



# In defence of the UK's unwritten constitution

Brian Christopher Jones

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## IfG–Bennett foreword

In February 2022, the Institute for Government and the Bennett Institute for Public Policy launched a Review of the UK Constitution, to offer an evidence-based and non-partisan analysis of the strengths and weaknesses of the constitution, and where necessary make recommendations for change.

To address the bold scope of this project, we have complemented our own in-depth research with a breadth of perspectives from some of the UK's foremost constitutional experts. In this series of expert guest papers, we publish the views and proposals of academics and practitioners, who take a range of stances from constitutional conservation through to major reform. While these papers respond to the pressing constitutional questions of the day, they all also look to construct long-term solutions that will inform political decision making as well as public debate.

Given the range of views expressed, we do not necessarily endorse all of the ideas found in these papers, but we can commend the rigour with which the arguments have been constructed and sincerely thank the authors for their thoughtful contributions.

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## Introduction and context\*

The UK constitution has undoubtedly been under pressure in recent years, but it is not broken or in disarray. It is working just as well as, or perhaps even better than, many written constitutions around the world.\*\* This is true when looking at problems that are international in scope, such as populism and coronavirus, but also when assessing more domestic problems, such as deposing problematic leaders and handling major constitutional change.

But there are many who would like to change the UK constitution into something completely different. The most common solution offered is to move from the current unwritten constitution based on parliamentary supremacy to a written constitution based on constitutional supremacy.\*\*\* Doing this would align the UK with the vast majority of states around the world that use a fundamental written text – a constitution – that sits above ordinary statutory law. The UK famously does not have such a text, but the idea is increasingly seeping into the public consciousness. Discussion and advocacy of such a document come not just from constitutional reformers in academia<sup>1</sup> and in non-governmental organisations,<sup>2</sup> but also can be found in newspapers, magazines and a variety of new media (blogs, podcasts, forums and social media).<sup>3</sup> Even celebrity authors have at times waded into the discussion.<sup>4</sup> While some of the mechanics and merits of incorporating a written constitution are evaluated below, ultimately I think a move to constitutional supremacy would be a significant mistake.\*\*\*\*

This paper defends the UK's unwritten political constitution. It does so first by examining recent crises (Brexit, coronavirus and Boris Johnson's premiership) and assessing how the constitution fared in each case. The paper then looks more generally at constitutional performance in terms of constitutional knowledge and understanding, the role of 'the people', allowing for and incorporating constitutional change, and whether entrenched written constitutions produce better protection of rights or enhanced democracy. Taking into consideration all these elements, it is difficult to see how a written constitution would benefit the UK going forward.

Although the world has more written constitutions than ever before, those constitutions are longer and more detailed than ever, and they are also enforced more strongly by supreme and constitutional courts than ever, the state of many democracies throughout the world is not great, and could even be said to be deteriorating.<sup>5</sup> While the state of

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\* This report builds off two recent works of mine: Jones BC, *Constitutional Idolatry and Democracy: Challenging the Infatuation with Writtness*, Edward Elgar Publishing, 2020; Jones BC, 'A (brief) case against constitutional supremacy', in Johnson R and Yi Zhu Y eds, *Sceptical Perspectives on the Constitution of the United Kingdom*, Bloomsbury Publishing, 2023.

\*\* I find the 'written' versus 'codified' debate a stale and trivial distraction. As Palmer has highlighted, the "great advantage of the term 'written' is that it inherently confronts you with the abstract nature of a constitution"; see Palmer MSR, 'What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders', *Public Law Review*, 2006, vol. 17, pp. 133–62, see p. 136.

\*\*\* Regarding the concept of 'constitutional supremacy' and how it would operate, see Limbach J, 'The concept of the supremacy of the constitution', *Modern Law Review*, 2001, vol. 64, no. 1, pp. 1–10.

\*\*\*\* I have outlined some of these reasons in Jones BC, 'Brian Christopher Jones: A single written UK constitution may only make things worse', blog, UKCLA, 25 May 2020, retrieved 25 August 2023, <https://ukconstitutionallaw.org/2020/05/25/brian-christopher-jones-a-single-written-uk-constitution-may-only-make-things-worse>; BC Jones, 'What's so great about a written constitution?', *The Atlantic*, 9 October 2020, retrieved 25 August 2023, [www.theatlantic.com/ideas/archive/2020/10/written-constitutions/616628](http://www.theatlantic.com/ideas/archive/2020/10/written-constitutions/616628)

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UK democracy may be grouped with those currently struggling, the answer does not lie in the drafting of a written constitution. This paper defends the UK's unwritten political constitution by arguing that it fared appropriately – if not commendably at times – during recent crises, and that the wider performance of the UK constitution compares favourably to written constitutions in other jurisdictions. Ultimately, while written constitutions may work for some jurisdictions, they are certainly not the only way forward. Unwritten constitutions can also provide a viable path forward, and can perform as well as written constitutions on many constitutional essentials, such as valuing the views of the general public and incorporating constitutional change.

### **The debate around constitution writing**

Calls for a written constitution in the UK are nothing new. In fact, the idea of using written constitutions has been tried before in the UK's constituent parts. In England during the interregnum period, Oliver Cromwell implemented the Instrument of Government in 1653, which has been identified as the world's first written constitution. Due to its unamendability and problems of concentration in relation to executive power,<sup>6</sup> the document was replaced by what has largely been considered England's second written constitution: the Humble Petition and Advice. This failed shortly after Cromwell's death.<sup>7</sup> Thus, when the Glorious Revolution happened in 1688, it is no surprise that parliament preferred a statute that guaranteed its rights against the monarch – the Bill of Rights 1689<sup>8</sup> – as opposed to experimenting with another fundamental document that may have been subject to monarchic abuse or potentially curtailed constitutional change. The UK's constituent parts have produced other constitutional documents that relate to high-profile political demands and state architecture, such as the 1215 Magna Carta, the 1320 Declaration of Arbroath, the Act of Settlement 1701 and the Acts of Union 1707, but none of these are akin to a fundamental written constitution that sits above all other types of law.

Although calls for a written constitution have been made throughout the UK's history, they have accelerated in the last half-century. Prominent calls for a written constitution were made during the late 20th and early 21st centuries. The Charter 88 movement and the Institute for Public Policy Research put forward initiatives for a written constitution in the late 1980s and early 1990s.<sup>9</sup> Tony Benn also led the charge in parliament, presenting a bill for a constitution that would have significantly altered the UK's constitutional structure.\* Although New Labour did not commit to a written constitution, it did commit to increased constitutional writtenness, bringing forward statutes such as the Human Rights Act 1998, devolution statutes and the Constitutional Reform Act 2005. The 800th anniversary of Magna Carta inspired a litany of proposals, including a major parliamentary report on the prospects of a written constitution,<sup>10</sup> a number of scholarly works on bringing forward a written constitution,<sup>11</sup> and even a project on 'crowdsourcing' the UK constitution.<sup>12</sup>

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\* Benn's Commonwealth of Britain Bill was introduced on 20 May 1991. The proposal was fairly radical, and would have even turned the UK's parliamentary system into a presidential system.

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The debates as to whether to draft a written UK constitution tend to revolve around flexibility versus rigidity and transparency versus opacity.<sup>13</sup> These are interesting and relevant debates and there is merit in discussing how these characteristics play out under written and unwritten conditions. However, there is room for a wider and more comprehensive assessment of what such a transition may entail. Implementing a written constitution for the UK – and thus transitioning from parliamentary supremacy to constitutional supremacy – may just be unwise, and could lead to a number of democracy-hindering downsides.

The debate around constitution writing also touches on other aspects of government that have changed throughout the years. A prominent feature that has shifted in many jurisdictions is the status of politics, in terms of both the faith that citizens possess in the political realm and also its role in the wider constitutional system. The UK constitution has not escaped these tensions.

### **Wider lack of faith in politics and the political realm**

The current lack of faith in the UK's political constitution also comes within a wider lack of faith in politics and the political realm more generally. This is not just a UK phenomenon<sup>14</sup> as it is seen in long-standing democracies around the world.<sup>15</sup> A number of factors appear to be driving this:

- confidence in government and democratic institutions is decreasing
- traditional democratic participation (for example, voter turnout and membership of political parties) has declined in many places
- a general anti-political sentiment towards politics and the political realm has developed.<sup>16</sup>

This is compounded by the fact that citizens feel they no longer control their democracies.<sup>17</sup> Many of these findings cut across geographical lines and also demographic factors such as income level, gender and race.<sup>18</sup> This means that they cannot be limited to merely one segment of the population or one particular area. Collectively, the developments amount to a wide sense of contemporary democratic disaffection. These trends are disturbing, and some people have connected them to the rise of populism and authoritarianism around the world.<sup>\*\*</sup>

Part of the problem in relation to the lack of faith in politics and the political realm may stem from changes to the relationship between law and politics that came about in the mid-20th-century post-World War Two climate. During this time there was an explosion

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\* Putnam et al note it seems unlikely "that so many independent democracies just happened to encounter rough water or careless captains simultaneously"; see Putnam RD, Pharr SJ and Dalton RJ, 'Introduction: what's troubling the trilateral democracies?', in Pharr SJ and Putnam RD eds, *Disaffected Democracies: What's troubling the trilateral countries?*, Princeton University Press, 2000. However, researchers have at times seen subtle differences in geographical and demographic factors; see Finifter AW, 'Dimensions of political alienation', *American Political Science Review*, 1970, vol. 64, no. 2, pp. 389–410, see pp. 389, 397 and 405–6. More recently, see Kenny M and Luca D, 'The urban-rural polarisation of political disenchantment: an investigation of social and political attitudes in 30 European countries', *Cambridge Journal of Regions, Economy and Society*, 2021, vol. 14, no. 3, pp. 565–82, see pp. 565, 566 and 570–77.

\*\* See, for example, Webb P, 'Who is willing to participate? Dissatisfied democrats, stealth democrats and populists in the United Kingdom', *European Journal of Political Research*, 2013, vol. 52, pp. 747–772; Levitsky S, 'Democratic Survival and Weakness', *Journal of Democracy*, 2018, vol. 29, no. 4, pp. 102–113, see pp. 104–07.

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of law (often in the form of new constitutions and bills of rights, and the enforcement of these by constitutional courts), and the use of parliamentary sovereignty around the world declined.<sup>19</sup> Constitutional supremacy, and the idea that countries should not just 'tie policy to law' but 'subordinate it to law', came in its place.<sup>20</sup> For many jurisdictions this meant that apex courts could strike down the actions of the other branches – even legislation passed by a national parliament. Now, law routinely asserts its dominance over the political realm.<sup>21</sup> Judith Shklar captured the essence of this new mindset, noting that, for many citizens, "politics is regarded not only as something apart from law, but as inferior to law".<sup>22</sup> This relationship between law and politics is now dominant around the world. Although the UK has formally retained parliamentary sovereignty, judicial review and the power of judges have generally been seen as on the rise.<sup>23</sup>

This widespread lack of faith in the political realm and its increasing subservience to the legal realm put even more pressure on the UK's political constitution.\* Reformers can point to data showing that trust and confidence in governmental institutions are at their lowest levels in decades, arguing that this demonstrates the current UK constitution is not working.<sup>24</sup> These arguments would be much stronger if it was merely the UK showing signs of democratic disaffection. In fact, the problem is much wider, and potentially goes to the heart of liberal democracy and the widespread challenges that it faces today.\*\* That is not to say that the findings in relation to the UK are acceptable or should be downplayed, but the wider picture regarding the current state of liberal democracy also needs to be taken into consideration, and helps provide context for the current challenges.

## Recent crises and the health of the UK constitution

Recent crises demonstrate that, far from being inadequate, irrelevant or even damaging, the UK constitution has performed adequately – if not admirably at times.

### Brexit

Brexit is arguably the most significant UK constitutional change in decades. It was never going to be smooth or easy; constitutional change rarely is. The change brought about by Brexit went further than merely decoupling from a significant international trade agreement. It was decoupling from a long-standing political, economic and cultural relationship that had taken decades to develop. This meant that the change did not

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\* Some may challenge this point in terms of the current operation of the UK Supreme Court, which arguably has taken a more cautious approach in recent years in terms of its interaction with the political realm (see, for example, Gearty C, 'In the shallow end', *London Review of Books*, 2022, vol. 44, no. 2, retrieved 23 August 2023, [www.lrb.co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end](http://www.lrb.co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end)). However, such fluctuations in the scope and intensity of judicial review do not indicate that judicial power has subsided. These changes may be indications that the current composition of the court is less interventionist or takes a different interpretative approach than the previous composition, that the court may be thinking more about its institutional legitimacy and potential prospects of judicial review/court reform, or it simply may be that the political realm has calmed and not as many contentious cases are coming forward. But there may be many more elements or considerations in play. Ultimately, these fluctuations in judicial review due to composition or other considerations do not mean that judicial power has decreased, but that increasing judicial power comes in cycles and is often responding to a number of factors.

\*\* See, for example, Fukuyama F, *Liberalism and Its Discontents*, Farrar, Straus and Girox, 2022, pp. 119 and 124: "While judges theoretically interpret laws passed by democratically elected legislators, they have at times bypassed the latter and promoted policies that allegedly reflect their own preferences and not those of the voters;" "By allowing themselves to be used as a means of leapfrogging the legislative process, courts and agencies have been made the targets of intense backlash and politicization."

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just affect goods, trade and political co-operation, but also families, livelihoods and allegiances. Thus, the scale and complexity of the changes were substantial and should not be underestimated.

The many and various calls during Brexit that the UK constitution was “broken” or “in turmoil” were overblown and inaccurate.<sup>24</sup> Beyond potentially exasperating these tensions, it is difficult to see how an entrenched constitution would have better navigated such difficult circumstances. Conversely, the description that the UK constitution was “remarkably resilient” during this period also seems out of place.<sup>25</sup> A more tempered and plausible assessment is that the UK constitution demonstrated a ‘bend but don’t break’ quality throughout the process. After all, constitutional tensions were undoubtedly present and some events happened that were unlikely to occur during normal times, such as backbenchers taking over the House of Commons Order Paper, governments losing significant policy votes but remaining in office, and devolved governments attempting to write legislation to supersede Westminster legislation. Judicial interventions heightened the drama during this period, and the different perspectives of the UK’s constituent parts regarding remaining in the EU furthered these tensions. Perhaps the most significant tension, however, was one that parliamentary sovereignty is supposed to reconcile: the difference between MPs’ preferences on Brexit compared with the electorate’s. And yet it took a referendum, two general elections and a copious amount of debate – both inside and outside of parliament – to temper and further align these tensions.

Some of the events described above seem more like constitutional anomalies than constitutional ‘resilience’. If not anomalies, they were certainly atypical of how the UK constitution regularly operates. But these anomalies also give form and shape to one of the UK constitution’s essential qualities: flexibility. The Brexit period demonstrates flexibility in two senses:

- how the constitution itself can change through constitutional amendment (that is, the UK’s exit from the EU)
- the various ways constitutional components may facilitate constitutional change (that is, through the process and mechanics of leaving the EU).

Thus, it is not just that the constitution *can* change, but also *how* these changes are realised, which demonstrate flexibility. And yet, Brexit also displayed elements of inflexibility, especially when looking at it from a devolution perspective. Although different perspectives across the UK’s constituent parts about leaving the EU were present, it was the UK government negotiating the exit deal and passing significant legislation through parliament. The devolved governments could try to influence the direction of travel, but ultimately these major decisions came down to the UK government and Westminster MPs during this period. Thus, the Brexit process demonstrates both the flexibility and rigidity of the UK’s unwritten constitution.

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\* Some even argued that this period was the UK constitution ‘working’; see McTague T, ‘Ignore the chaos. Britain’s system is working’, *The Atlantic*, 15 July 2022, retrieved 25 August 2023, [www.theatlantic.com/international/archive/2022/07/britain-arcane-constitution-boris-johnson-resignation/670527](https://www.theatlantic.com/international/archive/2022/07/britain-arcane-constitution-boris-johnson-resignation/670527)

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It is almost difficult to overstate how much critical commentary on the UK constitution came about during the Brexit episode. One leading academic even felt the need to remind people “don’t panic” during one of the complicated periods.<sup>26</sup> But it is easy to see why some people were panicking. Perhaps the height of this critical commentary was *The Economist’s* May 2019 issue, which featured on its cover parliament’s Elizabeth Tower surrounded by explosives, with the description: “Next to blow: Britain’s constitution”.<sup>27</sup> The magazine’s lead article on the subject lampoons Britain’s “supposedly sovereign” parliament, and describes the unwritten constitution as “a jumble of contradictions”, “ramshackle”, “unclear”, “easily amended” and containing the potential to “amplify chaos, division and the threat to the union”. The piece also speaks of “constitutional chaos”, “constitutional nightmare”, “ill-considered constitutional innovations” and “constitutional crisis”. Of course, the newspaper can be forgiven for trying to sell copies, but this level of alarmist rhetoric borders on scaremongering.

Brexit was, and remains, a fascinating insight into large-scale constitutional change, both in terms of how the UK constitution performed during this period and also in terms of how countries more generally may deal with such significant constitutional change. While it may not have been an occasion to celebrate the performance of the UK constitution, neither was it an occasion to sound the alarm bells on its demise.

## Coronavirus

The coronavirus period demonstrated that having a written constitution during times of crisis may matter very little. Indeed, many countries with entrenched written constitutions triggered emergency constitutional provisions or created new emergency measures to tackle the virus, thus presenting similar responses around the world to the disease: major restrictions on citizens’ freedom of movement.<sup>28</sup> The unwritten constitutions of the UK and New Zealand were no exception to this. However, both the UK and New Zealand fared adequately when looking at comparator nations,<sup>29</sup> and New Zealand’s response was considered by many to be among the world’s best.<sup>30</sup>

The coronavirus period also demonstrated that accountability in the UK constitution is alive and well, and that even during times of crisis we are quite far from seeing what could be called ‘unchecked’ power. The UK constitution allowed for lockdowns to be challenged, for bad practice to be exposed and for a thorough review of the response to begin as well. Legal challenges to the lockdown restrictions were upheld in both the High Court<sup>31</sup> and the Court of Appeal.<sup>32</sup> Governmental bad practice was exposed in a variety of ways. The most significant of these developments was the long-running exposure of the so-called ‘partygate’ scandal, which dogged Boris Johnson throughout his premiership and arguably brought him down.<sup>33</sup> But exposing bad practice was more than just partygate. Various government actions during the pandemic were exposed as unlawful,<sup>34</sup> government ministers were fined and even resigned during the Covid period for breaking the rules<sup>35</sup> and the government had to answer difficult questions on a daily basis in its coronavirus briefings and during parliamentary sessions. Finally, a Covid inquiry was set up and has started gathering evidence.<sup>36</sup> This means that families that

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lost loved ones, health workers, government officials and others will be able to provide evidence to the inquiry, and that mistakes and bad practice throughout the pandemic will be publicly called out.

The UK constitution also allowed different responses to the pandemic from the various constituent parts of the UK. Governments in England, Scotland, Wales and Northern Ireland all handled the pandemic differently, bringing in policies such as mask wearing and caps on gatherings, and other significant policies at different points.<sup>37</sup> The various countries also held their own coronavirus briefings and press conferences throughout the period. Even if these diverging responses may have led to confusion at times, this arrangement still allowed for a flexibility in relation to devolution that Brexit did not offer, while also allowing a unified response to certain issues.\*

When looking at the worldwide effects of coronavirus, the bottom line is that the type of constitution countries possessed did not seem to matter much, if at all. What mattered from a constitutional perspective was the type of government that was in power when coronavirus hit, what mechanisms were in place to hold the government to account and also how countries would go about learning from mistakes to better prepare for the next pandemic. At least in terms of the latter two, the unwritten UK constitution performed as well as many other written constitutions around the world.

### **The premiership of Boris Johnson\*\***

Boris Johnson's time in No. 10 was for some a sustained constitutional crisis.\*\*\* There is little doubt that his unique governing style sometimes conflicted with the customs and traditions of the UK constitution – especially those articulated in the ministerial code – and that this raised issues in relation to how the constitution was performing. In fact, some people grouped Johnson's leadership style with that of other 'strongmen' populist leaders around the world. But Johnson's downfall demonstrated the UK constitution working well, perhaps even admirably. At a time when many people have been lamenting the upholding of norms and values in the UK constitution,<sup>38</sup> analysing Johnson's departure from No. 10 could prove useful when assessing the need for and potential prospects of constitutional reform.

Johnson's downfall is especially intriguing because when he was deposed he was in a fairly strong constitutional position. He had recently won a confidence vote of Tory MPs, which meant that he was safe from being formally challenged as Conservative Party leader for another year. Additionally, the strong Conservative parliamentary majority at the time meant that he was likely to be safe from any confidence vote put forward by the opposition (especially because he led the party into the 2019 general election,

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\* See the Coronavirus Job Retention Scheme (CJRS), or 'furlough scheme' as it was commonly known. This scheme provided grants to employers to furlough employees and still pay up to 80% of their wages. The CJRS applied across the UK, including in England, Scotland, Wales and Northern Ireland.

\*\* Some of this discussion is taken from Jones BC, 'Leadership exit points in the UK constitution', blog, UKCLA, 5 June 2023, retrieved 25 August 2023, <https://ukconstitutionallaw.org/2023/06/05/brian-christopher-jones-leadership-exit-points-in-the-uk-constitution>

\*\*\* One scholar has referred to it as "constitutional vandalism"; see Latham-Gambi A, 'How should we teach the Johnson government? (Possible) pedagogical shortcomings in the face of (arguable) constitutional vandalism', blog, UKCLA, 14 September 2022, retrieved 25 August 2023, <https://ukconstitutionallaw.org/2022/09/14/alexander-latham-gambi-how-should-we-teach-the-johnson-government-possible-pedagogical-shortcomings-in-the-face-of-arguable-constitutional-vandalism>



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which produced the strong majority). But as stable as he was constitutionally, politically he was in a much more vulnerable position. The cost-of-living crisis was starting to hit, and his decision making and credibility had taken a hard knock because of the partygate revelations and the Owen Paterson affair.\* Sue Gray's report in May 2022 furthered these problems by coalescing the allegations into a thoroughly detailed and easily accessible document.<sup>39</sup> After appointing a deputy chief whip who faced allegations of sexual assault, including conflicting reports of when the prime minister was aware of these allegations, Johnson's political support collapsed. His government faced a record number of ministerial resignations, and Johnson himself was forced to resign.<sup>40</sup>

As the Johnson and even the Truss premierships highlight, the UK constitution contains a variety of methods to depose problematic leaders. There are four methods by which prime ministers can be deposed without their consent:

- confidence votes
- leadership challenges
- forced resignation
- regularly timed general elections.

The constitution also allows for leaders to admit that their time is up and willingly resign (see the departures of David Cameron and Tony Blair). In total this amounts to five potential leadership exit points within the UK constitution. These exit avenues are undoubtedly important. Many world leaders have consolidated power in recent years and some have resisted leaving office in various ways or made power transitions much more difficult. Thus, finding ways to depose problematic leaders without their consent or to put pressure on them to concede their positions is incredibly important from a constitutional perspective.

Johnson's departure also brings forward intriguing questions about the upholding of norms and values within the UK constitution. Specifically, Johnson's premiership was framed around a battle for truth within politics, with some claiming that truth – and the mechanisms that uphold it, such as the ministerial code – no longer mattered in the political realm or were insufficient in holding the government to account.<sup>41</sup> And yet, both the Sue Gray report and the later Privileges Committee report were based around fact finding and the ideas of truth. The Sue Gray report put Johnson in a difficult position going forward, which likely contributed to his exit from No. 10. The report by the Privileges Committee (led by a Conservative majority),<sup>42</sup> which came out about a year after Johnson left Downing Street, was even more damaging, and led to him quitting as an MP. If he ever does enter politics again, these two reports – in addition to his lengthy

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\* After investigations revealed that Paterson had been paid over £500,000 by companies to lobby ministers, his case was sent to parliament's Committee on Standards, who found that he had violated rules related to pay-advocacy and recommended he be suspended from the House for 30 days. The government responded by saying the standards system was flawed and attempted to implement a new select committee to review it, although later backtracked on this. However, the Paterson affair started larger conversations about trust and integrity in government and whether MPs should have second jobs.

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parliamentary record – would remain readily accessible for any potential rivals. The Covid inquiry will also deliver its final report in due course, which could be even more damaging for Johnson.

Many constitutions, both written and unwritten, struggle with executive power and how to manage it.<sup>43</sup> For those lamenting the state of the current UK constitution, they seem to be forgetting that virtually every 'strongman' populist around the world (for example, Putin, Xi, Duterte, Erdoğan, Orbán and Trump) has operated within the confines of a written constitution. And yet, those documents did not seem to provide the protective bulwark that many people thought they would. It is arguable if these documents have even amounted to speed bumps that could slow down the consolidation of executive power. I do not believe that Johnson belongs in the same group as these other leaders. Nevertheless, what seems clear is that when compared with written constitutions, the UK's unwritten political constitution can do just as good a job – and perhaps an even better job – of deposing problematic leaders. And at a time when democracy and constitutional government are under threat, that important constitutional feature is important to hold on to.

Each crisis described above produced different challenges:

- In terms of Brexit, they related to facilitating and incorporating constitutional change.
- In terms of coronavirus, they related to keeping the government accountable during a worldwide public health crisis and balancing citizen freedoms with health restrictions.
- In terms of Johnson's time in office, they related to dealing with and deposing a problematic leader.

At times, the UK constitution bent, and sometimes did not provide a clear and convincing direction for the political realm to follow. But there were also times when the UK constitution performed admirably, displaying why its unwritten nature has proved advantageous for so many years.

## **UK constitutional performance more generally**

### **The UK's unwritten constitution is not any more difficult to understand than written constitutions**

One common argument against the unwritten UK constitution is that nobody knows what it is, and this leads to a lack of clarity on its operation.<sup>44</sup> How could people understand a constitution if it is not neatly written down in one place, where citizens can read and refer to it? This is a provocative argument, as it makes the UK constitution look messy and disorganised. While this may be an effective rhetorical critique, the reality is much different. UK citizens are not lost or confused on the mechanics of the unwritten constitution, and they perform just as well as, or sometimes better than, those citizens living under written constitutional arrangements.

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Indeed, a number of large-scale quantitative studies demonstrate this.<sup>45</sup> A 2010 report for the Department for Education found that pupils in England were part of a group of 18 countries that “achieved significantly higher scores than the international test average” on civic knowledge.<sup>46</sup> Other large-scale studies show that civic knowledge in many countries does not vary significantly, and that English pupils often sit around the middle of the pack, along with German, Swiss and Danish pupils.<sup>47</sup> At times, English pupils have even outperformed pupils in countries that idolise their constitutions, such as the US.<sup>48</sup> These studies have taken place over a number of years and in a variety of contexts. Thus, it is reassuring that citizens in the UK have performed reasonably well, and at times better than pupils living under written constitutional systems. Additionally, a 2015 Ipsos MORI poll found that large numbers of those living under written constitutions had never even heard of these documents.<sup>49</sup> This was the case for close to a third of those polled in Australia, Belgium, Brazil, India and South Korea. In Romania, only 38% of people had heard of their written constitution. These figures demonstrate that merely possessing a written constitution will not educate a citizenry, and indeed will not ensure that citizens will ever read the document or know it exists.

But even if citizens do consult these documents, the idea that written constitutions function like operating manuals is a significant misconception.<sup>\*\*50</sup> All constitutions rely on a combination of written texts, unwritten principles and conventions, court judgments, formal and informal procedures, and many other elements that allow them to function. A good deal of constitutions even contain provisions that are out of date with modern practice, have fallen into desuetude or simply do not reflect reality.<sup>51</sup> Additionally, constitutional preambles can contain a good deal of problematic material, such as misleading statements on the power of the people, including historical propaganda that may fuel nationalist tendencies, and even sometimes proclaim that the hand of God or God’s particular genius helped draft the constitution.<sup>52</sup> Thus, citizens who do consult their written constitutional document may not receive an accurate portrayal of how their state functions or how that document came into being. And even if some constitutions do accurately reflect state functionality, certain provisions may be misunderstood without the benefit of further knowledge, such as customs and practices, court decisions and other resources (some of which may be tricky for citizens to find).

There is certainly room for UK citizens to improve when it comes to civic and political knowledge, and indeed further knowledge about how the UK constitution operates, but to say that a written constitution would clarify things seems to be far from reality. Generally, UK citizens are not confused about constitutional fundamentals, and tend to know just as much about their system as their peers in countries that possess a written constitution. Although these countries may have a place to point to when confronted with constitutional questions, these documents are certainly not a ‘one-stop

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\* However, English pupils were not in the highest-achieving cluster of countries, and their knowledge of EU institutions at this time was not as high as other areas.

\*\* Frankenberg states that written constitutions “hardly render an accurate description of social reality”, and he further notes that at best they “indicate how societies... envision coping with or camouflaging the business of establishing and exercising authority and bringing about social cohesion”; see Frankenberg G, *Comparative Constitutional Studies: Between magic and deceit*, Edward Elgar Publishing, 2018, pp. 14–15.

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shop' of constitutional information. At times they may mislead, enhance nationalist tendencies or present out-of-date or inaccurate information. Beyond this, possessing such a document does not seem to make citizens any more informed in terms of civic or political knowledge. If the conversation over a written constitution is going to continue, then it should proceed with caution regarding any potential to 'educate' the citizenry or 'clarify' our arrangements.

### **Parliamentary supremacy does not ignore or obfuscate the role of the people; it puts the people at the heart of the constitution**

Another common criticism of the unwritten political constitution is that 'the people' are nowhere to be found: unlike in many written constitutions that begin with "We the people", the UK constitution supposedly fails to incorporate this essential aspect.<sup>53</sup> Popular sovereignty, it is asserted, cannot function in a constitution that relies on parliamentary sovereignty. In reality, parliamentary supremacy does a better job than constitutional supremacy when it comes to incorporating the views of the public, and it does not ignore or sideline the people.

Whether having a "We the people" articulation actually matters is certainly up for debate, but some authors have struggled to articulate why a move to constitutional supremacy would be better for citizens. In fact, the way that some arguments have presented the advantages of doing so is rather bizarre. For example, a leading UK constitutional scholar has suggested we could learn from the Turkish constitution when it comes to incorporating the people, as that constitution has "clear and accurate" provisions on the people's sovereignty.<sup>54</sup> And yet, Turkish citizens are no more powerful or influential than UK citizens. A strong argument could be made that they are less powerful, and have not enjoyed near the same influence over their constitution as the British electorate. Turkey scores 32/100 on Freedom House's scale and it is placed 103rd on *The Economist's* Democracy Index.<sup>55</sup> It is extremely difficult to see what examining the Turkish constitution may achieve, other than confirming that possessing a "We the people" constitutional articulation means next to nothing.\*

Parliamentary supremacy ensures that the constitutional actors closest to the electorate – representatives – retain the most power in the constitutional system. Constitutional supremacy does not do this. As Jutta Limbach acknowledged, constitutional supremacy intentionally reduces the status of statutes and legislators.<sup>56</sup> These developments would present significant problems for the UK constitution, which highly values both of these. A transition to constitutional supremacy would mean that those closest to the people lose power while those with much less accountability, such as unelected judges, gain significant power. Such a move would likely allow judges to strike down acts of parliament on the basis that they are 'unconstitutional'. This means that the collective outputs of those with the closest connection to the people would no longer be as protected as they are now (currently, acts of parliament cannot be struck down by the courts), and that the courts would become the UK's highest legal authority.

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\* The idea that 'the people' are the supreme authority has always been problematic, and may very well be a fiction; see Morgan ES, *Inventing the People: The rise of popular sovereignty in England and America*, W.W. Norton, 1989, pp. 56–60 and 65.

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Most written constitutions mention 'the people', but this does not guarantee an enhanced focus on the general public or equate to better outcomes for the citizenry. In fact, this 'We the people' rhetoric is written constitutionalism's most potent fiction: it assures the people of absolutely nothing. Meanwhile, parliamentary supremacy at least protects those actors closest to the people as the highest legal authority, and also protects their outputs from being voided by other constitutional actors with less democratic authority.

### **The UK constitution does a better job of allowing and incorporating change than most written constitutions**

Unlike in many other jurisdictions around the world, constitutional reform in the UK is not theoretical or illusory, but on the agenda. Political parties in the UK can propose, debate and implement constitutional change, and they do so year in and year out. The evidence over the past quarter-century is striking: Brexit, devolution, the Human Rights Act 1998, the new Supreme Court, parliamentary reform and many other changes. Debates over the merits of these changes can and should happen, but the fact that they have happened is a testament to the dynamism of the UK's unwritten political constitution. Widely identified as one of the easiest constitutions in the world to change,<sup>57</sup> this method of constitutional amendment is an advantage and not a defect.

The amount of constitutional change that has happened in the past quarter-century is a microcosm of the widespread change that can be seen in the UK constitution over the centuries. Unlike in other constitutional contexts where entrenched written constitutions either take items off the table or make it more difficult to update constitutions,\* in the UK virtually nothing is off the table:

- the power and influence of various constitutional actors have fluctuated
- the period between general elections has changed over time
- the balance of power in parliament has shifted between the two Houses
- the role of the monarchy has altered significantly
- law making power has been highly centralised but is now increasingly decentralised
- long-standing government positions have been reformed
- major constitutional principles have been interfered with at various points and had to adapt
- major reform of the UK's top court has occurred.

These changes do not demonstrate a "frozen" constitution<sup>58</sup> or one that is at a "standstill",<sup>59</sup> but a dynamic constitution doing its best to adapt to political, legal, economic and cultural change. This level of constitutional change would simply not be possible in other contexts.

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\* Some constitutions contain 'eternity' clauses, which are permanent features of a constitution and cannot be amended by formal amendment procedures; see Suteu S, *Eternity Clauses in Democratic Constitutionalism*, Oxford University Press, 2021.

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The commitment to parliamentary supremacy rather than constitutional supremacy means that constitutional changes stay for as long as they are working, and that if something is problematic or highly unpopular, then it will most likely be scrapped.\* It is true that the UK constitution still contains some items that could be considered antiquated, such as the monarchy and an unelected House of Lords, but these items remain because either they are still relatively popular or their usefulness is contested. If the tide ever turned significantly against these or other features, then the constitution contains the means to scrap or reform them. The same cannot be said for written constitutions, which may entrench these items and make it much more difficult for them to be scrapped.

The advantages of an unwritten political constitution when it comes to producing constitutional change are evident: nothing is off the table, and constitutional features only stay for as long as they are useful. This means that there is a focus on constitutional maintenance, and that the UK constitution does not need to rely on tidal-wave constitutional moments or place undue pressure on the courts to produce social change.\*\*

### **Do entrenched written constitutions produce enhanced rights protection or better democracies?**

The seductive allure of enumerating aspirational rights has been an unstoppable force throughout the 20th and 21st centuries. Many countries have implemented lengthy bills of rights or expanded on what they previously had in their written constitutions.<sup>60</sup> And yet, it is difficult to tell what this vast expansion of enumerated rights has had on the realisation of rights or the operation of democracy. What seems clear, however, is that unwritten constitutions and jurisdictions with unorthodox constitutions (for example, the lack of a bill of rights, only possessing a statutory bill of rights or the lack of court strike-down power) can produce just as good rights protection and operation of democracy as jurisdictions with a written constitution that includes a long list of rights and strong enforcement by supreme or constitutional courts.

The articulation of rights in a constitution does not guarantee that those particular rights will be upheld, and the more rights are added to a constitution does not equate to better rights protection. A fascinating recent large-scale study on whether and how constitutional rights matter found that “constitutional rights by themselves often do little to impede governments’ efforts to repress their citizens’ rights” and that when governments are “determined to erode the protections provided by certain rights, they are usually eventually successful”.<sup>61</sup> Indeed, sometimes governments appear to have used the articulation of rights as a cover to undermine them. This seems to have been the case with anti-torture provisions, which actually produced more torture rather than less in countries that enacted these protections.<sup>62</sup> Although some rights can become harder for governments to violate and also be more self-enforcing

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\* This comes from the rule that parliament cannot ‘bind its successors’, which means that any parliament is free to overturn the actions of a previous parliament.

\*\* Regarding the idea of constitutional moments, see Ackerman B, *We the People, Volume 1: Foundations*, Harvard University Press, 1993. Regarding whether societal change can be brought about by courts, see Rosenberg G, *The Hollow Hope: Can courts bring about social change?*, University of Chicago Press, 1991.

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(for example, freedom of religion, the right to unionise and the right to form political parties), these rights affect organisations more than individuals and thus benefit from the organisational support of religious groups, unions and political parties that can potentially push back against rights infringements. The bottom line, however, is that the codification of rights is no panacea, and that we should be wary of more writing if this will not lead to better protection of rights.

Countries with unwritten constitutions, like the UK and New Zealand, have performed well on democracy and human rights indicators. Additionally, countries without contemporary constitutional 'essentials', such as Australia with its lack of a bill of rights, have also performed well on these indicators. The UK currently scores 93/100 on Freedom House's *Freedom in the World* report, garnering 39/40 on political rights and 54/60 on civil liberties.<sup>63</sup> New Zealand scores 99/100, with 40/40 on political rights and 59/60 on civil liberties. Australia, which does not have a federal bill of rights, also performs well. It scores 95/100, with 38/40 on political rights and 57/60 on civil liberties. These countries also do well on measurements of democracy: one recent index placed the UK 18th, Australia 15th and New Zealand second.<sup>64</sup>

In a further twist regarding the complexities of articulating constitutional rights, it seems that countries that have the fewest rights articulated in their constitutions (for example, Canada, Denmark, Finland, Iceland, Ireland, Norway and Sweden) continually perform quite well on democracy and human rights indicators.\* But the converse is also true: some of the countries with the longest and most detailed articulations of constitutional rights score quite low on democracy and human rights indicators.\*\* Thus, the picture in relation to the articulation of rights and the realisation of rights is not straightforward, and these examples call into question whether further articulation of rights is always the best possible solution.

Even though the picture regarding constitutional rights is extremely complex, this has certainly not stopped the significant expansion of enumerated constitutional rights throughout the world. Constitutions continue getting longer and increasing amounts of rights are found in constitutions, and yet at times it is very difficult to tell if this is contributing to better outcomes for citizens. The UK, with its current statutory protection of rights and lack of court strike-down power, has been as effective as countries that possess entrenched bills of rights with strong court enforcement. Ultimately, when it comes to protecting rights and ensuring democracy, countries with unwritten constitutions can perform just as well as those with entrenched written constitutions.

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\* Data is from the Comparative Constitutions Project; see 'Constitutional rankings', retrieved 25 August 2023, <https://comparativeconstitutionsproject.org/ccp-rankings>. In terms of the number of constitutional rights, these are the figures: Denmark (21), Ireland (31), Sweden (34), Canada (36), Norway (39), Iceland (40) and Finland (48).

\*\* Compare the democratic performance of countries like Ecuador (99 constitutional rights), Bolivia (88 constitutional rights), Serbia (88 constitutional rights), Venezuela (82 constitutional rights) and Mexico (81 constitutional rights). Data is from the Comparative Constitutions Project; see 'Constitutional rankings', retrieved 25 August 2023, <https://comparativeconstitutionsproject.org/ccp-rankings>

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## Conclusion: embracing the political foundations of constitutions

A switch from parliamentary supremacy, where MPs are the ultimate guardians and where the arena of politics is the key constitutional focus, to constitutional supremacy, where fundamental law is the ultimate controlling device and the interpretation of and dedication to a constitution becomes the key focus, sounds alluring. Or, it sounds alluring until one actually digs into what this change would entail.

It is so easy nowadays to disparage politics and the political process and to say that there are other answers, such as written constitutions and further articulations of rights. But these proposed solutions will only get countries so far. Written constitutions will not foster more engaged or knowledgeable citizens. They will not provide 'the people' an enhanced role in the state. They will not help bring about much-needed societal change; indeed, they may entrench mistakes and make it more difficult to change them. And finally, written constitutions certainly do not give you a healthier politics. In any constitutional system, the health of the constitution depends in large part on the health of the political realm. The UK's unwritten political constitution is no different. Indeed, the current constitution may put an even stronger focus on the health of the political realm compared with jurisdictions using entrenched written constitutions.

The enactment of a written constitution for the UK resulting in constitutional supremacy will not remedy the current constitutional problems (polarisation, democratic disaffection, integrity in government), many of which are seen not just in the UK, but also across the globe. A new constitution will also not erase the UK's past or transform it into a friendlier, more welcoming or more just nation. The only way to do that is to learn from our mistakes, and to reach out to our neighbours, communities and elected officials to help foster the values we would like to cultivate and to pass on to future generations. This means that citizens must engage with, not ignore or disrespect, the political realm. Ultimately, constitutional success comes from human beings rather than constitutional provisions. The UK's unwritten constitution is built on these political foundations, and puts its faith in the most transparent, most diverse and most democratic institution that we have: parliament.\* And that may be something to hold on to and build on, rather than tear down and replace.

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\* Indeed, the 2019 parliament is the most diverse ever; see BBC News, 'Election 2019: Britain's most diverse parliament', 17 December 2019, retrieved 25 August 2023, [www.bbc.co.uk/news/election-2019-50808536](http://www.bbc.co.uk/news/election-2019-50808536)



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