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# Brexit and the Uncodified Constitution of the United Kingdom

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# Brexit and the Uncodified Constitution of the United Kingdom

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**Abstract:**

**'The British constitution is under considerable strain. Brexit has drawn attention to the several competing sites of sovereignty within the British constitution and the transformed relationship between the executive and judiciary, fuelling a broader, popular interest in constitutional questions'. This paper will argue that the UK should adopt a codified constitution and it is time to adopt one now due to the momentous events that have occurred in the last few years.**

## Introduction

In this paper, the first section will demonstrate why the UK should adopt a codified constitution now. The second section will elaborate on the key features of the UK constitution, such as parliamentary sovereignty, constitutional statutes, conventions and prerogative powers. The final section will critically analyse the for/against debate over issues such as the protection of rights, clarity and judicial intervention. It will also identify some potential problems that could arise due to the adoption of a codified constitution, such as those with misrecognition of conventions, the method of enactment, and representation in the body of enactment.

Throughout the history of constitutions, one may argue that one of the major reasons for adopting a 'written'(1) constitution is that a country is experiencing momentous events such as a revolution, inva-

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(1) In this paper, I will also use the phrase ‹written› constitution, which refers to a codified constitution as established by Adam Tomkins, Public Law (OUP 2003) 7. He goes on to specify, unnecessarily in my view, that the document be ‹named The Constitution›

sion or constitutional crisis[2]. This can be exemplified by the United States' Constitution of 1787, the French Constitution of 1791 and the German Constitution of 1949, which were adopted as a result of momentous events. Thus, the author, in this paper, will argue that it is the time for the UK to adopt a codified constitution due to the momentous events that have occurred in the last few years. This chain of events commenced when the majority of the UK electorate voted to leave the European Union (EU) in a national referendum on 23 June 2016. This historical moment was viewed, particularly by constitutional scholars, as a crucial event in the constitutional politics of the UK[3]. As a result of this significant event, the UK had to hold two general elections in three years though it had already held an election before the referendum. The referendum raised two controversial cases regarding the Brexit process, known as the Miller's cases, which have been heard by the courts[4]. These events will be discussed in the first section as the main reasons it is important for the UK to adopt a codified constitution now.

However, before proceeding to the first section, it is essential to define what is meant by a constitution. Bradley and Ewing asserted that the term constitution can be defined in two ways: either with a narrow or a wide meaning[5]. In the narrow sense, a constitution is a document with a special legal status that establishes the principal and framework functions of the government organs within the state[6]. Wheare stated that a constitution, in the broader sense, is the complete system of government of a country, including a set of rules that regulate and establish the government[7]. Thus, one may conclude that a constitution is 'simply a set of rules and principles that govern the organisation and structure of the state which the governing institutions must, or should, adhere to'[8].

(2) Mark Ryan and Steve Foster, Unlocking Constitutional and Administrative Law (Routledge 2019) 28

(3) Michael Gordon, ‹Brexit: A Challenge for the UK constitution, of the UK constitution?› 12 European Constitutional Law Review 443

(4) R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Miller I) and R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland [2019] EWHC 2381 (Miller II)

(5) Anthony Bradley, Keith Ewing and Christopher Knight, Constitutional and Administrative Law (16th edn, Longman 2015)

(6) ibid 4.

(7) Kenneth Wheare, Modern Constitutions (Oxford University Press 1966) 1

(8) Ryan and Foster (n 3) 8

The UK is one of only three remaining democratic countries[9] in the world that lack a codified or a 'written' constitution.[10] The main feature of the UK constitution is parliamentary sovereignty, which means that the Parliament enjoys sovereign authority to make or unmake any law.[11] Although the Parliament's statute is normally comprehended to constitute the highest form of law, it is subject to the requirements of the European Union (EU) law, in line with the provisions of the European Communities Act 1972 (ECA)[12]. Thus, the principle of parliamentary sovereignty has been subjected to doubts by prominent commentators, on the basis of the membership of the EU and the establishment of the Human Rights Act, 1998 (HRA)[13]. As the UK lacks a codified constitution, there are many unwritten sources of constitutional conventions and prerogative powers. The former can be defined as rules of constitutional behaviour, which are observed by the sovereign power, whereas the latter 'is the remaining portion of the Crown's original authority'[14]. This paragraph represents the key features of the UK constitution, which will be further discussed in the second section.

**Why Now?**

In recent years, the UK has witnessed major changes in both its political and legal spheres, thus necessitating the adoption of a codified constitution. This was noted by John Bercow, Former Speaker of the House of Commons of the UK, who proposed a codified constitution to stop 'executive malpractice or fiat', which could possibly help escape the constitutional crisis that the UK has found itself in over Brexit[15].

(9) The other two are New Zealand and Israel

(10) Robert Blackburn, 'Enacting a Written Constitution for the United Kingdom' (2015) 36 Statute Law Review 1

(11) Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (8th edn, Macmillan 1915) 3–4

(12) Lord Neuberger of Abbotsbury, 'Who Are the Masters Now?' The Second Lord Alexander of Weedon Lecture (6 April 2011) <https://webarchive.nationalarchives.gov.uk/20131203081513/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-weedon-lecture-110406.pdf> accessed 21 July 2020

(13) Vernon Bogdanor, The New British Constitution (Hart 2009)

(14) Alex Carroll, Constitutional and Administrative Law (Pearson Longman 2007) 246

(15) Rowena Mason and Owen Bowcott, ‹John Bercow: I›ll Stop Boris Johnson Breaking the Law on Brexit› (The Guardian, 2019) <https://www.theguardian.com/politics/2019/sep/12/bercow-warns-pm-not-to-defy-law-on-no-deal-brexit> accessed 4 July 2020

This view has been supported by Sionaidh Douglas-Scott who argues that Brexit has effectively shown that the British constitution is no longer functioning adequately today[16]. Therefore, these viewpoints show that the Brexit and its consequences have triggered the need for a codified constitution.

**(i) The Referendum and the General Election**

On 23 June 2016, a referendum was held in the UK to decide whether it should remain within or leave the EU. It was found that 51.9% of the votes cast were in favour of leaving the EU. Shortly after it was declared that the UK had voted to leave the EU, former Prime Minister David Cameron resigned, just a year after he had clinched a surprise majority in the general election[17]. After Cameron's resignation, former Home Secretary Theresa May became the new Prime Minister in July 2016[18]. Mrs. May then, in mid-April 2017, called for a snap election in June 2017, arguing that its outcomes will deliver certainty and stability for the UK during its critical transition out of the EU[19]. In this election, the Conservative Party remained the single largest party in the House of Commons but lost its small overall majority[20]. Mrs. May, who became the UK's second female Prime Minister, later resigned as Prime Minister in May 2019, as she had been struggling to get parliamentary support for the legislation required to implement the deal that she had negotiated with the EU[21]. Subsequently, Boris Johnson, who was elected as the Leader of the Conservative Party and later appointed as Prime Minister, called for an early election in December. The Conservative

(16) Adam Tomkins and Sionaidh Douglas-Scott, ‹Does Britain Need a Proper Constitution?› (Prospect Magazine.co.uk, 2019) <https://www.prospectmagazine.co.uk/magazine/does-britain-need-constitution-debate-sionaidh-douglas-scott-adam-tomkins> accessed 20 July 2020

(17) Heather Stewart, Rowena Mason and Rajeev Syal, ‹David Cameron Resigns after UK Votes to Leave European Union› (The Guardian, 2016) <https://www.theguardian.com/politics/2016/jun/24/david-cameron-resigns-after-uk-votes-to-leave-european-union> accessed 5 July 2020

(18) ibid.

(19) ‹Why Did Theresa May Call an Election?› (BBC News, 2017) <https://www.bbc.com/news/election-2017-40210957> accessed 5 July 2020

(20) ‹UK Poll Robs Conservatives of Majority› (BBC News, 2017) <https://www.bbc.com/news/election-2017-40209282> accessed 6 July 2020

(21) ‹Here›s What›s Just Happened in UK Politics› (BBC News, 2019) <https://www.bbc.com/news/uk-politics-48379730> accessed 6 July 2020

Party received a landslide Commons majority of 80 seats, the party's largest Commons majority since 1987, but only a minority of the popular vote[22]. This clearly shows that the EU referendum created a state of chaos in the UK's political sphere, which resulted in two general elections in just three years.

Nevertheless, Sionaidh Douglas-Scott argues that because of an uncodified constitution, the UK lacks precise instruments for constitutional change[23]. Therefore, the referendum was not merely a matter of distinct political controversy but also subject to high-profile constitutional legal cases[24]. This was confirmed by both controversial legal cases Miller I and Miller II, which will be elaborated in the next subsections.

**(ii) Miller I**

Given the nature of the UK constitution, there was great ambiguity on who had the authority to make the decision to leave the EU[25]. The government assumed that the authority rested with the executive, by employing the Crown's prerogative power; others argued that the decision could only be taken by Parliament[26]. This crisis led to a constitutional case, Miller I, which was described as 'the most important constitutio-

(22) ‹Here›s What›s Just Happened in UK Politics› (BBC News, 2019) <https://www.bbc.com/news/uk-politics-48379730> accessed 6 July 2020

(23) Sionaidh Douglas-Scott, ‹Brexit, the Referendum and the UK Parliament: Some Questions about Sovereignty› (UK Constitutional Law Association, 2016) <https://ukconstitutionallaw.org/2016/06/28/sionaidh-douglas-scott-brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/> accessed 6 July 2020

(24) Andrew Blick and Richard Gordon, ‹Using the Prerogative for Major Constitutional Change: The United Kingdom Constitution and Article 50 of the Treaty on European Union› (2016) https://consoc.org.uk/wp-content/uploads/2016/10/Royal-Prerogative-paper-Andrew-Blick-Richard-Gordon-PDF.pdf accessed 6 July 2020

(25) Nick Barber, Tom Hickman and Jeff King, ‹Pulling the Article 50 «Trigger»: Parliament›s Indispensable Role› (UK Constitutional Law Association, 2016) https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-thearticle- 50-trigger-parliaments-indispensable-role/ accessed 8 July 2020

(26) ‹Court Rules against Government on Brexit› (BBC News, 2017) <https://www.bbc.com/news/uk-politics-38720320> accessed 8 July 2020

nal case for a generation'[27]. In a controversial judgement, the Supreme Court held that an Act of Parliament was needed to allow ministers to provide notice of the decision of the UK to withdraw from the EU.[28] This is because, based on the reading of the ECA, the EU withdrawal will have a significant change in the UK domestic law;[29] therefore, such changes in the UK law will require Parliamentary legislation.[30]

The Supreme Court's decision has received severe criticism. Lord Carnwath, in his dissenting judgement, illustrated that triggering Article 50(2) will not alter any laws or affect rights but will simply mark the beginning of a crucial political process of negotiation between the government and the Parliament[31]. This is because, as stated by Lord Reed, the ECA amounts to nothing more than a 'scheme under which the effect given to EU law in domestic law reflects the UK's international obligations under the Treaties, whatever they may be'[32]. Thus, the Brexit will not render the ECA 'a dead letter'[33] because it merely gives effect to EU obligations[34].

Nevertheless, Pavlos Eleftheriadis argues that dissenting or minority judgements, particularly those such as of Lord Reed, are outdated by more than 20 years because they fail 'to take into account the legal process whereby EU law has become part of the law of the United Kingdom'[35]. Eleftheriadis further states that an interpretation of the ECA establishes that Lord Reed's judgement is based on Dicey's reading on the doctrine of 'simple sovereignty'[36]. It implies that there is no higher law of the constitution and that the simple rule of parliamen-

(27) David Allen Green, ‹Why the Article 50 Case May Be the Most Important Constitutional Case for a Generation› (Jack of Kent Blog, 2016) <http://jackofkent.com/2016/10/why-thearticle-50-case-may-be-the-most-important-constitutional-case-of-a-generation> accessed 8 July 2020

(28) Miller I (n 5)

(29) ibid 69.

(30) ibid 82.

(31) ibid 259.

(32) ibid 187.

(33) Barber et al (n 26)

(34) Mark Elliott, ‹The Supreme Court›s Judgement in Miller: In Search of Constitutional Principle› (2017) 76 The Cambridge Law Journal 262

(35) Pavlos Eleftheriadis, ‹Two Doctrines of the Unwritten Constitution› (2017) 13 European Constitutional Law Review 542

(36) ibid 535–538

tary sovereignty is the most important constitutional rule in the UK constitution[37]. This notion has been rejected by the House of Lords in Factortame[38] and by the Supreme Court in the HS2 case,[39] where Lord Neuberger and Mance held that the ECA had formed a special procedure of law-making, whereby EU law normally takes primacy over subsequent law[40]. This affirmed what various academics have claimed over the years, specifically that the British Constitution is not as Dicey described it[41].

Although the issue over the authority to make the decision to leave the EU had been settled in less than a year,[42] it has become evident that the UK constitution does not easily adapt to novel situations[43]. As the UK constitution did not delineate a procedure to withdraw from the EU, it was difficult to predict what would happen. This can be confirmed in the Supreme Court's divided judgement where there were some disagreements among the judges. Additionally, it was uncertain whether the government would respect the Supreme Court's judgement. Furthermore, Article 50 of the Treaty on European Union necessitates a state deciding to leave the EU to do so 'in accordance with its own constitutional requirements'. For any state with a codified constitution, this Article normally would not cause any problem; it merely asks the state to looks to its constitutional document to find the answer[44]. For example, Article 88 of the French Constitution states that the state will be a member of the EU and any alteration to this would entail modifying the constitution, which would be done by a procedure laid down in Article 89[45]. Such a codified constitution is required in the UK.

(37) Dicey (n 12)
(38) R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1991] 1 AC 603
(39) R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3
(40) Para 207
(41) See R.T.E. Latham, The Law and the Commonwealth (Oxford University Press 1949) 522–525 and R.F.V. Heuston, Essays in Constitutional Law (2nd edn, Stevens 1964) 1–3
(42) The referendum took place in June 2016 and the judgement was held in January 2017
(43) Sarah Mackie, ‹Brexit and the Trouble with an Uncodified Constitution: R (Miller) v Secretary of State for Exiting the European Union› (2018) 42 Vt L Rev 335
(44) ibid.
(45) la Constitution du 4 Octobre 1958

### (iii) Miller II

On 24 September 2019, the UK Supreme Court, in a unanimous judgment, decided that the Prime Minister's decision to prorogue (suspend) the Parliament for 5 weeks in the run-up to the 31 October 2019 deadline for the UK's withdrawal from the EU was unlawful and of no effect, as it had stopped the Parliament from performing its constitutional functions without reasonable justification(46). Paul Craig concurs with this verdict and states that the principle of parliamentary sovereignty validates and requires the courts to nullify the government's advice to Her Majesty the Queen to prorogue Parliament(47). His argument was based upon the cases of Proclamations,(48) De Keyser,(49) and Miller I, as, in his view, all these cases restrain the prerogative power to protect parliamentary sovereignty.

However, Richard Ekins criticises the Supreme Court's judgement and claims that Craig's argument is flawed because none of the cases illustrated by Craig support the idea that judicially enforceable boundaries on prerogative authority are, or tend to be, necessary for or supportive of parliamentary sovereignty. Moreover, the latter two cases concern how an Act of Parliament bears on the prerogative(50). Furthermore, Finnis rejects the Supreme Court's use of the principles of parliamentary accountability and parliamentary sovereignty as standards for defining limits to prerogative power(51). Finnis further establishes that parliamentary accountability is simply a political convention, which must be kept in the political sphere, and that the Supreme Court was

(46) Miller II (n 5)

(47) Paul Craig, ‹Prorogation: Constitutional Principle and Law, Fact and Causation› (UK Constitutional Law Blog, 2019) <https://ukconstitutionallaw.org/> accessed 12 July 2020

(48) (1611) 12 Co Rep 74

(49) Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508

(50) Richard Ekins, ‹Parliamentary Sovereignty and the Politics of Prorogation› (Policy Exchange, 2019) <https://policyexchange.org.uk/wp-content/uploads/2019/09/Parliamentary-Sovereignty-and-the-Politics-of-Prorogation3.pdf> accessed 12 July 2020

(51) John Finnis, ‹The Unconstitutionality of the Supreme Court›s Prorogation Judgment› (Policy Exchange, 2019) <https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment/> accessed 12 July 2020

wrong in investing it with legal substance[52]. This shows that Craig's argument and the Court's judgement are flawed and the limit of the prerogative power is vague and undefined.

Nevertheless, Craig argues that Fennis's argument is not persuasive because the use of constitutional principles to determine the scope of prerogative power is legitimate, as prerogative is a species of discretionary power, which must be subject to control[53]. The author of this paper considers that Fennis's claim that parliamentary accountability is a political convention that must be kept in the political domain is misconceived and not persuasive. This is because the fact that a legal dispute has arisen from a subject of political debate has never been a satisfactory reason for the courts to reject considering it[54]. 'Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense',[55] such as the cases of Proclamations and Entick v Carrington[56]. This shows that raising a political issue in courts was and still is an ordinary course of action; therefore, Fennis's claim regarding parliamentary accountability seems to be unreasonable.

In addition to the case of Miller I, Miller II clearly demonstrates that certain parts of the UK constitution are either uncertain or confusing. The main objective of a constitution is to define the allocation of powers,[57] and in these cases, the UK's uncodified constitution was incapable of doing this with precision until the Supreme Court delivered its judgment.

## Key Features of the UK Constitution

### (i) Parliamentary Sovereignty

With regard to the last century of British constitutional law history, it could be argued that Dicey's theory of parliamentary sovereignty was

(52) ibid.
(53) Paul Craig, ‹The Supreme Court, Prorogation and Constitutional Principle› [2019] SSRN Electronic Journal 8 <https://dx.doi.org/10.2139/ssrn.3477487> accessed 17 July 2020
(54) Miller II, at.31
(55) ibid, at.32.
(56) (1765) 19 State Tr 1029
(57) Mackie (n 44) 335

the most significant of all theories[58]. As stated by Dicey, 'Parliament has, under the English constitution, the right to make or unmake any law whatever; and further ... no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament'.[59] Although this theory has shaped the pillars of the UK constitution, various scholars argue against the Diceyan conception, saying that its authority is limited to a certain extent. Bogdanor elaborated on this, stating that 'In practice … if not in law, parliamentary sovereignty is no longer the governing principle of the British constitution'[60]. As such, the theory has been examined by academics and the courts in light of the EU law and the HRA to find whether the principle of parliamentary sovereignty is absolute.

In the leading case that examines the supremacy between the domestic and the EU law, factortame,[61] Lord Bridge held that as a matter of well-established principle in the jurisprudence of the Court of European Justice, the EU law takes precedence over domestic law.[62] However, one may argue that this limitation exists only because the Parliament willed it to be so in the ECA 1972; thus, it could be repealed at any time. In other words, sovereignty has been lent rather than accorded to it[63]. Bogdanor, nevertheless, argues that this interpretation of the parliamentary sovereignty seems quite different from the traditional version put forward, which effectively posits that the Parliament has the right to make or unmake any law and that no person or body can set it aside[64]. Thus, it can be concluded, in Eleanor Sharpston's words, that the ECA 1972 changed the rule of recognition in the UK, as the European Community was not a mere association of sovereign states, but rather a supreme legal body in which the doctrine of primacy had already been established[65]. In addition to EU membership, there has

(58) Pavlos Eleftheriadis, ‹Parliamentary Sovereignty and the Constitution› (2009) 22 Canadian Journal of Law & Jurisprudence 267
(59) Dicey (n 12) 3–8
(60) Bogdanor (n 14) 283
(61) R v Secretary of State for Transport (No 2), 1 AC 603 (HL 1991)
(62) ibid 658.
(63) Colin Turpin and Adam Tomkins, British Government and the Constitution (Cambridge University Press 2011) 86
(64) Vernon Bogdanor, ‹Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty› (2012) 32 Oxford Journal of Legal Studies 186
(65) Thoburn v Sunderland City Council 4 [2003] QB 151

appeared another challenge to parliamentary sovereignty, that is human rights law[66].

The HRA 1998 gives effect to many provisions of the European Convention on Human Rights[67]. Section 2 requires the domestic courts to 'take into account' the decisions of the European Court of Human Rights (ECHR) but are not bound by it. Section 3 provides that an Act of Parliament must be read in a way that is compatible with the European Convention on Human Rights and Section 4 further empowers the courts to issue a 'declaration of incompatibility'. These sections may be seen as boundaries that have been added to the sovereignty of the Parliament. However, Aileen Kavanagh claims that the HRA neither allows judges to 'strike down' legislation nor prevents the Parliament from passing legislation that conflicts with the European Convention on Human Rights[68]. Therefore, the HRA does not undermine the sovereignty of the Parliament.

Nevertheless, Lord Bingham established that a national court is under a duty to not weaken the effect of the ECHR case law, and it is open to member states providing more generous rights than those guaranteed by the Convention[69]. This was reaffirmed by Lord Hoffmann who states that even though the Parliament has the power to make legislation, certain rights exist that cannot be restricted by any power[70]. As can be seen from the above analysis, the theory of parliamentary sovereignty is no longer absolute. Thus, the authority of earlier concept is subject to certain boundaries such as, the ECA 1972 and the HRA 1998.

**(ii) Constitutional Statutes**

The idea of constitutional statutes has been raised in the leading case of Thoburn,[71] where Laws LJ defined constitutional statute as a statute that considerably affects fundamental rights and duties or

(66) Iain McLean, What's Wrong with the British Constitution? (Oxford University Press 2012) 11

(67) S 1

(68) Aileen Kavanagh, Constitutional Review under the UK Human Rights Act (Cambridge University Press 2009) 314

(69) R (Ullah) v Special Adjudicator [2004] UKHL 26

(70) Eric Metcalfe, ‹The Strange Jurisprudence of Lord Hoffmann: Human Rights and the International Judge› (2009) 2 UCL Hum Rts Rev 35

(71) Thoburn v Sunderland City Council [2003] QB 151

otherwise the relationship between the state and its citizen or sets up state institutions[72]. This definition has been criticised by various scholars. Farrah Ahmed and Adam Perry argue that the Laws LJ definition is flawed because there are statutes that are regarded as constitutional but do not deal with citizens or their rights[73]. For instance, the Parliament Acts of 1911 and 1949 strike as clear illustrations of constitutional statutes, but they are entirely about the relationship between the House of Commons and the House of Lords[74]. Thus, David Feldman provides the following alternative definition that fixes the problem established by Laws LJ as follows: 'Constitutional legislation establishes state institutions and confers functions, responsibilities and powers on them ... the key function of a constitution is to constitute the state and its institutions and confer functions, powers and duties on them'[75]. Although Feldman's meaning avoids some of the issues with Laws LJ's definition, it suffers from being too overinclusive[76]. This shows that the definition of constitutional statutes is problematic, and its meaning is still ambiguous.

Consequently, the courts tended to treat constitutional statutes differently. In Thoburn, Laws LJ held that the ECA is not subject to the doctrine of implied repeal[77] because the ECA is a 'constitutional statute'[78]. This was confirmed by the Supreme Court in H v Lord Advocate, and Lord Hope established that the Scotland Act 1998, due to its 'fundamental constitutional' status, is 'incapable of being altered otherwise than by an express enactment'[79]. This demonstrates that constitutional statutes, due to its significance, are not subject to the principle of implied repeal.

Besides protecting them from implied repeal, the courts went

(72) ibid 62.
(73) Farrah Ahmed and Adam Perry, ‹Constitutional Statutes› (2016) 37 Oxford Journal of Legal Studies 466
(74) ibid.
(75) David Feldman, ‹The Nature and Significance of «Constitutional» Legislation› (2013) 129 LQR 343, 350
(76) Ahmed and Perry (n 74) 467
(77) Thoburn (n 72) 62–63
(78) ibid 62.
(79) [2012] UKSC 24

further in their treatment with constitutional statutes. In Brynmawr,[80] Beatson J held that '[g]iven the constitutional status of GOWA 2006, the court is reluctant to read implied limitations into it by reference to legislation which is not of a "constitutional" nature'[81]. This shows the generalia specialibus maxim does not operate in cases of potential clashes between earlier ordinary and later constitutional statutes[82].

Furthermore, the emergence of constitutional statutes has created a problematic issue in the courts, that is the potential for a conflict between two constitutional statutes. This was raised in HS2,[83] where there is a possible conflict between the ECA and the Bill of Rights 1689. Lord Mance and Lord Neuberger acknowledged that the two constitutional statutes would raise 'further considerations' not canvassed in Thoburn, but they did not elaborate on what these considerations are.[84] Therefore, the issue of constitutional statutes, in terms of conflict between themselves, is vague and unsettled.

**(iii) Constitutional Conventions**

Besides the written sources, there are also unwritten sources of the UK constitution, that is conventions or 'constitutional conventions'. According to Dicey, constitutional conventions are understandings, practices or habits that might regulate the behaviour of several members of the sovereign power, but they are not laws because they are not enforced by the courts[85]. An example of a constitutional convention is the Queen's Royal Assent to all bills passed by the Parliament before they become Acts of Parliament[86]. Ivor Jennings demonstrated a three-step test to establish whether a habit could be regarded as a convention[87]. First, are there precedents for the practice? Second, do the actors in the precedents believe that they are bound by an obligatory rule? Third, is

(80) R (Governors of Brynmawr Foundational School) v The Welsh Ministers [2011] EWHC 519
(81) ibid 87.
(82) Ahmed and Perry (n 74) 464
(83) R v Secretary of State for Transport (n 40)
(84) ibid 208.
(85) Dicey (n 12) 24
(86) Anthony Bradley and Keith Ewing, Constitutional and Administrative Law (16th edn, Pearson 2015) 19
(87) Ivor Jennings, The Law and the Constitution (London 1959)

there a reason for the practice?[88] It is essential to recognise that the test does not entail binary questions; rather, it is a matter of degree[89].

Furthermore, the general rule of constitutional conventions is that they are not formulated in writing; however, this is not always the case[90]. For instance, the rule that judges must not undertake political actions is in a written form only now[91]. In 2011, the government issued The Cabinet Manual, which is 'a guide to laws, customs and rules on the operation of the government'[92]. This report covers the operation of the entire machinery of the central government in an informative way, but it does not claim any special authority, as it has not been acknowledged by Parliament[93]. This shows that conventions are usually unwritten, but some of them have been codified.

Additionally, the issue of constitutional conventions has been raised by the courts. For instance, in Miller I, the Supreme Court held that judges can acknowledge the function of political conventions, but courts of law cannot enforce them, nor can they 'give legal rulings on its operation or scope, because those matters are determined within the political world'[94]. This shows that although constitutional conventions are acknowledged by the courts, they are inapplicable in them.

**(iv) Prerogative Power**

There is no universally agreed definition of prerogative power. In Miller I, the Supreme Court defined prerogative as encompassing the 'residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation'[95]. While Blackstone stated that prerogative

(88) ibid 81.
(89) Max Vetzo, ‹The Legal Relevance of Constitutional Conventions in the United Kingdom and the Netherlands› (2018) 14 Utrecht Law Review 145
(90) Bradley, Ewing and Knight (n 6) 21.
(91) ibid.
(92) 'A Guide To Laws, Conventions and Rules on the Operation Of Government' (The Cabinet Manual, 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf> accessed 21 July 2020
(93) Bradley, Ewing and Knight (n 6) 21
(94) Miller I (n 5) 141, 146
(95) Para 47

power was limited to 'that special pre-eminence, which the king hath, over and above all other persons',[96] this definition rejects the authority of the monarch, who has no statutory authority. This clearly shows that the meaning of the term 'prerogative power' is unclear. However, its examples could be as obvious as authorising the executive to declare war, issuing of passports, the right of conducting foreign affairs and the authority of negotiating international treaties[97].

In the early seventeenth century, case law acknowledged that while the courts could determine the existence and extent of prerogative power, they could not review or question the manner in which a prerogative had been exercised[98]. The courts also established that if there was a conflict between statutory power and prerogative power on the same ground, the executive was under a general duty to act under the statute[99]. The reasons for the courts' silence on questions concerning the prerogative power relate to the prerogative's relationship with the concept of 'the Crown' that tends to act, in the words of the constitutional historian F. W. Maitland, as 'a convenient cover for ignorance,' which 'saves us from asking difficult questions'[100]. This demonstrates that the courts have, in the past, tended to act with special reticence when it came to reviewing legal actions undertaken in the name of the Crown[101]. It also shows that an Act of Parliament prevails over prerogative power, but prerogative powers are not subject to judicial review.

Nevertheless, the principle that prerogative power is not subject to judicial review was overruled in the GCHQ case[102]. The House of Lords held that an exercise of prerogative power is reviewable on ordinary public law grounds, but some questions of prerogative power are not justiciable. De Smith's Judicial Review provides circumstances

(96) William Blackstone, Commentaries on the Laws of England (8th edn, Book 1, ch 7, 1778) 239
(97) Colin Turpin and Adam Tomkins, British Government and the Constitution (7th edn, Cambridge University Press 2011) 489
(98) Prohibitions del Roy (1607) 12 Co Rep 63
(99) Attorney-General v. De Keyser's Royal Hotel Ltd (1920) AC 508
(100) Frederic Maitland, The Constitutional History of England (Cambridge University Press 1980) 418
(101) Maurice Sunkin and Sebastian Payne, The Nature of the Crown (Oxford University Press 1999) 33
(102) Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 6

in which the supervision of the courts may not apply; these are questions of international law- or treaty-making and the prerogative power of royal assent to legislation[103]. Due to its significance, the case serves as a clear example of 'locus classicus of a modern public law', as it 'effectively buried the old concept that the prerogative power was unreviewable judicially'[104].

## For and Against and Some Problems

The lack of a codified constitution in the UK is of considerable significance in many accounts, but not all[105]. Anthony King argues that 'constitutions … are never … written down in their entirety, so the fact that Britain lacks a capital – C Constitution is far less important than is often made out'[106]. Bogdanor states that the UK constitution appears flexible and relatively easy to change[107]. Therefore, a codification could do away with this characteristic of the UK constitution[108].

On the other hand, however, Lord Hailsham established that the legislative programme of the Parliament is governed by the government, and the government bill always passes in the House of Commons due to the nature of the majoritarian first-past-the-post electoral system[109]. Therefore, he strongly advocated for a codified constitution to limit the powers of the Parliament[110]. Madgwick and Woodhouse doubt that the enforceability of the human rights rules as legislation is the highest authority within the UK constitution[111]. Thus, a codified constitution can be a means of protecting rights against abuse[112].

(103) Stanley A De Smith and others, De Smith's Judicial Review (7th edn, Sweet & Maxwell 2013) 133–134

(104) Sir Louis Blom-Cooper and Richard Drabble, ‹GCHQ Revisited› (2010) Public Law 18–24

(105) See e.g.: The Governance of Britain (Stationery Office, 2007) Cm 7170, 20; 62

(106) Anthony King, The British Constitution (Oxford University Press 2009) 5

(107) Bogdanor (n 14) 14

(108) Roger Gough, An End to Sofa Government: Better Working of Prime Minister and Cabinet (Conservative Democracy Task Force 2007) 3

(109) Lord Hailsham, Elective Dictatorship, The Richard Dimbleby Lecture (London: BBC, 1976)

(110) ibid.

(111) Peter Madgwick and Diana Woodhouse, The Law and Politics of the Constitution of the United Kingdom (Harvester Wheatsheaf 1995) 12

(112) Rabinder Singh QC, ‹The UK Constitution: Time for Fundamental Reform?›, JUSTICE Tom Sargant memorial annual lecture 2010, 21

As can be seen from the above analysis, there is significant disagreement among scholars on whether the UK's current arrangements are suitable, or whether a codified constitution of some kind should be adopted(113). Thus, this section will examine and critically analyse the arguments for and against adopting a codified constitution and the consequent problems that might arise due to it.

**(i) Protecting Rights**

In a recent book, the philosopher AC Grayling observes that 'a constitution not at the whim of any current administration is a sterner guardian of rights and liberties than a constitution malleable to partisan and passing interests'(114). This view has been supported by Lord Scarman even more eloquently, stating that a codified constitution exemplifying a Bill of Rights is required if powerless and wholly under-represented groups are to secure their human rights and freedoms(115). These views demonstrate that human rights assertion is a fundamental feature of the case for a codified constitution, and a written constitution would support these rights.

However, Jeff King argues that a constitutional arrangement for a bill of rights would be a decent device, but this assertion is far weaker than what these statements propose(116). This is because the statement that an entrenched charter will significantly advance real rights protection 'is by no means established'(117). His reasoning is based on the Freedom House Report that showed that seven of the top ten states, in the ranking for respecting civil and political liberties, have no robust constitutional judicial review for statutes(118). Australia, which has no federal charter of rights at all, is positioned eighteen spots ahead of the

(113) Andrew Blick, ‹Codifying – or not codifying – the UK constitution: A Literature Review›, (2011) For the House of Commons Political and Constitutional Reform Committee 3

(114) Anthony Grayling, Democracy and its Crisis (updated edn, Oneworld 2018) 178

(115) Lord Scarman, ‹Why Britain Needs a Written Constitution›, (The Fourth Sovereignty Lecture, London, Charter 88 Trust Publications 1992) reprinted in (1993) 19 Commonwealth Law Bulletin 317, 322

(116) Jeff King, ‹The Democratic Case for a Written Constitution› (2019) 72 Current Legal Problems 12

(117) ibid.

(118) Freedom House, ‹Freedom in the World 2018› <https://freedomhouse.org/report/%20%20freedom-world-2018-table-country-scores> accessed 3 August 2018

United States and forty-six spots ahead of Germany[119]. This shows that entrenching rights in a written document does not cause any difference.

The author of this paper, however, argues that King's argument is flawed on the basis that his assertion does not reflect the real practice in the UK. Due to the principle of parliamentary sovereignty, human rights have an unstable status because Parliament can repeal any legislation by a bare majority of the government in the House of Commons. This can be confirmed during the several attempts made to 'scrap' the HRA 1998[120]. Furthermore, due to the absence of a codified constitution, the HRA cannot be as powerful with a written constitution because it does not provide the Supreme Court with the power of striking down legislations or withholding government actions that are incompatible with the HRA[121]. This indicates that establishing a codified constitution that contains human rights would be a vital tool for enhancing human rights because these rights will not be easily changed or repealed and will be safeguarded by a higher authority, the constitution[122].

**(ii) Clarity**

In 1904, Lowe established that the British government is based upon a structure of implied understandings, but the understandings are not constantly comprehended[123]. There are several scholars who, over the years, have made much of the necessity for clarity, and the role of a codified constitution in affording it. Bogdanor and others contend that a written document (constitution) delivers an accessible, clear and coherent account of the body of central principles and rules according to which society and state are governed and constituted. It also defines the powers of the government's institutions,[124] imposes limits on them and divides powers between its branches[125]. This has been confirmed

(119) ibid.
(120) ‹Scrapping the 1998 Human Rights Act: What Would It Mean?› (The Guardian, 2014) https://www.theguardian.com/law/2014/oct/01/scrapping-human-rights-act-british-bill-of-rights accessed 3 August 2020
(121) Grayling (n 115) 141
(122) ibid.
(123) Sidney Low, The Governance of England (TF Unwin 1914) 12
(124) Vernon Bogdanor, Tarunabh Khaitan and Stefan Vogenauer, ‹Should Britain Have a Written Constitution?› (2007) 78 The Political Quarterly 499
(125) Eric Barendt, ‹Is There a United Kingdom Constitution?› (1997) 17 Oxford Journal of Legal Studies 138

by Robert Blackburn, who observes that a codified constitution will assist individuals to see and know what are the institutions and rules that manage and direct legislators, civil servants, ministers and senior state officials in performing their public duties(126). The mass of common law rules that are gathered in complicated Acts of Parliament are incomprehensible to most individuals, and law reports and tacit conventions, some of which are ambiguous even to officials, are completely inscrutable to most individuals(127). Therefore, a codified constitution would supersede this by being the sole text of basic law, clearly understandable and intelligible to all, as is the case in the vast majority of the states in the world(128).

King, nevertheless, establishes that the extent to which a codified constitution will deliver more clarity is often overstated(129). This is because a significant amount of the UK constitution is known and written down in law reports and legislation(130). These include codes separately made by the Cabinet Office on the regulation of government ministers and civil servants, such as the Ministerial Code (which describes terms and conditions under which ministers hold office), the Cabinet Manual (which defines conventions, practices of the central government and the law) and a code of human rights and freedoms enacted by the HRA 1998 (which relate to citizenship rights). King further states that the adoption of a written constitution will increase judicial review of its interpretation, and therefore, 'the extra clarity will be purchased at a high price'.(131) He also claims that if clarity is all that is at stake, 'a non-binding declaratory code could be adopted'(132). This shows that establishing a written constitution will not provide much clarity to the UK constitution, and it would be better to adopt a non-binding declaratory code to clarify issues over uncertainty.

However, Blackburn argues that in terms of codifying a huge

(126) Robert Blackburn, ‹Enacting a Written Constitution for the United Kingdom› (2015) 36 Statute Law Review 3
(127) ibid.
(128) ibid.
(129) King (n 117) 15
(130) ibid.
(131) ibid 16.
(132) ibid.

amount of the UK constitution, the codification procedure of diverse parts of parliamentary and government conduct must be outlined in a single document forming a written constitution in order to be easily accessible and intelligible to the public(133). Blackburn further illustrates that in terms of status and modification, the laws of a constitutional nature are primarily special charters to ordinary rules(134). Thus, a mere non-binding declaratory code will not be sufficient, as besides being easily changeable, it will neither have a higher status nor be a biding code. This clearly shows that King's argument is incorrect, and adopting a written constitution would provide more clarity.

However, Barber maintains that 'the lack of clarity and the present uncertainty' in the UK constitution can be beneficial(135). He emphasises the vague relationship between, firstly, the Parliament and the European Institutions and, secondly, the British Courts and the ECHR(136). Barber states that none of these political and legal institutes have supreme power to determine the force of European laws and legislation(137). He thus observes this uncertainty as a beneficial compromise, that is an implicit 'agreement to disagree', and a framework in which conflicting views can co-exist(138). This demonstrates that the presence of ambiguity in the British constitution can be useful in certain circumstances.

Although the lack of clarity in the UK constitution may be a valuable tool sometimes, it might have brought negative consequences in both the economic and political spheres. As established earlier, Miller I has proved that the UK constitution is uncertain. The uncertainty in the dispute has cost taxpayers a significant amount of money, the amount of which the government has, thus far, denied declaring(139). This dispute has also left the public, politicians and the EU uncertain of what will

(133) Blackburn (n 127) 4
(134) ibid.
(135) Nicholas Barber, ‹Against a Written Constitution› (2008) Public Law 15
(136) ibid.
(137) ibid 16.
(138) ibid 17.
(139) Benjamin Kentish, ‹The Government Says It Doesn›t Know How Much Its Article 50 Legal Case Cost because of ‹Printing And Electricity Costs› (The Independent, 2017) https://www.independent.co.uk/news/uk/politics/uk-government-article-50-legal-challenge-supreme-court-gina-miller-electricty-printing-charges-a7565461.html accessed 5 August 2020

happen next, thereby adding to the confusion and distress already caused by the Brexit decision(140). The ambiguity was mirrored in the value of the currency, with the pound, which had fallen about 17% against the dollar since the Brexit vote, dropping 0.6% of its value in the immediate aftermath of the Supreme Court's decision(141). This suggests that there would unavoidably be some ambiguity surrounding Brexit because it signifies a major transformation for various individuals; however, much of this ambiguity was produced by the state being uninformed of its own constitutional arrangements(142).

**(iii) Judicial Intervention**

Within the present constitutional arrangements in the UK, the notion of striking down an Act of Parliament that is 'unconstitutional' has received limited support from some senior judges. In the case of R (Jackson) v Attorney General,(143) Lord Steyn argued that in certain situations in which there is an attempt to eliminate judicial review or the normal role of the courts, the Supreme Court may have to consider whether this is a constitutional fundamental that even a sovereign Parliament cannot abolish(144). This shows that the courts may declare a legislation as unconstitutional if there is interference with the role of the courts by an Act of Parliament.

However, the author of this paper argues that this view seems difficult to apply because it may raise a political conflict between the courts and the Parliament and may be construed as a violation of the Parliament's sovereignty. This has been affirmed by Lord Bingham who states that we live in a society devoted to the rule of law in which the Parliament has the power to legislate as it wishes; therefore, it may legislate in a way that violates the rule of law and the courts cannot fail to give effect to such legislation if it is unambiguously and clearly

(140) ibid.
(141) Zlata Rodionova, 'This Is What the Supreme Court Brexit Decision Did to the Pound' (The Independent, 2017) https://www.independent.co.uk/news/business/news/brexit-legal-challenge-pound-sterling-drop-supreme-court-rules-theresa-may-article-50-parliament-a7542836.htm> accessed 5 August 2020
(142) Felicity Matthews, 'Whose Mandate Is It Anyway? Brexit, the Constitution and the Contestation of Authority' (2017) 88 The Political Quarterly 603
(143) [2005] UKHL 56
(144) Para 102

expressed[145]. This shows that the judiciary of the UK has no authority to strike down primary legislation. Thus, Lady Hale proposes that the courts are not 'the guardians of the constitution': they apply positive law, not the constitution writ large[146]. In other words, they are not accountable for the constitution's justice or coherence or for upholding constitutional norms in general[147]. It is the Parliament that enjoys principal accountability for determining the justice of the law and for electing how or whether the law is to change.[148] Therefore, one may suggest that adopting a codified constitution will shift the power to the courts, which results in limiting the power of the Parliament. This is because the Parliament will no longer be the supreme authority within the UK constitution.

The principle of parliamentary sovereignty has been interpreted by certain scholars as a barrier to the existence of a codified constitution[149]. Bogdanor argues that there is no point in having a written constitution unless one is willing to abandon the doctrine of parliamentary sovereignty, for a written constitution is contrary to this notion[150]. This is because a written constitution would impose a restraint on the power of Parliament[151]. For instance, a codified constitution would shift authority from the Parliament and an elected House of Commons to unelected judges who would be accountable for interpreting the constitution and might thereby be drawn, inappropriately, into policymaking[152]. Therefore, the 'transition to the new constitution' might involve 'the present parliament 'committing suicide'[153]. This clearly indicates that adopting a codified

(145) Thomas Bingham, The Rule of Law (Penguin 2010) 186

(146) Lady Hale, The Supreme Court: Guardian of the Constitution, Sultan Azlan Shah Lecture

(9 November 2016)

(147) Richard Ekins, ‹Constitutional Practice and Principle in the Article 50 Litigation› (2017) 133 Law Quarterly Review 347

(148) Richard Ekins and Graham Gee, ‹Putting Judicial Power in Its Place› (2017) 36 University of Queensland Law Journal 376

(149) Richard Gordon, Repairing British Politics (Hart 2010) 10–11

(150) Bogdanor (n 14) 14

(151) Sir John Baker, ‹Our Unwritten Constitution›, Maccabaean Lecture in Jurisprudence, British Academy, 24 November 2009

(152) ibid.

(153) Dawn Oliver, ‹Towards a Written Constitution?› in Chris Bryant (ed), Towards a New Constitutional Settlement (Smith Institute, 2007) 149

constitution would shift the power from elected members, the Parliament, to unelected members, the judiciary, which is virtually a suicidal act. This was confirmed by Hood Phillips, who establishes that a written constitution 'would be declared to be the supreme law of the land', subject to the 'entrenchment sanctioned by judicial review'(154). He expects that judiciaries would be asked to take an oath of loyalty to the new constitution.(155) He believes that the Judicial Committee of the Privy Council will be the most appropriate option as the court with the 'ultimate appellate jurisdiction' for cases in which a constitutional issue was raised(156).

There will be judicial implications at some level if the UK adopts a codified constitution(157). This is because some constitutional provisions will become justiciable,(158) and a practice of constitutional legalism will arise(159). Therefore, the scope of constitutional review might expand, which will constrain the Parliament's power(160). The American evolution of judicial review shows a remarkable illustration of how a codified constitution can affect parliamentary sovereignty(161). In Marbury v Madison,(162) the US Supreme Court declared an Act of Congress unconstitutional, establishing the doctrine of judicial review. Chief Justice John Marshall argued that judicial review was not established by the writing of the constitution itself, but rather the nature of the written constitution inherently established judicial review(163). This attests to how a codified constitution might 'appear to envisage constitutional supremacy as supplanting Parliament; with judges able to rule acts of Parliament incompatible with the constitution and strike them down'(164).

(154) Owen Hood Phillips, Reform of the Constitution (Chatto & Windus 1970) 146–7
(155) ibid 157.
(156) ibid 160–61.
(157) House of Commons Political and Constitutional Reform Committee, ‹Constitutional Role of the Judiciary if There Were a Codified Constitution›, (2013–2014), HC 802
(158) Dawn Oliver, ‹Written Constitutions: Principles and Problems› (1992) 45 Parliamentary Affairs 142–6
(159) Martin Loughlin, The Idea of Public Law (OUP 2004) 47–52
(160) Brian Jones, ‹Preliminary Warnings on «Constitutional» Idolatry› (2016) Public Law 12
(161) ibid.
(162) 5 US 137 (1803)
(163) ibid 176–8
(164) Blick (n 114) 4

The notion of judicial review has received several criticisms. Mashaw finds that judicial review has either had no noticeable effect on its functioning or has made it worse[165]. This was confirmed by Dahl who argues that the Supreme Court of the United States was disruptive to the law-making majority for as much as a quarter of a century in cases relating to child labour, the regulation of the wages and hours of women and workmen's compensation,[166] known as the Lochner era[167]. Klarman purports judicial review does nothing significant[168]. Waldron further argues that judicial review of legislation is unsuitable and politically illegitimate as an approach of final decision-making in a free and democratic society because it privileges a small number of unaccountable and unelected judges against the representatives of the people, the majority[169]. He also states that there is no reason to assume that judges, rather than legislatures, will be more likely to protect and precisely define what rights people actually have[170]. This demonstrates that judicial review is not a good device, because its functioning makes things worse, especially for the legislatures, and legislators are in a better position to determine and protect rights than judges are. Therefore, one may argue that the UK should not adopt a written document based on the fact that judicial review would cause obstacles in the parliamentary operation.

Nevertheless, Klarman's view that judicial review does nothing significant is refuted by Cross who suggests that judicial review might be justified even if a judiciary lacks 'any intrinsic advantage in constitutional interpretation and enforcement' because it supports the liberty provided by the Bill of Rights[171]. This was confirmed in Lawrence, Roe and Brown[172] in which Waldron himself admittedly argued that these cases 'upheld our society's commitment to individual rights in

(165) Jerry Mashaw, Bureaucratic Justice (Yale University Press 1983) 7
(166) Robert Dahl, A Preface to Democratic Theory (expanded edn, University of Chicago Press 1956) 111
(167) Lochner v. New York 198 US 45 (1905).
(168) Michael Klarman, From Jim Crow to Civil Rights (OUP 2006) ch 7
(169) Jeremy Waldron, ‹The Core of the Case against Judicial Review› (2006) 115 The Yale Law Journal 1348
(170) ibid 1360.
(171) Frank Cross, ‹Institutions and Enforcement of the Bill of Rights› (2000) 85 Cornell L Rev 1529
(172) Lawrence v Texas, 539 US 558 (2003); Roe v Wade, 410 US 113 (1973); Brown v Bd of Educ, 347 US 483 (1954)

the face of prejudiced majorities'[173]. This clearly indicates that judicial review plays a crucial part in enforcing and protecting human rights. Furthermore, Fallon claims that Waldron's statement that judicial review is unfair and politically illegitimate in a democratic society is flawed because he believes it improves the fundamental fairness of a society's political decisions by safeguarding against breaches of fundamental rights; thus, it is neither unsuitable nor completely politically illegitimate[174]. This shows that a scheme with judicial review produces fewer breaches of fundamental rights than a system without judicial review[175]. Additionally, Fallon contends that Waldron's point that rights are better protected and defined by legislatures is defective because he fails to acknowledge the fact that courts have a unique insight that arises from their emphasis on facts and sensitivity to historical contexts of the scope of certain rights; these would amplify their sensitivity to reasonable violations that legislatures might fail to understand[176]. He further illustrates that courts normally decide cases upon solid facts, some of which even highly experienced legislators may not have considered[177]. This demonstrates that courts, rather than legislatures, are more likely to produce accurate conclusions regarding how to define rights of the kind normally included in bills of rights – on notions for which that courts are uniquely well designed to function as 'forum[s] of principle'[178]. As can be seen from the above analysis, the device of judicial review for striking down legislations would be a great achievement if the UK adopts a written constitution. Thus, expanding the power of the judiciary and limiting the Parliament's power would not be an issue, but instead, it would enhance human rights in a way by which people's rights are safeguarded, as established in the American model.

However, even if we assume that judicial review is a defective tool because the Parliament should remain the final determinant of law, rather than an unelected judiciary applying constitutional articles to

(173) Waldron (n 170) 1348
(174) Richard H. Fallon, ‹The Core of an Uneasy Case for Judicial Review› (2008) 121 Harv L Rev 1735
(175) ibid 1719
(176) ibid 1710.
(177) ibid 1709.
(178) Ronald Dworkin, A Matter Of Principle (Harvard University Press 1985) 69–71 (characterising the Supreme Court as ‹the forum of principle›)

override Acts of Parliament, a written constitution can be compatible with the continuation of parliamentary sovereignty(179). The Commons Justice Committee notes that there are two types of a codified constitution, one is a document that aims to bring together the fundamental principles, occasionally named conventions, of our constitutional arrangements, the most crucial of which is that the Parliament is sovereign, and the second type is an overarching and entrenched constitution, which is more powerful than Parliament(180). This has been confirmed by Blackburn who affirms that the exact constitutional jurisdiction and the powers of the courts depend on the model and the nature of the document(181). A clear example of this is the French Conseil Constitutionnel, whose function, from its establishment in 1985 until the 1970s, was limited to separation of powers and election issues(182). Thus, the claim that the UK should not codify its constitution, because it will restrain the sovereignty of the Parliament, is flawed. Enacting a written constitution will not automatically limit the Parliament's power, and thus, the relationship between Parliament and the courts, in a written constitution, depends on the content of the constitution. For instance, the House of Commons recommended three different forms of document that a written constitution might take(183). These could be, first, a non-legal 'Constitutional Code', setting out the essential existing elements and principles of the constitution and workings of government; secondly, a 'Constitutional Consolidation Act', being a consolidation of existing laws of a constitutional nature together with a codification of essential constitutional conventions and principles into one Act of Parliament; or thirdly, a 'Written Constitution proper', being a document of basic law by which the country is governed and the relationship between the state and its citizens, with an amendment process and elements of reform(184). The second and the third model confer the power to the judiciary to review the validity of Acts of Parliament. However, the first

(179) House of Commons Justice Committee, Constitutional Reform and Renewal (The Stationery Office 2009), Eleventh Report of Session 2008–09, HC 923

(180) ibid 21.

(181) Blackburn (n 127) 6

(182) Frederick Morton, ‹Judicial Review in France: A Comparative Analysis› (1988) 36 The American Journal of Comparative Law 90

(183) Blackburn (n 127) 7

(184) For a draft illustrative blueprint for each of these three types of document, see those prepared by the author for the House of Commons Political and Constitutional Reform Committee, A New Magna Carta?, 2014–15, HC 463, 29–356

form can only make a declaration of incompatibility under the HRA 1998.[185] The aim of this declaration is just to notify the government and Parliament, and in effect to invite them to initiate some reform of the law to amend the offending legislation[186]. This clearly affirms the fact that the existence of a written constitution does not necessarily mean that the power of striking down legislation will be between the hands of judiciary but depends on the content of document itself. The first model satisfies those who were obsessed to traditional principle of parliamentary sovereignty and who were opposed to the idea of unelected judiciary having the final word on constitutional issues as it shows that the notion of parliamentary sovereignty and a written constitution can co-exist and work together.

Additionally, analysing and addressing the for/against debate is not sufficient to decide whether or not the UK should have a written constitution, because it is important to take into consideration the problems that may arise with conventions, the method of enactment and the body of enactment if a new constitution is enacted.

**(iv) Conventions**

As established earlier, conventions are understandings, practices or habits that might regulate the behaviour of several members of the sovereign power[187]. Nevertheless, none of these words clearly define conventions. A constitutional convention is more than a practice, usage or custom; it is a tool that obstructs and limits the actions of a constitutional actor[188]. Practices and habits, unlike conventions, do not propose what ought to happen but instead describe what does happen[189]. Thus, Brazier argues that conventions should be distinguished from practices because they are not always precise and have been the subject of debate.[190] Therefore, in regard to conventions, problems could arise in adopting a codified document. This is because conventions play a significant role in the UK constitution. This was confirmed by Lord Wilson who ob-

(185) Ibid 40.
(186) Ibid.
(187) Dicey (n 12) 24
(188) David Pollard, Neil Parpworth and David Hughes, Constitutional and Administrative Law (Oxford University Press 2007) 116
(189) ibid.
(190) Rodney Brazier, ‹The Non-Legal Constitution: Thoughts on Convention, Practice and Principle› (1992) 43 Northern Ireland Legal Quarterly 262

serves that conventions control relations between the diverse areas of the UK constitution and the exercise of power[191]. This demonstrates that enshrining the mechanics and structure of government in a codified constitution would raise difficulties[192] because the unclear nature of conventions plays a crucial part in the UK constitution. Therefore, two major difficulties could arise – first, how are they are to be recognised and distinguished from mere usages or practices, and second, which ought to be involved in the constitution?[193] Wade contends that by their very nature, it is difficult to recognise conventions with any degree of accuracy[194]. If this is true, it will be problematic for the constitution to delineate a specific statement of, for instance, the powers of the Queen.

Nevertheless, as established in Section 2, conventions have been included in the form of codes of practice for civil servants, ministers and Members of Parliament. Thus, it is improbable to propose that conventions are integrally incapable of being recognised and stated. Certainly, the courts have frequently acknowledged the presence of conventions. The Supreme Court of Canada in Reference re Amendment of the Constitution of Canada went even further than simply acknowledging a convention[195]. It established, for the first time in a common-law domain, deciding a dispute as to whether a past practice – that of securing provincial consent to constitutional amendments affecting the powers of the provinces – was a convention or merely a usage[196]. In Australia, a Constitutional Convention, held in 1983–85 to 'recognise and declare' constitutional conventions, acknowledged 34 conventions concerning matters such as the relationships between the Prime Minister, Governor-General and the House of Representatives[197]. Bogdanor and Vogenauer, therefore, state that there is a necessity to differentiate, as the Su-

(191) Lord Wilson, ‹The Robustness of Conventions in a Time of Modernisation and Change› [2004] PL 407–9

(192) Sir John Baker, ‹The Unwritten Constitution of the United Kingdom› (2012) 15 Ecclesiastical Law Journal 21

(193) Vernon Bogdanor and Stefan Vogenauer, ‹Enacting a British Constitution: Some Problems› (2008) 38 Public Law 45

(194) Emlyn Wade, ‹Introduction› to the 10th edn of Dicey's Law of the Constitution, p.clv

(195) [1981] 1 SCR 753

(196) The Supreme Court held by a majority vote that the practice amounted to a convention but was not legally binding

(197) Charles Sampford, ‹›Recognise and Declare›. An Australian Experiment in Certifying Constitutional Conventions› (1987) 7 OJLS 369–417

preme Court in Canada did, between a mere usage and a convention[198]. However, once conventions have been recognised, we need to consider the extent to which they should be embodied in the constitution[199]. Thus, the issue around conventions should not present too much of a problem and can be resolved through either the public bodies or the courts. Therefore, the case for a written constitution is highly unlikely to be discredited by this minor issue.

**(v) The Method of Enactment**

There are four major methods in adopting a constitution: the endowment, the contract, the constituent assembly, and the referendum. However, the author will only focus on the last method, the referendum. This is because 'Referendums have been a prominent part of political life in the UK for more than forty years'[200]. Tony Benn, a former Member of Parliament, argues that the process of adopting a new constitution should involve 'the agreement of both Houses of the Commonwealth Parliament and the endorsement of the people in a referendum'[201].

However, Hood Phillips claims that the most proper way for constitutional change would be 'a Constitution Amendment Bill passed by a special majority of (say) two-thirds of each House'[202]. He opposes the use of referendums since: 'It is difficult to frame a complex technical question in a way suitable to be answered yes or no by large numbers of people who have not the necessary background and have not followed all the previous discussions'[203]. This clearly demonstrates that the use of referendum seems inevitable in adopting a written constitution despite it raising a crucial problem as it allows individuals to vote in an uninformed issue.

(198) Bogdanor and Vogenauer (n 190) 46
(199) ibid.
(200) Lucy Atkinson and Andrew Blick, ‹Referendums and The Constitution› The Constitution Society 2017 https://consoc.org.uk/wp-content/uploads/2017/02/Web-version-Referendums-paper.pdf accessed 28 June 2021.
(201) Tony Benn and Andrew Hood, Common Sense: A New Constitution for Britain (London Hutchinson 1993) 51
(202) Phillips (n 155) 149
(203) ibid

### (vi) The Body of Enactment

Evidently, if the case for a codified constitution is mainly democratic, the contribution by the public in the end creation is important.(204) If we look abroad, the traditional process is popular endorsement through a referendum(205). However, that would qualify as ratification; therefore, the problem lies with the body entrusted with drafting the document. Authorship necessitates representation because drafting involves debate and a process for settlement(206). This is where the question gets very interesting – what kind of representation?(207)

The first observable body to consider is the Parliament. It is the supreme body of the state, and its legitimacy and complex set of practices, conventions and customs have turned it into the nation's best conduit for political scrutiny, dialogue and decision(208). Nevertheless, the author of this paper regards it is the wrong body to draft a written constitution. This is because of the nature of the UK Parliament that not a single party, but rather, the leadership of a generally divided party controls every main vote in the Commons, at least outside the select committees, and can triumph over any challenge by the House of Lords,(209) and all that with just over a third of the popular vote behind it(210). Therefore, this procedure must not be executed by the government due to the same reasons(211). Some scholars have been led to suggest other alternatives, generally within executive powers but at some distance from the government itself. For instance, Blackburn proposes a body known as the 'Commission for Democracy' for drafting a written constitution as a Bill before the Parliament(212). He proposes that this be designed through ministerial prerogative following cross-party discussions and agreement of its main composition and aims(213). As it lacks direct involvement

(204) King (n 117) 25
(205) ibid.
(206) ibid.
(207) ibid.
(208) ibid 26.
(209) Stewart Davidson and Stephen Elstub, ‹Deliberative and Participatory Democracy in the UK› (2016) 16 BJPIR 367
(210) ibid.
(211) ibid.
(212) Blackburn (n 127) 21–25
(213) ibid.

from the public, he proposes that a review body be established, such as the Royal Commission, that is independently managed by experts and representatives to simplify the process by engaging and informing the public(214). Such a body could manage suitable public discussion and present a form of independence from the Parliament and the government(215). This shows that due to the UK's political system, neither the Parliament nor the government should be the drafting body to establish a written constitution; therefore, an independent body, as Blackburn proposes, is the most suitable way to adopt a codified constitution.

King, nevertheless, argues that Blackburn's proposal is problematic because Blackburn's proposed body is too remote from the Parliament; thus, it would lack the legitimacy for making bold recommendations(216). He also states if it were too close, it would be in danger of political tribalism(217). In all events, the almost insuperable difficulty for any executive-run procedure is that the final call must be rejected or passed by the Parliament(218). Therefore, the idea of a constitutional convention could be appropriate for such reasons, and such conventions can take many forms. Robert Hazell and Alan Renwick, for instance, envisage representation through a citizens' convention that would permit normal members of the public to deliberate, provide evidence and make recommendations(219). However, it has a limitation, as illustrated before. If Parliament holds the final decision, it can act as a conservative veto point to block the convention's work. Thus, King proposes that a constituent assembly be established, which will be organised for the specific purpose of revising or drafting a constitution, and which,

(214) ibid 15–17.

(215) It would do so through the commission of a variety of ‹mini-publics›, namely, citizen assemblies, consensus conferences, deliberative opinion polls, planning cells and citizens› juries: See Stephen Elstub and Gianfranco Pomatto, ‹Mini-publics and Deliberative Constitutionalism› in Ron Levy and others (eds) The Cambridge Handbook of Deliberative Constitutionalism (CUP 2018) ch 22

(216) King (n 117) 26

(217) ibid.

(218) ibid.

(219) A Renwick and R Hazell, ‹Blueprint for a UK Constitutional Convention› (The Constitution Unit UCL, June 2017) <https://www.ucl.ac.uk/constitution-unit/news/2017/jun/new-report-blueprint-uk-constitutional-convention> accessed 13 August 2020

importantly, has its own legislative authority[220]. The assembly should achieve three fundamental objectives: it must represent the public, it must discuss the right issues in a complete and informed manner and it must have the power to have its findings be approved by those holding political power[221]. Thus, Blackburn's proposed body is flawed, as it would lack legitimacy. In contrast, King's proposal can be seen as the most appropriate way to enact a written constitution because it fixes Blackburn's proposal and would ultimately produce a constitution that would be representative, informed and effective.

## Conclusion

To sum up, the lack of momentous events clearly explains why the UK does not have a written constitution[222]. However, Brexit has produced a series of three crucial events that have led to a constitutional crisis in both political and legal domains. First, a state of instability and uncertainty was created by the executive body, which caused two general elections in three years. Second, the Brexit litigation Miller I emphasised a variety of flaws in the UK's constitutional arrangements. The case also demonstrated that the constitution is incapable of being adapted to novel situations, and the constitution does not detail procedures for withdrawing from the EU. Third, the Miller II case illustrated that some areas of the UK constitution are either confusing or ambiguous. Thus, due to these 'constitutional moments', it can be said that it is time for the UK to enact a written constitution[223].

However, the case for adopting a codified constitution is not only because the UK has experienced momentous events but also because a written document would improve human rights issues because individuals' rights will likely be safeguarded if there exists a higher authority that is difficult to amend. A written document would also provide clarity on constitutional arrangements. Furthermore, adopting a written document might result in judicial implications, such as broadening the power of the judiciary by judicial review. Although judicial review may

(220) King (n 117) 27

(221) ibid.

(222) Rodney Brazier, Constitutional Reform: Reshaping the British Political System (Oxford University Press 2008) 158–9

(223) The phrase 'constitutional moments' is often used by Ackerman in Bruce Ackerman, We the People (Belknap Press of Harvard University Press 1998)

limit the power of Parliament, it would safeguard the public against breaches of fundamental rights. Moreover, a written document will not enable the courts to constrain the Parliament's power. This is because, as Blackburn suggests, the precise constitutional jurisdiction and the powers of the courts depend on the model and the nature of the document. Thus, a written constitution can be compatible with the continuation of parliamentary sovereignty. Finally, it will not be too difficult to resolve potential problems that may arise if a constitution is enacted, such as misrecognition of conventions and representation in the body of enactment. On one hand, the issue of conventions can be settled through public bodies or the courts. The issue of the body of enactment, on the other hand, can be tackled, as King proposes, through a constitutional convention. Thus, the case for a codified constitution is highly unlikely to be diminished by these minor issues.

# خروج بريطانيا من الاتحاد الأوروبي ودستورها الغير مقنن.

فهد وليد خالد العامر(*)


## ملخص الدراسة

يجادل البحث على أن المملكة المتحدة يجب أن تتبنى دستورًا مقننًا وقد حان الوقت لتبنيه الآن بالذات نظراً للأحداث المحورية التي وقعت في السنوات القليلة الماضية. سيوضح القسم الأول أظهر لماذا يتعين على المملكة المتحدة لإعتماد دستور مقنن خصوصاً الآن. كما سيتناول القسم الثاني الخصائص الرئيسية لدستور المملكة المتحدة، مثل السيادة البرلمانية والقوانين الدستورية والاعراف وامتيازات الملك. بينما سيحلل القسم الأخير النقاش حول مع-ضد تبني دستور مكتوب فيما يتعلق بقضايا مثل حماية الحقوق و مسألة الوضوح والتدخل القضائي. كما سيتطرق أيضاً بعض التحديات المحتملة التي يمكن أن تنشأ بسبب تبني دستور مقنن، مثل مشاكل فهم الاعراف الدستورية واشكاليات الجهة الممثلة في تبني الدستور.


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# مجلة الحقوق

فصلية علمية محكمة - تصدر عن مجلس النشر العلمي - جامعة الكويت

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