

## Candidate 2 evidence

6/2 (2)

British constitutional affairs contains the question as to whether we should maintain our constitutional inheritance or amend it? In that sense, should we keep our unwritten constitution or move to a codified document? Interest in this issue has emerged since the 1990s. Beginning with New Labour's Tony Blair and his ratification of the Human Rights Act and moving towards the Liberal Democrat Nick Clegg, who is in favour of a judicial Bill of Rights, there is political interest in amending our constitutional structure. Nevertheless, Unlocked Democracy.org are a campaign group which are sceptical of these piecemeal reforms. They argue that executive power in the UK is too concentrated in parliament - the government of the day is free to ignore the constitution. There are no effective checks and balances!

The concepts of 'negative' and 'positive' constitutionalism highlight the fragility of the UK constitution. As an ideal type, the former refers to a separation of powers. The latter refers to civil freedoms such as freedom of speech and habeas corpus. The UK constitution does not always protect these ideals.

The US system of constitution is useful for understanding how change can be brought in the UK. As a federal system there are clear checks of power between federal government and state government. The former typically, cannot interfere in affairs reserved to the individual states. There are also checks and balances between the executive, legislature and judiciary. They are reciprocal monitors of each other - each has powers over the others to maintain checks on power and civil freedoms. This relates also to their having a bill of rights. As the constitution is flexible, the Supreme Court is able to uphold the constitution - often where civil freedoms come under threat from an over-powerful executive.

The US example is a good model for comparison to the UK. It is an organised coherent constitutional system. The UK has more accidental system of constitutional law and arguably needs revised into a coherent codified document. Constitutional provisions are dispersed through wide-

6/3 ③

varying statute laws, conventions and common law. It is confusing to the public as there is no codified written document. ~~As~~ Unlockeddemocracy.org cite this circumstance as an example of democratic weakness that could be easily addressed in a constitutional convention. In addition, the constitution is malleable - it is very easy to revise by the government of the day. It is open to governments to use statute law to make partisan amendments that are not always in the public interest. This is seen in the controversial Terrorism Act 2006 which was criticised by its ignoring the principle of habeas corpus in allowing detention without charge for 28 days.

A further criticism of the British constitution is that it is out of date in key areas - it needs to catch up with events. As a unitary constitution it keeps all political authority in Westminster. The devolved assemblies of Scotland, Wales and Northern Ireland are granted devolved powers but ultimate authority still resides with Westminster. Powers could be recalled back to Westminster - such as tax varying powers. Again there is ambiguity regarding the Brexit issue and the (European) HRA. Leaving the EU creates uncertainty as to whether Britain can retain the HRA or need to create a British Bill of Rights. Again with the House of Lords, it still hasn't got a precise role in parliament - a constitutional remit could help resolve what its modern role should be. If the UK should construct a new constitution it would need to address these issues.

Contrary to the above, it is true that the existing constitutional structure is historically stable. Much like Edmund Burke's (1729-1797) concept of inheritance, parliament has been stable. It has moved from monarchical to democratic status. The argument follows we don't need revision to our constitution, but instead for people to take an active interest in its existing provisions. The constitution has underpinned our system of democracy. With a stable House of Commons, with regular elections and a choice of parties and leaders, it is a system shown to work in modern democracies and arguably doesn't need change.

(4) 6/4

The existing constitution is, unlike the USA, responsive and quick. If a constitutional problem arises it is relatively easy to resolve. This is seen in the ambiguous convention of criteria for an MP to resign. The example of disgraced MPs, such as Chris Huhne who was convicted for perverting the course of justice, still holding power was changed by the 2015 Recall of MP Act. This legislation was a quick response to a constitutional issue. This advantage is unlike other entrenched systems of constitutional rules based

Despite these strengths of being responsive more critical problems exist in our uncodified constitution. The work of the political analyst Joseph Schumpeter draws attention to democratic elites and elective dictatorships. There are very limited checks and balances to the UK constitution. Elective dictatorships harness political legitimacy from the electorate only to use the time between elections to pursue their own, rather than their electorates, wishes. This is unbounded power that a new constitution could check. At present, the legislature is nearly always dominated by party majorities who then invest power in their leadership team. The whip system ~~the~~ likewise ensures conformity to the wishes of the executive - deselection as an MP is the ultimate penalty for disagreement with the leadership. Executives don't always act in the public interest, as in the 2006 Terrorism Act, and there is an argument to base a constitution on a separation of powers.

This latter idea has a long tradition. It was the enlightenment thinkers John Locke and Montesquieu who called for a separation between the executive, legislature and judiciary. In essence it means the reciprocal monitoring of each other's actions. The US system has taken this to its fullest extent where the legislature can devise legislation and not, as in the UK example, just deliberate on policy. The system of standing committees in the US system is likewise very thorough in revising legislation. Again, with the judiciary, there is the ability to strike out legislation - meaning it goes back to where it came from for more deliberation or revision.

(5) 6/5

Given the dominance of the UK executive over parliament, there is a strong case for having a separation of power. The legislature could then act in the public interest - which is the reason many MPs chose the job. Likewise the judiciary could monitor the actions of the government - again maintaining the public interest and checking executive power.

The argument above presents a very negative picture of the conduct of executives. Supporters of the constitutional status quo cite the concept of parliamentary sovereignty. There are already checks and balances in the operation of the British parliament. Westminster is the highest authority in the land and gains this status through democratic legitimacy. The public are wise enough to see curbs on their freedoms and act accordingly. If a government exploits its authority then it is likely to be seriously challenged at the next election. The public also tend to place trust in their politicians and then to hold them to account at election time. Again it is the case that no government can bind its successors - the flexibility of the constitution means that statute laws are easily changed if found unpopular or unconstitutional.

The topic of constitutional entrenchment also shows how the UK system is more flexible than the US system. It is a flexible and responsive constitution whereas the US can become bogged down in legal disputes with an unelected and often partisan Supreme Court. Again, amendments in the US system, 27 since its inception, are very difficult to achieve. The need for supermajorities in congress and ratification from individual states. This leads to a system that lacks responsiveness to fast moving political issues.

This is not to say our system of judicial law is fit for purpose. Clearly the UK Supreme Court has a weak remit. Its role is largely confined to upholding the HRA. In that, it cannot challenge legislation and can only state that proposed laws are incompatible with the sentiment of the HRA.

(6) 6/6

Again with the UK Supreme Court, a revised constitution could check bad law making - or laws seen not to be in the public interest. The example of the Data Protection Act 2018 is a case in point. It effectively monitors internet habits of the general public in order to find criminal activity - in amongst the habits of law abiding citizens.

In the debate of constitutional reform there is clear evidence that the UK system has worked over centuries. It is a flexible and responsive system that has provided for, mainly, stable government. The question is to whether we should keep this system or adopt to a more American system. There is also the argument that we need democratic renewal in our political culture. Unlockdemocracy.org cite weak electoral participation in local, national and European elections as a sign of disengagement due to executive power-holding, and in Westminster in general seeming to be aloof and remote. However, the key issue as to why the UK should adopt a codified constitution is that currently, any executive can ignore the constitution. Again there is no judiciary to successfully step in to protect constitutional provisions, likewise, the UK legislature can effectively only debate legislation that has been devised by the executive. There are only very weak checks and balances.

7 6/7

### Politics Higher Resource Sheet

Candidate Name	Scottish Candidate Number

Bill Jones and Philip Norton (2010) Politics UK, 7th Ed. Pearson Education – used for history of constitutional reform – negative and positive constitutionalism – constraining government and enabling citizenry.

Duncan Watts (2003) Understanding US/UK Government and Politics. Manchester University Press. – Used for information on political elites, authority and types of constitutions.

Haffernan, R. et al (2011) Developments in British Politics (Meg Russell chapter) – opinions of modern political parties to constitutional reform.

Hazell UCL (2010) Bill of Rights in the Coalition – Human Rights Act and Bill of Rights – centralised power and remoteness of politicians – executive elites and dictatorships.

Heywood, A. (2004) Political Theory, An Introduction (3rd ed) Palgrave MacMillan – general background information on constitutions.

Heywood, A. (2017) Essentials of UK Politics: For AS and A-Level (4th ed), Palgrave. – general background information on constitutions.

Ian Budge et al (2007) The New British Politics – sources of the constitution – do we need protection from over powerful government?

Philip Norton in Politics Review (Nov 2009, v.19. n.2) – information on Gordon Brown's opinion on constitutional reform.

Unlockdemocracy.org – used for campaigns information and information on constitutional reform.

Recall of MPs Act 2015

Edmund Burke (1729 - 1797)

War of Independence (1775 - 1783)

Terrorism Act 2006 was revised to allow detention without charge for a maximum of 28 days.

Data Protection Act 2018 allowing security services to harvest personal internet data.