provisions. Professor Ringen called the British constitution a "complex and evolving living organism<sup>9</sup>."

<sup>6</sup> Bogdanor, V., "The New British Constitution" (2009).

<sup>7</sup> Blick, A. "Codifying-or not codifying- the UK Constitution: A literal Review. Centre for Political and Constitutional Studies, Kings College London." (2011). 4-32.

<sup>8</sup> Bevir, M. and Rhodes, R.A., "Searching for civil society: changing patterns of governance in Britain." (Public Administration, 2003) 81(1), pp.41-62.

<sup>9</sup> Blick, A. Codifying-or not codifying- the UK constitution: A literal Review. Centre for Political and Constitutional Studies, Kings College London. (2011) 4-32.

Conventions are also a significant non-legal part of the UK Constitution. Although courts cannot sanction the provisions of a convention due to its non-legal nature, conventions are widely respected and recognized within the political domain. Dicey defined conventions as: “understandings, habits or practices which, though they may regulate the ... conduct of the several members of the sovereign power... are not in reality laws at all since they are not enforced by the courts.”<sup>10</sup> The doctrine of parliamentary supremacy, together with the rule of law and conventions, is the foundation of the UK’s unwritten constitution.

### **Constitutional Text versus the Constitutional Order**

Constitutional text refers to the written bylaws and quasi-legal instruments, most often referring to the official charter of a nation. The declaration of independence or a republic proclamation can also be considered as Constitutional text. Constitutional text is the written text which is the nominal Constitution. Whereas, Constitutional order is much broader than just the Constitutional text. It concerns a wider range of features such as laws, customs, conventions, theories, norms, traditions, administrative structures, and interpretations. The academic Yash Ghai explained that the Constitutional order represents a “fundamental commitment to the norms and procedures of the

Constitution. It has more to do with behaviour, practice, and internalisation of norms than Constitutional text.”<sup>11</sup> The Constitutional order encompasses all regulations or theories that aim to achieve the function of limiting the power of the government, detail the outlines of authority and assemble government institutions.

The Constitutional text by itself is wholly inadequate to describe the Constitutional law of a nation as it is only one element of the Constitutional framework. The Constitutional order is necessary for an individual to understand the Constitution of UK. However, this also has resulted in nearly 80% of UK citizens having very trivial knowledge about the UK Constitution as the Constitutional text contains insufficient amount of information.<sup>12</sup> This less accessible and unintelligible nature of the Uncodified Constitution happens to be one of its shortcomings compared to a Codified Constitution.

### **Arguments For and Against the Codification of the UK Constitution**

With the acts such as the Human Rights Act,<sup>13</sup> the Constitutional Reform Act,<sup>14</sup> European Union (herein referred to as EU) referendum in 2016, House of Lords Reform Act,<sup>15</sup> House of Lords (Expulsion and Suspension) Act,<sup>16</sup> EU (Withdrawal

<sup>10</sup> Barbwe N.W. “Law and Constitutional Conventions” (2009).

<sup>11</sup> Ghai, Yash, ‘Chimera of Constitutionalism: State, economy and society in Africa’, lecture, 2010, available at <  
[https://www.up.ac.za/media/shared/Legacy/sitefiles/file/47/15338/chimera\\_of\\_Constitutionalism\\_ygl.pdf](https://www.up.ac.za/media/shared/Legacy/sitefiles/file/47/15338/chimera_of_Constitutionalism_ygl.pdf)> [accessed date 04/10/2022]

<sup>12</sup> Ipsos Mori. “Audit of Political Engagement 5: The 2008 Report with a special focus on the Constitution”. London: Hansard Society. (2008).

<sup>13</sup> Human Rights Act of 1998

<sup>14</sup> Constitutional Reform Act of 2005

<sup>15</sup> House of Lords Reform Acts 2014

<sup>16</sup> House of Lords (Expulsion and Suspension) Act 2015

Act<sup>17</sup> and EU (Future Relationship) Act<sup>18</sup> the discussion on whether Britain should adopt a written Constitution has been a significant topic of conversation<sup>19</sup>. The process of Brexit has caused a crisis<sup>20</sup> in relation to the unwritten constitution and left it in a molten condition as stated Andrew Blick and Peter Hennessy.<sup>21</sup> Balance of the power of the executive and the legislature, stability, and clarity have been some of the pinpointed reasons for individuals to consider recommending the codification of the British Constitution.<sup>22</sup>

Academics debate that Britain has a broken and outdated First-Past-The-Post electoral system which only worked when Britain had only two wide-ranging social classes (working class and middle class).<sup>23</sup> However, currently this system doesn't work as there are more than 2 social classes due concepts like immigration, de-industrialization and occupational diversity. This dysfunctional election system deteriorates the capability of the parliament to act on and consider diverse public opinion, diminishing accountability of Parliament to the people. Thus, codification is suggested for electoral reform, such as replacing the first-past-the-

post voting system with proportional representation.<sup>24</sup>

Two of the central doctrines of the Uncodified British Constitution are parliamentary supremacy (was established by the Glorious Revolution in 1688) and the separation of powers, which clarifies that the Parliament would be highest source of law in the UK and act as a check and balance for the Government.<sup>25</sup> Nonetheless, in reality, there is a lack of complete separation of powers between the Executive (government) and Legislature (House of Commons) as majority of ministers are members of the ruling party.<sup>26</sup> A key feature of the Westminster model makes the executive (the majority of ministers who members of the elected party) also a part of the legislature, resulting in a fusion between executive and legislature, which grants the government excessive power. However, providing the government such power, weakens the liability of Parliament to the people, as the current dysfunctional election system has weakened the ability of the parliament to consider diverse public outlooks and undertake action. This can lead to the abuse of power. Therefore, individuals argue that codifying the British Constitution and

<sup>17</sup> European Union (Withdrawal) Act 2018

<sup>18</sup> European Union (Future Relationship) Act 2020

<sup>19</sup> McHarg, A. "Reforming the United Kingdom Constitution: Law". *Convention, Soft Law. The Modern Law Review* (2008). 71/6: 853-877; Oliver, D. "Written Constitutions: Principles and Problems". *Parliamentary Affairs* (1992) 42/2: 135-152.

<sup>20</sup> AC Grayling, 'Why the UK Needs a Written Constitution' in DJ Galligan (ed), *Constitution in Crisis: The New Putney Debates* (IB Tauris 2017).

<sup>21</sup> Blick A and Hennessy P, 'Brexit and the Melting of the British Constitution' (The Constitution Society 2019).

<sup>22</sup> Beatson, J. *Reforming an unwritten Constitution. Law Quarterly Review* (2010). 48: 1-17.

<sup>23</sup> Gavin B, "Why the UK Needs a Written Constitution" (2017) < <https://citizen-network.org/library/why-uk-needs-a-written-constitution.html> > [accessed date 04/10/2022]

<sup>24</sup> Proportional Representation ([www.electoral-reform.org.uk](http://www.electoral-reform.org.uk)) < <https://www.electoral-reform.org.uk/voting-systems/what-are-voting-systems/proportional-representation/> > [accessed 09/01/2022]

<sup>25</sup> Dicey, A. V. "The Law of the Constitution", London: Macmillan and Co Ltd (1959)..

<sup>26</sup> Gavin B, "Why the UK Needs a Written Constitution" (2017) < <https://citizen-network.org/library/why-uk-needs-a-written-constitution.html> > [accessed date 04/10/2022]

controlling the power of the executive would restore the balance,<sup>27</sup> preventing incidents like the Great Repeal Bill which proposed to permit ministers to re-write provisions of EU law once these are translated to UK law, without reference to Parliament.<sup>28</sup>

The British philosopher Anthony Clifford Grayling explained that “the government is subject to it, whereas with an unwritten constitution it is the constitution which is subject to the government; the government can choose to alter it or interpret it in ways that suits itself. A written constitution is therefore an important safeguard against abuses by government of their powers, not least because it would entrench civil liberties and the due processes of law.”<sup>29</sup>

<sup>27</sup> Beatson, J. “Reforming an unwritten Constitution”. *Law Quarterly Review* (2010). 48: 1-17.

<sup>28</sup> Murkens, J. E. K. "The Great 'Repeal' Act will leave Parliament sidelined and disempowered." *LSE Brexit* (2016); Footnote: The Glorious Revolution of 1688 refers to the events in England when William of Orange, a Dutch prince, and his wife Mary, the daughter of King James II, were invited to assume the English throne. The revolution marked a significant turning point in British history, as it established the supremacy of Parliament over the monarchy and solidified key constitutional principles.

Regarding the Great Repeal Bill, it is important to provide some context. After the referendum in 2016, in which the majority of UK voters supported leaving the European Union (EU), the British government initiated the process of withdrawing from the EU, commonly known as Brexit. As part of this process, the UK needed to convert EU law into domestic law to ensure a smooth transition. The Great Repeal Bill, later known as the European Union (Withdrawal) Act 2018, was introduced to facilitate this conversion.

Critics of the Great Repeal Bill expressed concerns about the potential concentration of power in the executive branch during the process of converting EU law into UK law. They argued that granting ministers the authority to make changes to EU laws without parliamentary scrutiny would undermine democratic accountability and the balance of power between the executive and legislative branches. The

Nevertheless, one could argue codifying the constitution not a proper safeguard against those trying to strive for political domination, a prime example is the abuse of power within ill governed countries like Sri Lanka who have codified constitutions. One could also rebut the argument on needing to codify the constitution to maintain checks and balances by reasoning that Constitutional conventions regulate Constitutional conduct and the behavior of public officers, thus acting as one of the checks and balances for the power of the executives.<sup>30</sup> The general public is quite sensitive to the breach of Constitutional conventions and is likely to not tolerate it at any cost.<sup>31</sup> This nontolerant nature of the public was displayed during the rejection of the House of Lords to pass the budget in

proposal sparked debates about the appropriate level of parliamentary involvement and scrutiny in the Brexit process.

Some proponents of constitutional codification argue that a written constitution could help prevent such incidents by clearly defining the powers of the executive and providing stronger checks and balances. The argument is that codifying the constitution would create a more robust legal framework that ensures greater parliamentary oversight and control over the executive's actions, thus mitigating the potential for unilateral decision-making.

It's worth noting that discussions on constitutional codification and the balance of powers in the UK remain ongoing, and different perspectives exist on the merits and drawbacks of such reforms.

<sup>29</sup> ‘Why The UK Needs A Written Constitution’ (www.politics.co.uk, 2018) < <https://www.politics.co.uk/blog/2017/10/16/why-the-uk-needs-a-written-constitution/> > [accessed 09/01/2022]

<sup>30</sup> Bradley, A. W. and Ewing, K. D. “Constitutional and Administrative Law”. Essex: Pearson. (2011). (ed.)

<sup>31</sup> Brunclík M. "Three-Fold Gap: Researching Constitutional Conventions in the Czech Republic: A Review Article." *Politologicky Casopis*, (2021) 28(1); Chand, B.. “Conventions of the Constitution”. *Journal of Comparative Legislation and International Law* (1938) 20/4: 222-229.

1909. There were heavy political consequences as a result of the House of Lords refusing to pass Finance Bill in 1909 as it breached a convention.<sup>32</sup> causing a constitutional crisis between the years of 1909–11,<sup>33</sup> resulting in the Parliament Act of 1911 finally incorporating the convention into primary legislation. “Parliament may pass many laws, which many people do not want, but it never passes any laws, which any substantial section of the population violently dislikes.”<sup>34</sup> Even though conventions are not legally binding, in practice they seem to be more efficient than the courts, as the public opinion would probably result in severe political repercussions and executive would likely face political difficulties.

The shortcomings of the UK’s unwritten common law constitution was further highlighted in the Supreme Court’s 2017 *Miller* case. In this case, it was argued that that an Act of s would be necessary before the Government could invoke Article

50The notion of Parliamentary Supremacy allows Acts of Parliament to contradict international law and repeal constitutional statutes, the Supreme Court has the power to subject such Acts to judicial review, however, they do not have the power to strike down Acts of Parliament, unless if it ever was absolute.<sup>35</sup> If a written constitution is adopted it would be incompatible with the concept of absolute legislative authority. Some academics such as Martin Loughlin and Stephen Tierney call the principle of Parliamentary Supremacy an inadequate and primitive concept and state that it must be “jettisoned.”<sup>36</sup> Thus, it is possible for a written constitution to coexist with the concept of legislative authority, indicating that the two are not mutually exclusive.<sup>37</sup>

Moreover, codifying the Constitution would definitely make it more stable, however, it will be deprived of its most noteworthy character: its unrivaled

<sup>32</sup> Leyland, P. “The Constitution of the United Kingdom”. Portland: Hart Publishing. (2012). (ed.)

<sup>33</sup> Powell, D. “The Constitutional Crisis, 1909–1,” (In *The Edwardian Crisis*, Palgrave, London, 1996) pp. 39-67

<sup>34</sup> Ewing, K.D. “The Law and the Constitution: Manifesto of the Progressive Party”. *The Modern Law Review* (2004). 67/5: 734-752.

<sup>35</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2005] 1 AC 262 [104]; [107] (Lord Hope), [102] (Lord Steyn), [159] (Lady Hale); *Axa General Insurance Ltd and Others v The Lord Advocate* [2011] UKSC 46, [2012] AC 868.

<sup>36</sup> Martin Loughlin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81 *MLR* 986, 1015–16.

<sup>37</sup> The codification of the constitution in the United Kingdom would necessitate a significant transformation in its existing legal and political culture, as it would pose a challenge to the fundamental principle of Parliamentary Supremacy, wherein Acts of Parliament currently hold the highest authority in law. A written constitution would replace Acts of Parliament as the ultimate source of law, while still recognizing the principle

of Parliamentary Supremacy within the overarching framework of the constitution and through judicial review. Presently, the principle of Parliamentary Supremacy permits Acts of Parliament to contravene international law and repeal constitutional statutes. However, the Supreme Court possesses the power to subject such Acts to judicial review, although it lacks the authority to invalidate Acts of Parliament unless parliamentary authority were to become absolute. The adoption of a written constitution would be incompatible with the notion of absolute legislative authority. Some scholars, including Martin Loughlin and Stephen Tierney, critique the principle of Parliamentary Supremacy as inadequate and archaic, suggesting that it should be discarded. However, it is not entirely clear why they propose its abandonment. In support of this argument, they point to examples such as the 1972 Constitution of Sri Lanka, which vested absolute legislative authority in the National State Assembly despite being a written constitution. Thus, it is possible for a written constitution to coexist with the concept of legislative authority, indicating that the two are not mutually exclusive.



flexibility and its political nature.<sup>38</sup> This would rob the Constitution of its adaptability, making it difficult and complicated<sup>39</sup> to keep up with the constantly changing political views of Britain.<sup>40</sup> One could contend that the real issue is the lack of certainty about the amendment formula of the written constitution and how the law is going to translate to the future as it is amended as previously seen in 1982 Canadian Constitution.<sup>41</sup> Nevertheless, it can be argued that the codified constitutions of countries like Sri Lanka have been subjected to many amendments over the years displaying that a codified constitution is not rigid and is quite adaptable to modification.

Nonetheless, it is debatable that it is easier to amend the uncodified constitution than in countries with written constitutions with elaborate amendment procedures. Some scholars argue that a codifying the constitution would make it conservative<sup>42</sup> and anti-rationalist.<sup>43</sup> When examining the proposition that codification of a constitution engenders conservatism and anti-rationalism, it is crucial to grasp the contextual nuances and underlying principles associated with these concepts. The term "conservative" commonly denotes a disposition to preserve established traditions, institutions, and norms. In the realm of codified constitutions, this implies that the act of

codification solidifies and fortifies the existing state of affairs, impeding the ability to adapt to evolving societal needs and circumstances. Conversely, an uncodified constitution's strength lies in its inherent flexibility and adaptability. By permitting the gradual evolution of constitutional principles in response to changing social values and emerging challenges, unwritten constitutions can be supplemented by conventions, customs, and judicial interpretations, which are more amenable to societal requirements. Critics contend that codification restricts constitutional development by effectively freezing it in time, thus impeding progress and inhibiting the capacity for change. On the other hand, the term "anti-rationalist" implies a rejection or skepticism towards rationalism, which emphasizes the use of reason, logic, and objective analysis as fundamental tools for comprehending and constructing knowledge. Within the context of a codified constitution, anti-rationalism posits that codification may hinder the critical assessment and revision of constitutional provisions based on rational analysis. Opponents of codification argue that a written constitution can establish a rigid framework that hampers adaptability to unforeseen circumstances or evolving societal understandings. They contend that an unwritten constitution, reliant on evolving norms and judicial interpretation, offers a more flexible and rational approach to constitutional development. This

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<sup>38</sup> Beatson, J. Reforming an unwritten constitution. *Law Quarterly Review* (2010) 48: 1-17.

<sup>39</sup> Allen, M. and Thompson, B. "Cases and Materials on Constitutional and Administrative Law". Oxford: Oxford University Press.

<sup>40</sup> Bogdanor, V, Khaitan, T, and Vogenauer, S. (2007). "Should Britain Have a Written Constitution?" *The Political Quarterly* (2011) (ed.) 78/4: 499-517.

<sup>41</sup> The amendment process introduced during the 1982 constitutional reform is no longer approved of the Parliament of the United Kingdom.

<sup>42</sup>Burke, E., "Reflections on the Revolution in France" (first published 1790, Dent 1910).

<sup>43</sup>Oakeshott, M., "Rationalism in Politics" (Methuen 1962).



perspective suggests that codification may engender a fixation on the original intent of the constitution's framers, rendering it more challenging to apply rational analysis and reinterpret constitutional provisions as society progresses. It is essential to note that these arguments are subject to varying interpretations among scholars, and consensus regarding the advantages and disadvantages of codifying a constitution remains elusive. The codification versus uncodified constitution debate involves a careful weighing of the benefits of clarity and certainty against the flexibility and adaptability afforded by an unwritten constitution. Ultimately, the decision to codify or maintain an uncodified constitution depends on the specific needs, traditions, and values of a given society.

This flexibility can also be seen as a benefit as it has enabled the removal of hereditary peers from the House of Lords, introduction of the Human Rights Act 1998, devolution to Scotland, Wales, and Northern Ireland, via the establishment of the Scottish Parliament and Welsh Assembly in 1999, the Northern Ireland Assembly in 1998. The creation of the Supreme Court and Freedom of Information Act (2000) are also instances where this adaptable nature of the Constitution was highlighted. In fact one could argue that this flexible and adaptable nature of the Uncodified Constitution promotes democracy as the frequent use of referendums and electoral reform increases political participation.

An argument often brought up in support of codifying the Constitution is that it would offer a clear-cut, straightforward and user-friendly arrangement of the fundamental laws and principles. However, academics like Blick have argued that it would be nearly impossible to determine the accurately detailed and precise content of the Constitution as there are many customs, historic documents, common law, and royal prerogatives that are currently a part of the UK Constitution.<sup>44</sup> Conversely this fact could also be perceived as a shortcoming of the Uncodified Constitution as some aspects of it is unclear and more open to interpretation by the Judiciary, causing uncertainty and lack of clarity. Most general citizens are unaware of the UK's governing arrangements and are in need for political education and legal clarity. A survey conducted by YouGov in 2018 disclosed that 65% of respondents wanted "a written constitution providing clear legal rules within which government ministers and civil servants are forced to operate."<sup>45</sup> Likewise, a survey conducted ComRes in 2019 revealed that 72% of the respondents were in support having a written Constitution to provide clear legal rules for how Government Ministers, Parliament and civil servants are required to act.<sup>46</sup> Therefore one could argue in favour of codification of the UK constitution by declaring that it would compile all of the rules into a set of document, consequently making the laws easy to understand by

<sup>44</sup> Blick, A. "Codifying-or not codifying- the UK Constitution: A literal Review". Centre for Political and Constitutional Studies, Kings College London. (2011). 4-32.

<sup>45</sup> YouGov / Unlock Democracy Survey Results | cloudfront.net < [https://d25d2506sfb94s.cloudfront.net/cumulus\\_upl](https://d25d2506sfb94s.cloudfront.net/cumulus_upl)

[oads/document/suhgvnbdg3/UnlockDemocracy\\_18\\_1116\\_Constitution\\_w.pdf](https://comresglobal.com/polls/daily-express-voting-intention-and-brexite-poll-january-2019/) > [accessed 09/01/2022]

<sup>46</sup> Daily Express Voting Intention and Brexit Poll January 2019 (comresglobal.com, 2019) < <https://comresglobal.com/polls/daily-express-voting-intention-and-brexite-poll-january-2019/> > [accessed 09/01/2022]

clarifying the laws,<sup>47</sup> protecting it with entrenchments and it clearing up the confusion of what is included in the constitution.<sup>48</sup> This would allow the authorities, institutions and the general public to comprehend and easily enforce them.

There have been several attempts to codify the Constitution such as Tony Benn's Constitution which was ordered by the House of Commons in 1991 and the IPPR Constitution,<sup>49</sup> nevertheless, all these attempts have failed. Many academics such as Roger Scruton<sup>50</sup> regard the notion of a codified constitution as "unnecessary, undesirable and un-British."<sup>51</sup> The constitutional reforms since 1997 (House of Lords Reform, Electoral Reform, Devolution & Regional Government, a Bill of Rights (Human Rights Act), a Freedom

of Information Act, more use of referendums, and a Constitutional Reform Act) display an absence of confidence in the traditional constitution; nevertheless, it also illustrated the lack of political will for a new constitution<sup>52</sup>. Even so, over the years, many scholars have also argued for the codification of the constitution and have produced several draft constitutions.<sup>53</sup>

Some of the prominent draft constitutions to date are the Macdonald Constitution, published with the Liberal Democrats federal green paper, the Tony Benn's Constitution, ordered by the House of Commons in 1991 and the IPPR constitution. Most of these draft constitutions actually maintain the doctrine of parliamentary supremacy and the political system and focus on presenting a less confusing and more comprehensible

<sup>47</sup> Blackburn, R., 'Enacting a Written Constitution for the United Kingdom' (2015) 36 Stat LR 1

<sup>48</sup> Regarding the concept of entrenchments, it refers to provisions within the constitution that are protected from ordinary amendment processes and require a special majority or other mechanisms to be modified. The specific manner in which entrenched provisions would be laid down in a codified UK constitution would depend on the drafting and deliberative processes involved. Possible approaches could include requiring changes to be made by a special majority in parliament or even incorporating referenda for certain amendments, ensuring a higher threshold for modification compared to ordinary legislation. The exact mechanism for entrenchment would be subject to careful consideration and debate during the constitution-drafting process.

The term "entrenchment" refers to the process of safeguarding constitutional provisions from regular amendment procedures. It typically involves requiring a more rigorous process, such as a special majority or referenda, to modify or repeal specific constitutional provisions. The precise method of entrenchment in a codified UK constitution would necessitate thorough deliberation and decision-making.

<sup>49</sup> INSTITUTE FOR PUBLIC POLICY RESEARCH < <https://www.ippr.org/files/images/media/files/publication/2014/01/the-Constitution-of-the-united-kingdom-1991-2014-1420.pdf> > [accessed date 03/30/2022]

<sup>50</sup> Scruton, R., *A Political Philosophy* (Continuum 2006) vii–viii.

<sup>51</sup> "The House of Commons Political and Constitutional Reform Committee, *A New Magna Carta?*" (www.parliament.uk 2014) < <https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/463/46302.htm> > [accessed 08/31/2022]

<sup>52</sup> Bogdanor, V., *The New British Constitution* (Hart Publishing, 2009) ix.

<sup>53</sup> Bentham, J., "Constitutional Code", vol I (F Rosen and JH Burns ed, first published 1830, Clarendon Press 1983); Lord Hailsham, 'Elective Dictatorship', Richard Dumbleby Lecture (BBC 1976); Lord Hailsham, 'The Dilemma of Democracy: Diagnosis and Prescription' (Collins 1978); Ferdinand Mount, 'The British Constitution Now: Recovery or Decline?' (Heinemann 1992) 3; Tony Benn and Andrew Hood, 'Common Sense: New Constitution for Britain' (Hutchinson 1993); IPPR, 'A Written Constitution for the United Kingdom' (Mansell 1991);

take on the structures of government and fundamental rights, diminishing the concerns of scholars who contend that codifying the constitution would be a threat to parliamentary supremacy and cause a shift in the current political framework of UK. The HCPCRC draft constitution clarifies that the Parliament holds that exclusive powers to legislate “without limitation” on all matters, including the Constitution.<sup>54</sup> The Oxford student draft constitution also reflects a similar view.<sup>55</sup> The main elements of the current UK Constitution are left more or less intact.<sup>56</sup> However, LSE’s draft constitution<sup>57</sup> and HCPCRC draft constitution grants courts the power of constitutional review in situations where Acts of Parliament and the constitution contradict each other and empower the courts to make a declaration of non-compliance and unconstitutionality.<sup>58</sup> While the main elements of the current UK Constitution remain largely intact in these draft proposals, the LSE’s draft constitution and the HCPCRC draft constitution introduce the power of constitutional review to the courts. In situations where Acts of Parliament and the constitution contradict each other, these drafts empower the courts to issue declarations of non-compliance and unconstitutionality. The question of whether legislative enactments would be struck down in such instances would depend on the specific provisions and mechanisms outlined in the draft

constitutions. Regarding concluding thoughts on these drafts, it is crucial to acknowledge that the process of constitutional reform is multifaceted and highly debated. The proposed draft constitutions reflect various perspectives and attempt to address the need for clarity, accessibility, and potential judicial review. Whether these drafts represent the way forward depends on numerous factors, including societal consensus, political will, and careful consideration of the implications and consequences of adopting a codified constitution. The significance of engaging in informed public dialogue, scholarly analysis, and democratic deliberation cannot be overstated in determining the future direction of constitutional reform.

## Discussion

Contrary to popular belief, the major part of Britain’s Constitution has already been transcribed on paper in statutory form and most of the other uncodified set of rules and traditions have been incorporated into the Cabinet Manual. The fragments of the British Constitution that continued to stay uncodified are areas of the Constitutional order which are regulated by firmly established conventions. For example, the powers and the relationship between the executive and the legislature are governed by conventions.

<sup>54</sup> THE UK CONSTITUTION - UK Parliament ([www.parliament.uk](http://www.parliament.uk)) < <https://www.parliament.uk/globalassets/documents/commons-committees/political-and-constitutional-reform/The-UK-Constitution.pdf> > [accessed 08/31/2022]

<sup>55</sup> Bogdanor, V., Khaitan, T., & Vogenauer, S., ‘Should Britain Have A Written Constitution?’ *Political Quarterly* (2007) 499.

<sup>56</sup> IPPR, *A Written Constitution for the United Kingdom* (Mansell 1991).

<sup>57</sup> Conor G “The Constitution” < <https://lisedesignunit.com/theconstitution/offline/download.pdf> > [accessed 08/31/2022]

<sup>58</sup> The House of Commons Political and Constitutional Reform Committee, *A New Magna Carta?* (HC 2014–15) 284

It can also be disputed that codifying the British Constitution would strip it off of its most noteworthy quality: its flexible nature which enables it to be reformed to reflect the circumstances of the time period, robbing it off of its adaptable nature. Academics have stated purpose of codification is to conserve constitutional choices that already exist.<sup>59</sup> However, codifying the constitution may force the UK to reach conclusions for issues, that otherwise need not be answered yet, such as whether it should become a monarchy or a republic and whether it should become federal state or unitary state. These issues do not need to be answered right now as the uncodified Constitution shows resemblance to all of these structures due to its vague nature and broad interpretations.

Moreover, the argument about improving the stability, accountability, clarity, and balance of the Constitution through codification might not actually be viable as the entire Constitutional framework of UK would shift, leading to greater legal and political problems. However, the draft constitutions aimed to preserve the current political system and the doctrine of parliamentary supremacy, thus one could argue the key features of the uncodified Constitution are unaffected in theory. Then again, considering the practical realities, codifying the constitution would lead to a period of instability as it would likely be followed by long time of debate and uncertainty about the constitution. The complexities of this undertaking may lead to prolonged periods of uncertainty as competing viewpoints are debated and

consensus is sought. The drafting and adoption of a codified constitution require careful consideration of multiple factors, including the balance of powers, the protection of individual rights, and the establishment of effective mechanisms for governance and judicial review. These deliberations can be time-consuming and may encounter obstacles and disagreements along the way. During this period of transition, the uncertainty surrounding the new constitution and its implications could potentially create instability within the legal and political systems. The practical realities of codification may entail navigating through a transitional phase that can be challenging, as it involves adapting to a new constitutional framework and addressing any unforeseen consequences or ambiguities that may arise. In light of these practical considerations, the potential period of instability and uncertainty should be carefully weighed against the perceived benefits of codifying the constitution. The decision to codify the constitution requires a comprehensive assessment of the potential risks and rewards, taking into account the specific needs, values, and aspirations of the society in question. Moreover, academics like Blick mentioned it would not be possible to determine the precise substance of the Constitution in order to codify it.

As previously discussed, the uncodified nature of the Constitution could be a result of the lack of a defining historical political event within Britain that otherwise would have compelled them to codify the constitution (such as civil war – South

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<sup>59</sup> Murkens, J.E.K., “A written constitution: a case not made.” (*Oxford Journal of Legal Studies*, 2021) 41(4), pp.965-986; Elazar, D., ‘Constitution-Making: The Pre-eminently Political Act’ in KG

Banting and R Simeon (eds), *Redesigning the State: The Politics of Constitutional Change in Industrial Nations* (Macmillan 1985) 233.

Africa, Independence – Sri Lanka). In the absence of such crisis there is a lack of shared political will to build a codified constitution together, and this would be a real threat to the actual process of codification as it might lead to a period of dispute and debate.

Observing the history of the UK, we can conclude that the current political will of the people was certainly not to acquire sovereignty for themselves but rather to confine it within the Monarchy. Great Britain takes great pride in the monarchy. As Head of State, the Monarch assumed constitutional and representational duties which have been developed for over a decade of history. However, a republican government came into existence in the mid-17th century due to a Parliamentary victory in the English Civil War, between Parliamentarians and Royalists led by Charles the 1st. This can be strongly considered as a historical landmark in the UK, such as the revolution in France, independence in Sri Lanka, and the civil war in South Africa. In this political turning point, the citizens of the UK chose to restore the monarchy in 1660. During this period of transition, the uncertainty surrounding the new constitution and its implications could potentially create instability within the legal and political systems. The practical realities of codification may entail navigating through a transitional phase that can be challenging, as it involves adapting to a new constitutional framework and addressing any unforeseen consequences or ambiguities that may arise. In light of these

practical considerations, the potential period of instability and uncertainty should be carefully weighed against the perceived benefits of codifying the constitution. The decision to codify the constitution requires a comprehensive assessment of the potential risks and rewards, taking into account the specific needs, values, and aspirations of the society in question.

The result of this period of unrest, namely identified as the English Civil War (1642–1651) was the interchange of the monarchy with the Commonwealth of England, which was under the control of Oliver Cromwell from 1653 to 1658 and later under his son Richard from 1658 to 1659. Nevertheless, the republic failed three years after the death of Oliver Cromwell, resulting in the Commonwealth losing support which led to the restoration of the monarchy. Currently, the Monarch acts as a focal point of the UK's national identity, unity and tradition. The general public seems to prefer to encapsulate their sovereignty within a constitutional monarchy with explicitly circumscribed powers and take great pride in the current system that they have established as it confers a sense or an ambience of stability and continuity. An Ipsos MORI poll conducted in 2011 with 1,000 British adult respondents revealed that 75% of the public would like Britain to remain a monarchy and 18% were in favour of Britain becoming a republic.<sup>60</sup> A poll conducted 10 years later by YouGov showed similar results, with majority being in favour of monarchy, 61% being in support for the monarchy and 24%

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<sup>60</sup>Mori, I., "Monarchy/Royal Family Trends – Monarchy v Republic 1993–2013". (2013) <https://www.ipsos-mori.com/researchpublications/researcharchive/122>

[/MonarchyRoyal-Family-Trends-Monarchy-v-Republic-19932013.aspx?view=wide](#) [accessed 14/12/2022]

against.<sup>61</sup> A part of me largely also believes this might have arisen from disillusionment with a failed republic previously. It is plausible to consider that this preference for monarchy has emerged, at least in part, from a sense of disillusionment with the failed republican experiment in the past. The tumultuous period of the Commonwealth may have contributed to a collective desire for a more stable and enduring system of governance, which the monarchy has come to represent. The historical context and the collective memory of the failed republic appear to have played a role in shaping the prevailing sentiment in favor of the monarchy among the British public. This sentiment aligns with the perception that the monarchy provides a sense of stability, continuity, and national pride

When looking at the intention of the general public with regards to codification of the constitution, a 2010 poll carried out by the Ministry of Justice disclosed 44 % of the respondents were for codification, 39 % were against it, and 17% responded “don't know”.<sup>62</sup> In 2019, 72% of the respondents wanted a written constitution providing clear legal rules in a ComRes/Daily Express poll.<sup>63</sup> There has been a spike in the amount of individuals who prefer to have a codified constitution, yet there is a significant portion of individuals who are against the codification. As discussed earlier the collective political will is an essential element to determine political stability after codification.

<sup>61</sup> Eir, N., "Young Britons are turning their backs on the monarchy"(2021). <https://yougov.co.uk/topics/politics/articles-reports/2021/05/21/young-britons-are-turning-their-backs-monarchy> [accessed 14/12/2022]

<sup>62</sup> Parliament.uk. “A new Magna Carta? - Political and Constitutional Reform Contents”

## Conclusion

Even though it can be argued that codifying the Constitution would improve stability, accountability, clarity, and balance, the Constitution would lose its adaptable and flexible nature in the process. Besides, the current uncodified Constitution has been successful and effective for eons thus suddenly changing it would cause the whole system to shift causing practical problems. Thus, observing the issues discussed above, even though there are certain weaknesses in the current UK Constitution such as the exercise of prerogative power, further codification of the UK Constitution seems rather uncalled for, as of right now, unless there is a collective political will.

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<sup>63</sup> Murkens, J.E.K. "A written constitution: a case not made." (Oxford Journal of Legal Studies, 2021) 41(4), pp.965-986.



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