





# **To codify or not to codify?**

## **Lessons from consolidating the United Kingdom's constitutional statutes**

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## Executive summary

- Only a few countries in the world lack a codified constitution. The UK is one of those countries. This has prompted some to advocate for the codification of the UK's constitution. Perhaps the most notable proponents of such a position, at least recently, are the members of the Political and Constitutional Reform Committee (PCRC), but they are certainly not the only actors to champion this position.
- This report contributes to the debate over codification of the UK's constitution by comparing the contents of the existing written elements of the UK's constitution to other countries' constitutional texts. In doing so, we are able to identify, with great precision, the topics addressed in other countries' constitutions but omitted from constitutionally relevant statutes in the UK. Reflecting on the topics 'missing' from the UK's constitution offers three lessons for those contemplating further codification of the UK's constitution:
  1. Much of the UK's constitutional order is already written down in statute form.
  2. Many details about the executive, the legislature and the relationship between these two branches of government are regulated entirely by convention. These are the parts of the UK's constitution that are most vulnerable to conflicting interpretations and should be prioritised if more of the UK's constitution is codified.
  3. Further codification is not essential. Much of what is uncodified has recently been incorporated into the Cabinet Manual and other texts. In addition, the parts of the UK's constitution that remain uncodified are also the parts of the constitutional order where conventions are the most well-established. As a result, codifying these elements would likely have minimal impact on day-to-day politics.

## Introduction

In 2015, we celebrate the 800<sup>th</sup> anniversary of Magna Carta (1215) and the 750<sup>th</sup> anniversary of Simon De Montfort's parliament of 1265. These anniversaries make 2015 a perfect year for reflection on the UK's constitution. The constitution has changed dramatically over the last 800 years, gradually evolving from a feudal monarchy to a constitutional monarchy with parliamentary sovereignty. Unlike most other countries, this evolution has proceeded without a 'constitutional moment'. There has been no single significant event which has rendered the current constitutional order unsustainable and prompted citizens to reconsider the institutions and values that bind their society together. As a result, the UK never adopted a single document that formalises the fundamental rules and restrictions of its central governing institutions. Instead, the UK's constitution remains 'uncodified'. In this report, we reflect on the uncodified nature of the UK's constitution and provide some lessons for those involved in the debate over whether or not it should be codified.

Being uncodified makes the UK's constitution unusual but not unique. Israel, New Zealand, Sweden and Saudi Arabia also have uncodified constitutions. The singularity of the UK's constitution stems not from its uncodified nature, but from both the breadth of its content and the specific parts of the constitution that politicians have chosen to write down (or not) over time. Rather than a small collection of texts, like other countries with unwritten constitutions, the text of the UK's constitution is found in a large collection of constitutionally relevant statutes that has accumulated over the last 800 years. Perhaps as a result of this long, slow accumulation, the topics encompassed in those statutes are not what one would expect to find in a modern constitution. In this project, we have consolidated those statutes that we have deemed constitutionally relevant into a single document.<sup>1</sup> The result is the longest and, arguably, the most complex constitution in the world. However, several central aspects of the UK's constitutional order are still left entirely to convention.

Consider the office of the Prime Minister, the head of government and most powerful public official in the UK. In most constitutions, numerous provisions are devoted to explaining the selection of the head of government and the powers given to the individual holding that office. As a result of the pre-eminence of the office, the head of government is mentioned frequently in other countries' constitutional texts, on average within 32 different provisions. In contrast, within the set of statutes that we claim is the codified portion of the UK's constitution, the Prime Minister is mentioned in only 16 provisions.<sup>2</sup> This is despite the word count of the UK's constitutional text being more than ten times longer than that of the average constitution. The 16 provisions which do mention the Prime Minister are all found in three relatively recent statutes – the Scot-

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<sup>1</sup>The word cloud on the cover is a visual representation of the 250 most commonly used words in our interpretation of the UK's constitutional text. The constitutional statutes upon which our version of the UK's constitutional text are based can be found in Table 1, and one can download our interpretation of the [UK's constitutional text](#) from [Constitute](#).

<sup>2</sup>[Search for Prime Minister](#) on Constitute to see the 16 provisions.



land Act (1998), the Constitutional Reform Act (2005) and the Fixed-term Parliaments Act (2011) – and focus on either the role of the Prime Minister in the selection of certain non-elected officials or in the scheduling of elections. None of the provisions detail the selection process for the Prime Minister, nor do they specify the pivotal role played by the Prime Minister in British government.

The office of Prime Minister is not the only part of the UK's constitution that is textually underspecified. Many aspects of it are left to convention. There are, for example, very few details about the legislature within the UK's constitutional text. In most constitutions, the chapter on the legislature is one of the longest and most detailed sections. [Constitute](#), a project that identifies the topics addressed in all 194 constitutions in force around the world, lists 49 distinct topics about the legislature that can be found in national constitutions. The average constitution addresses 24 of these, but the UK's constitution addresses just 12. Notable omissions include provisions on legislative oversight of the executive, the size of the two chambers, the quorum necessary for legislative sessions, and the leadership of the chambers. More generally, of the 131 topics found in more than half of the world's constitutions, according to the [Constitute](#), the codified parts of the UK's constitution contain only 78 of these topics. The average constitution contains 95. In other words, despite having by far the longest written constitution, the UK's constitutional text, as we have identified it, covers fewer 'core' topics than three-quarters of the world's constitutions.

Clearly, the UK's constitution could be further codified. But should it be? And, if further codification is to take place, which conventions should be codified and in what form? The main purpose of this report is to answer these questions. To do so, we use data from [Constitute](#) to identify the topics typically addressed in constitutions – i.e. core topics – and then compare these core topics to those addressed by the UK's constitutionally relevant statutes. Any core topics not addressed in these statutes are the most likely topics to be written down if further codification were to take place. Lastly, we assess whether codification of these omitted core topics would actually solve any of the constitutional problems facing the UK today.

The remainder of this report is structured as follows. The next section provides a general definition of a constitutional text and explains how we operationalised that definition. The following section describes our interpretation of the UK's constitution. In this section, we explain how we identified all of the written elements of the UK's constitutional order and consolidated them into a single document. The resulting document represents our interpretation of the codified portion of the UK's constitution, which we refer to as the UK's constitution throughout this report. However, it is important to remember that this is only our subjective interpretation of the UK constitution; there is no formally recognised constitutional document in the UK. The third section compares the content of the UK's constitution to other constitutions in force around the world. In this section, we focus on four aspects of national constitutions: executive power, legislative power, judicial independence and constitutional rights. The final section reflects on our effort both to consolidate the codified parts of the UK's constitution into a single document

and to compare that text to other countries' constitutions. The main lesson learned from this exercise is that further codification of the UK's constitutional text is not strictly necessary because many of the topics which have yet to be recorded in statute have been written down in other texts, like the Cabinet Manual and the House of Commons Standing Orders.

## What is a constitution?

At the inaugural 2014 Cambridge Freshfields Lecture, Lord Neuberger, President of the Supreme Court of the United Kingdom, advocated the notion that the UK is without a constitution.

*Unlike every other European country, we have no written constitution and we have parliamentary sovereignty. Indeed, it may be said with considerable force that we have no constitution as such at all, merely constitutional conventions, and that it is as a consequence of this that we have parliamentary sovereignty. (Neuberger 2014, para. 26)*

This is not a novel idea. Many before him, including Thomas Paine and Tocqueville, have asserted that England is without a constitution. Yet much has changed since the time of 18th and 19th century political thinkers, both in terms of the laws in force and dominant scholarly opinion. In current times Lord Neuberger's suggestion is controversial and was probably made with the intention of inciting debate. Indeed, in his response to Lord Neuberger's statement, Dr. Mark Elliott challenges the sincerity of his position:

*It seems unlikely that Neuberger intended to argue that the UK possesses no constitutional laws, given the obvious untenability of such a position. Rather, . . . what Neuberger really means is that the UK possesses no body of constitutional law that occupies a hierarchically distinctive or superior position within the legal order. (Elliott 2014b)*

Elliott contends that Neuberger has gone too far. While the UK's constitution is certainly unusual, it undoubtedly exists. He attributes its unusual status to two features. The first being the absence of a single text, which leads him to label the UK's constitution as 'unwritten', the second its 'flat' nature, demonstrating an absence of superiority to regular laws (Elliott 2014a).

This report takes a position similar to that of Elliott (2014b). We propose that the UK's constitution has, to a great extent, been written down. The assertion that there

is no single constitutional text is certainly correct but a constitutional text need not be restricted to a single document. There are a number of statutes in the UK that are constitutionally relevant and could be said to represent the UK's written constitution. Before explaining which statutes we deem to be constitutionally relevant in the UK, let us first differentiate the constitutional text from the larger constitutional order.

## **The constitutional text versus the constitutional order**

The principal divide regarding the use of the term 'constitution' relates to its reference in some instances to the form in which it is presented, and in others to the functions which it carries out. The first connotation refers to the written constitutional text, which is almost universally present in modern states as a formal charter. The second connotation comprises the wider constitutional order, made up of a range of elements (e.g., laws, theories, and interpretations) which perform what are traditionally understood as 'constitutional' functions.

To understand what is meant by this latter conceptualisation, we should first establish what existing scholars have said about the traditional purpose of constitutions (Elazar 1985; Finer 1988; Breslin 2009). The first, and perhaps most important, function of a constitution is to limit government power. Constitutions generate a set of inviolable principles and more specific provisions to which future law and government activity more generally must conform. This function, commonly termed 'constitutionalism', is vital to the functioning of democracy. A second, and very practical, function of constitutions is that they define patterns of authority and set up government institutions. This is crucial as all governments, whether democracies or dictatorships, need established institutions through which to govern, allowing those in charge to focus on the substance of government policy rather than arguing over the rules of the game. It is worth noting that this latter meaning is distinct from the constitutionalist function. The process of defining an institution does involve placing constraints on behaviour, but to a much lesser degree than the substantive entrenched limits on government behaviour incorporated into the notion of constitutionalism. Lastly, constitutions can also serve a symbolic purpose (Pitkin 1987). By defining a nation and its goals, constitutions provide citizens with a sense of common purpose and belonging.

The constitutional order comprises all rules or understandings that purport to accomplish these three functions, regardless of the form that they take. The constitutional text applies only to the formal written element - that is, the nominal constitution - regardless of whether it adequately serves these purposes. Indeed, the written text alone invariably falls short of describing a territory's constitutional rules in their entirety. Consider, for instance, judicial review in the United States. The Supreme Court's power to strike down legislation is derived not from the constitutional text, but the constitutional order. This example makes clear that a country's constitutional text constitutes only one element, albeit a very central element, of the larger constitutional order. Of course, popular

understanding of the term constitution is more closely aligned with a textual definition. Few citizens, when asked, would likely speak of norms and the like when asked to identify their country's constitution. Perhaps this explains why nearly 80% of UK citizens believe that they know little to nothing about the UK constitution as the text of the UK constitution, the piece of the constitutional order which is most meaningful to them, is buried across numerous statutes (Ipsos Mori 2008).<sup>3</sup>

Perhaps unsurprisingly, UK scholars and political actors have embraced a definition of the constitution which emphasises the constitutional order and places less weight on the pieces of that order which are written into the statute book. One of the earliest advocates of such an approach was British constitutional scholar A.V. Dicey, who stated that “[c]onstitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state” (Dicey 1960, p. 23). A more recent example of this approach comes from Professor Anthony King, who states that:

*A constitution is the set of the most important rules that regulate the relations among the different parts of the government of a given country and also the relations between the different parts of the government and the people of the country.* (King 2001, p. 1)

King acknowledges that his attempt at defining a constitution is “far from perfect”, yet many contemporary definitions appear to share with him a broad consensus over the principles of a constitution. Recurrent is the theme of the establishment and restriction of the powers of governing actors, the relationships between such actors, and their relationship with citizens. In his book *The New British Constitution*, Vernon Bogdanor (2009) mirrors King's definition, describing a constitution as:

*... nothing more than a collection of the most important rules prescribing the distribution of power between the institutions of government - legislature, executive and judiciary - and between the individual and the state.* (Bogdanor 2009, p. 9)

Similarly, the Select Committee on the Constitution, a House of Lords committee with a remit to examine the constitutional implications of public bills, drew from King's (2001) definition to help determine the boundaries of their work.

Of course, this does not mean that UK scholars have failed to recognise that some parts of their constitution are written down. Recall Elliot's (2014b) critique of Lord Neuberger above. Moreover, King (2007) distinguishes between written constitutions

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<sup>3</sup>For a more in depth discussion of the difference between the constitutional text and constitutional order, see Elkins, Ginsburg and Melton (2009).

that are ‘codified’ and ‘uncodified’. He defines a ‘codified’ constitution as a written constitutional document which has been consolidated into a single text and formally adopted. This stands in contrast to an ‘uncodified’ constitution, which may indeed be written down, but which does not take the form of a single text. Much of the UK’s constitution has been written down in the form of a number of constitutionally relevant statutes. However, since those statutes have not been consolidated into a single document and formally adopted, one might say that the UK has a written, albeit uncodified, constitution.

## **Identifying constitutionally relevant texts**

A key challenge for our endeavour is to identify a set of constitutionally relevant statutes from the UK that will be comparable with the codified constitutions in force in other countries. To do so, we rely on the operational definition developed by the Comparative Constitutions Project (CCP).<sup>4</sup> According to the CCP, for a law to be considered part of a country’s constitution, it must satisfy one of three conditions:

1. The document is identified explicitly as the Constitution, Fundamental Law, or Basic Law of a country.
2. The document contains explicit provisions that establish it as the highest law, either through entrenchment or limits on future law.
3. The document contains provisions which define the basic pattern of authority, either by establishing or suspending an executive, legislative or judicial branch of government, or by protecting the rights and freedoms of individuals.

The first of these conditions is sufficient to qualify a document as a constitution. The others are applied as supplementary tests if there are no legal documents in a country that meet the first condition.

Over time, most states have written a legal text called a constitution, basic law or fundamental law. The United States constitution, promulgated in 1789, is regarded as the first national constitution of the modern era and was followed quickly by short-lived constitutions in France (1791, 1793, 1795, and 1799), Poland (1791), the Netherlands (1798), and Switzerland (1798). After these early constitutions were drafted, future constitution-making has primarily occurred in waves surrounding major world events and booms of state births. There are waves associated with the independence of Latin American countries in the early 19th century, the Spring of Nations in the mid-19th century, the First and Second World Wars, decolonisation in the 1960s and 1970s, and the end of the Cold War in the 1990s. In all, more than 900 constitutions have been

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<sup>4</sup>More information about the CCP is available on the [project’s website](#).

written over the last 200 years, such that today discrete texts identified as a constitution, and falling under the first condition of our operational definition, are nearly universal (Elkins, Ginsburg and Melton 2009, 2014a).

The UK is one of very few countries in the world that does not have its constitutional text consolidated into a single document, but it is not the only country. As noted in the introduction to this report, Canada, Israel, New Zealand, Saudi Arabia, and Sweden also have constitutions consisting of multiple texts. That being said, the constitutionally relevant texts in these countries are significantly easier to identify than in the UK. The Canadian constitution was largely consolidated by the 1982 Constitution Act. Israel has a set of Basic Laws that form the basis of its constitution. Saudi Arabia has three royal decrees that establish the basic structure of government. And Sweden has four documents that all possess the status of fundamental law. In each of these countries, there is a concise set of documents that act like a codified constitution and qualify as a constitution under either the second or third condition in the above operational definition. The other exception is New Zealand which, like the UK, has a number of constitutionally relevant statutes. It nonetheless has a Constitution Act 1986 which consolidates the fundamental rules regarding the executive, legislative and judicial branches of government, arguably the most important parts of the constitutional order, into a single document.

Thus, even in comparison to other uncodified constitutions, the UK constitution is unique. Its uniqueness does not come from a lack of codification, but from the number of constitutionally relevant statutes adopted by Parliament and the topics addressed in those statutes. Unlike other countries, there is no central document or obvious cluster of documents that make up the UK's written constitution. This lack of a discernible constitutional text (or texts) makes it difficult to understand precisely which topics are addressed by the UK's constitution and exemplifies the benefits of consolidating all of the laws which collectively form the basis of the UK's written constitution. It also demonstrates the challenges involved in, and the subjective nature of, proposing a definitive list of such laws to be consolidated.

## **The UK's constitutional text**

To develop our interpretation of the laws which comprise the UK's constitutional text, we have applied the operational definition described in the previous section. No law qualifies as a constitution under either of the first two conditions. There is not any one law which identifies itself as a 'constitution' or similar phrase, nor are there any explicitly entrenched statutes. This leaves the third condition, which defines certain laws as constitutional according to the nature of their contents. This condition is reflective of the common understanding of the substance of a constitutional text, as held by academics and political actors alike. Drawing lessons from King, Bogdanor and others, our criteria deem a law to be constitutional if that law includes provisions which estab-

lish or restrict the powers of governing actors; which define the relationships between such actors; or which define their relationship with citizens and the impact of this relationship on individual rights. Using this criterion, we were able to identify 18 UK statutes which we consider to be constitutionally relevant. These are listed in Table 1. The consolidation of these 18 statutes in their most recent form, encompassing any amendments made since the time of promulgation, comprises our interpretation of the UK's written constitution. We have combined them into one document, available on Constitute, which we will analyse below.

Our approach to defining the UK's written constitution is, of course, subjective. It is one interpretation, of which there are many others. Still, our effort has a lot in common with other recent consolidation attempts. A paper produced for the Political and Constitutional Reform Committee (PCRC), in conjunction with their investigation into the possibility of a codified constitution for the UK, included a list of "Acts of Parliament of a constitutional nature" (Blick 2012, p. 80).<sup>5</sup> Similarly, the online resource Oxford Constitutions of the World provides a list of statutes "of particular significance for the constitutional development of the United Kingdom" (Oxford Constitutions of the World 2005). Both of these alternative interpretations share many similarities with our list of statutes. Of the 18 statutes which we have deemed 'constitutional', 12 of these appear in both of their lists and only the Senior Courts Act (1981) appears in neither of the other two (see Table 1).

There are certainly some differences between the three attempts at categorisation. The PCRC list takes a broader interpretation of what is and is not constitutional, with 28 statutes compared to our 18. While a number of the topics covered by these additional Acts do appear in constitutional texts in some other countries, we made the decision that they are not essential elements of a written constitution. Take the Representation of the People Act (1983) as an example. This lengthy statute of over 200 provisions provides a detailed account of electoral rules and regulations, from voter registration, to campaign financing, to conduct at polling stations. Whilst such rules are often found in regular, non-constitutional laws, they are less likely to be entrenched within a country's national constitution. Indeed, details of the electoral system are found in only 19 per cent of constitutions written since 1789 (Elkins, Ginsburg and Melton 2009). The Oxford list, meanwhile, is slightly less inclusive than our own. Although their list includes the now repealed Northern Ireland Act (2000), it excludes the Petition of Right (1628), the Union with Ireland Act (1800), the Life Peerages Act (1958), and the Senior Courts Act (1981). The Oxford list also omits the Fixed-term Parliaments Act (2011), but this was passed after that list was compiled.

Importantly, neither the Oxford nor the PCRC list of constitutionally relevant statutes were created based on a general definition of what comprises a constitutional text, which makes the validity any comparisons between their versions of the UK's constitutional text and constitutional texts in other countries slightly tenuous. That said, the differ-

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<sup>5</sup>This list was derived from an earlier - now outdated - one compiled in a Joint Committee report on the Draft Civil Contingencies Bill (HL 184/ HC 1074, p. 49).

Table 1: Three interpretations of the UK's constitutional statutes

Statute	Most recent amendment	Constitution Unit	Oxford	PCRC
Magna Carta 1297	1969	X	X	X
Petition of Right 1628	1968	X		
Habeas Corpus Act 1679	2006	X	X	
Bill of Rights 1689	1950	X	X	X
Act of Settlement 1701	2013	X	X	X
Union with Scotland Act 1706	1950	X	X	X
Union with Ireland Act 1800	1993	X		X
Parliament Acts 1911 and 1949	1968	X	X	X
Life Peerages Act 1958	2009	X		X
European Communities Act 1972	2013	X	X	X
House of Commons Disqualification Act 1975	2014			X
Ministerial and Other Salaries Act 1975	2013			X
British Nationality Act 1981	2014			X
Senior Courts Act 1981	2013	X		
Representation of the People Act 1983	2014			X
Intelligence Services Act 1994	2013			X
Government of Wales Act 1998	2014			X
Northern Ireland Act 1998	2014	X	X	X
Scotland Act 1998	2014	X	X	X
Human Rights Act 1998	2013	X	X	X
House of Lords Act 1999	1999	X	X	X
Freedom of Information Act 2000	2014			X
Local Government Act 2000	2014			X
Northern Ireland Act 2000	2007		X	
Criminal Justice Act 2003	2014			X
Civil Contingencies Act 2004	2013			X
Constitutional Reform Act 2005	2014	X	X	X
Government of Wales Act 2006	2014	X	X	X
Constitutional Reform and Governance Act 2010	2013			X
Equality Act 2010	2014			X
Fixed-term Parliaments Act 2011	2013	X		X
European Union Act 2011	2011			X

Notes: The names of the Acts and data on their amendment are from [legislation.gov.uk](http://legislation.gov.uk). The Constitution Unit's version of the UK constitution uses the text of each statute from [legislation.gov.uk](http://legislation.gov.uk) and is available for download ([html](#) or [pdf](#)) from [Constitute](http://Constitute).



ences between approaches to consolidating the UK constitution highlight an important limitation of our study. Our version of the UK's constitutional text has invariably been shaped by our methodology. We have not only decided which specific statutes to include, we have also chosen to include them in their entirety. Each selected statute contains one or more fundamental provisions concerning governing structures or individual rights and freedoms, but many of the statutes in question also contain provisions covering a host of additional topics. While it would have been possible to remove such provisions, we decided to include each statute in full, rather than trying to identify which provisions within those statutes are constitutionally significant.<sup>6</sup>

In making these decisions, our objectives were first to maximize comparability and then to be inclusive. Thus, while constitutions can (and often do) include provisions of a non-typical nature, a look at the word count of our collection of UK constitutional statutes indicates that its scope is far broader than what would typically be found in a constitution. At approximately 225,000 words, its length is significantly greater than even the longest codified constitution.<sup>7</sup> In part, this results from our decision to include the entire text of the statutes we identified as constitutional. Given this decision, it is understandable that the statutes included might encompass topics which would not be included in a purpose built, codified constitution; they are, after all, simply ordinary laws. Although both our methodology and the resulting breadth of the UK constitution require that we exercise caution in conducting comparisons, a central objective of our analysis is to identify what is missing from the UK's written constitution. Given this focus, our inclusive approach will only help to emphasise the absence of any missing topics which we would typically expect to find in a constitutional text.

## **Evolution of the UK constitution**

Different countries have chosen to adopt formal, written constitutions for a variety of reasons. For many newly formed states, a constitution has been considered an essential element of independence. In other cases, constitutions have developed in response to political upheaval, such as a coup or loss of sovereignty to an invading power (Elkins, Ginsburg and Melton 2009). The UK has managed to maintain its unique constitutional status because there have been no critical 'constitutional moments' in its recent history (Bogdanor 2009). Since the onset of the modern constitutional era, there has been no significant civil war, military defeat, or toppling of a regime. In the absence of any such major upheaval, there has been neither reason nor desire for the introduction of a codified constitution to establish new governing structures or to reinforce existing arrangements.

Although there has never been a direct shift from an uncodified to a codified consti-

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<sup>6</sup>We have, however, removed some schedules, in full or in part, from certain Acts due to their extensive length and minimal relation to constitutional topics.

<sup>7</sup>India holds the record for the longest codified constitution, at 146,000 words.

tution, the constitutional arrangements in the UK have not remained stagnant. The constitution as it stands today has been shaped throughout history by a number of actors and in response to a range of pressures. The history of the UK's constitution can be traced back as far as early attempts to formalise limits on the powers of the monarch. Most notable perhaps is Magna Carta of 1215, which itself drew influence from Henry I's Charter of Liberties from 1100. Magna Carta attempted to put legal constraints on the king by establishing the principle that the rule of the sovereign is subject to the law. Whilst Magna Carta was declaratory in nature and often overlooked, the principles which it established firmly paved the way for future constitutional developments (Bogdanor 1996).

For most of the last 800 years, the UK's constitution has evolved gradually, usually during times of tension between Parliament and the monarchy. The seventeenth century saw the implementation of the Petition of Right (1628), which aimed to curtail the King's taxation powers and formalise a ban on imprisonment without trial, and later the Bill of Rights (1689), which guaranteed the powers of Parliament and set out strict limits on the use of royal prerogatives (Johnson 2004). Although both of these acts were important for the evolution of modern constitutions elsewhere in the world, neither prompted a major rethinking of the UK's constitutional arrangement. The next constitutional changes were embodied in the Union with Scotland (1706) and Union with Ireland (1800) Acts, which, at least temporarily, brought together the British Isles into a single United Kingdom.

The start of the modern constitutional era, marked by the creation of the United States constitution in 1789, ushered in a period of extensive constitutional change throughout much of the world. In comparison, the UK's constitutional developments, though important for the development of Westminster democracy, were relatively minor. The Reform Acts of the 19th century were, in the words of Earl Grey, designed to preserve and not to overthrow.<sup>8</sup> Then, in the early 20th century, Ireland declared independence from the rest of the UK, and the Parliament Acts, which define the roles of the House of Commons and the House of Lords in the law-making process, were adopted in 1911 and 1949.

It was not until after the Second World War that the UK embarked on a period of major constitutional reform. In the 1960s, public discontent, fuelled by declining economic conditions, brought existing constitutional rules under heavy scrutiny (King 2007; Turpin and Tomkins 2007). The first major constitutional change of this period was Britain's entry into the European Community, formalised into law by the European Communities Act 1972. Membership of the EC, and later the EU, had implications for parliamentary sovereignty, one of the central principles of the UK's constitution. Another new constitutional law of this period was the Senior Courts Act 1981 (formerly named the Supreme Court Act). The purpose of this Act was to consolidate all existing enactments and rules regarding the structure and powers of the judiciary. This represented an initial step on the path towards a more codified constitution for the UK,

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<sup>8</sup>He was referring to the bill which became the Great Reform Act (1832).

enacting into a single law the rules and regulations governing one of the three central branches of government.

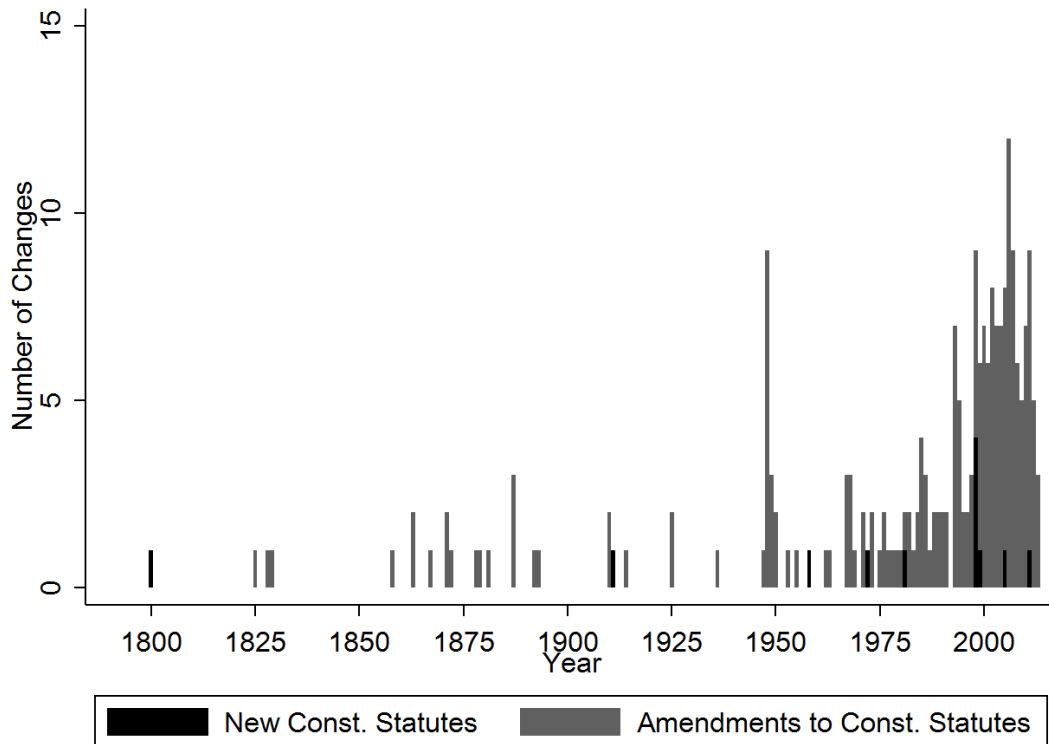
Pressure for further constitutional change continued to mount throughout the end of the 20th century. In reaction to many years of criticism that the government was over-centralised and under-regulated, the Blair government responded with an ambitious project of constitutional reforms (Turpin and Tomkins 2007). Legislation was written or amended to address concerns on a range of issues, from Scottish and Welsh devolution to the need for a Bill of Rights (King 2001). As new legislation on such topics came into force the effect was threefold. Firstly, a number of existing constitutional principles were amended. The House of Lords Act (1999), for example, fundamentally changed the composition of the House of Lords by removing most hereditary peers, a change that enhanced the perceived legitimacy of the House of Lords and has led peers to be more assertive in the law-making process (Russell 2013). Second, new institutions were created. The Scottish Parliament, the National Assembly for Wales, and the Supreme Court are but a few examples of the new institutions added to the UK's constitutional order from 1999-2009. The third effect, and perhaps the most significant from our perspective, was that more and more of the UK's constitution was written into law. The reforms of the Blair government caused much of the constitution to be codified (Bogdanor 2009), albeit in a piecemeal manner across a number of different statutes. To be specific, of the 329 topics commonly associated with national constitutions, the UK's constitutional text addressed only 74 (22%) prior to 1998. The statutes added by Blair and his successors almost doubled the number of topics covered by the UK's constitutional text, increasing the total number of topics covered to 139 (42%).

This rapid period of constitutional change prompted King to observe that, “the United Kingdom's constitution changed more between 1970 and 2000, and especially between 1997 and 2000, than during any comparable period since at least the middle of the 18th century” (King 2001, p. 53). Evidence for this assertion is presented in Figure 1, which illustrates the number of changes to the British constitution from 1789 to 2013. In the figure, black bars indicate the creation of new constitutionally relevant statutes and grey bars indicate amendments to existing constitutionally relevant statutes.<sup>9</sup> From the 1970s onwards, constitutional change shifted from being a relatively rare occurrence to a near annual event. The burst of new statutes written in the early years of the Blair government intensified this trend by significantly increasing the number of constitutional laws. With a greater pool of constitutional statutes available for review and alteration, a sustained growth occurred in the number of amendments to such statutes each year.

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<sup>9</sup>Data on amendments to constitutionally relevant statutes are from [legislation.gov.uk](http://legislation.gov.uk).

Figure 1: Constitutional change in the UK from 1789-2013



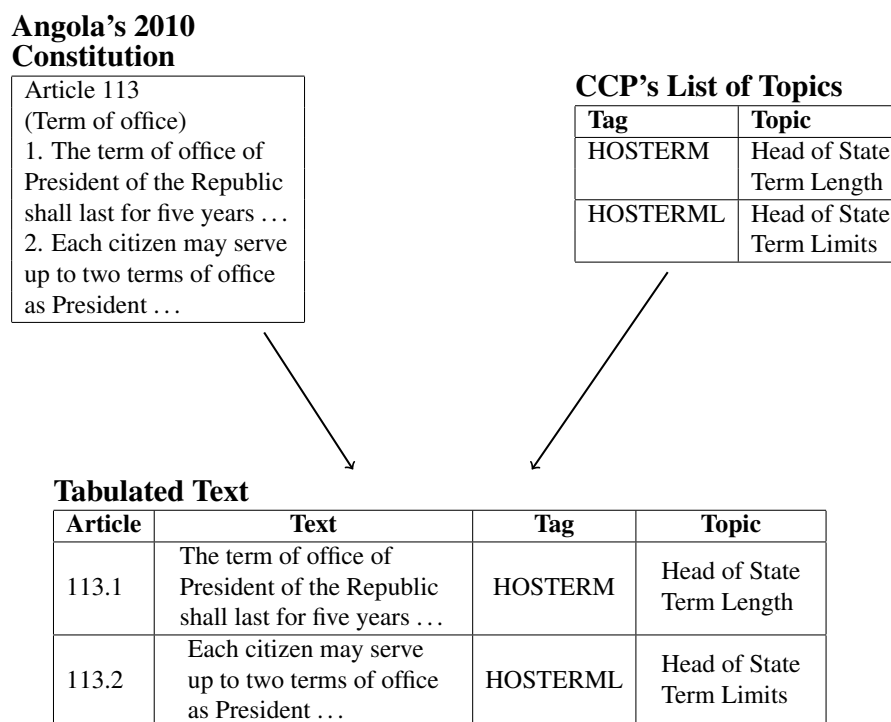
## The UK constitution in comparative perspective

In order to compare the UK's written constitution with constitutions from across the world, we have relied heavily on constitutional texts and data regarding their contents which have been collected by the CCP. The CCP has been collecting these data for the last nine years and have used them to produce the [Constitute](#) website. Constitute provides users with access to constitutional texts and facilitates powerful, topic-based searches of 329 topics commonly found in constitutions. Like our study, its focus is strictly centred upon written constitutional texts. The norms and conventions in effect in countries across the world are not included as part of the constitutions on the website. Although this focus means that Constitute provides only a partial picture of each country's constitutional order, it facilitates comparison between a very central element of the constitutional order of each country: the written text.

The topic-based search function on Constitute uses tags to identify the relevant provisions of each constitutional text. The topics used on Constitute are based on the CCP's 669 question [survey instrument](#), which is used by the CCP to catalogue the contents of the world's constitutions. The survey instrument was vetted by a board of international experts on constitutional design and, as such, represents a scholarly consensus about the issues that are commonly addressed in national constitutions. Some questions from the survey instrument translated naturally into topics but others needed to be combined

because they addressed similar issues. For instance, the CCP’s survey instrument has numerous questions on the presence and use of executive emergency powers. On Constitute, these are all combined into one ‘emergency provisions’ topic. Following this procedure, the CCP team has distilled the questions from its survey instrument into a list of 329 topics that are commonly addressed in national constitutions. An extract of the list of topics is provided in the top right table of Figure 2.

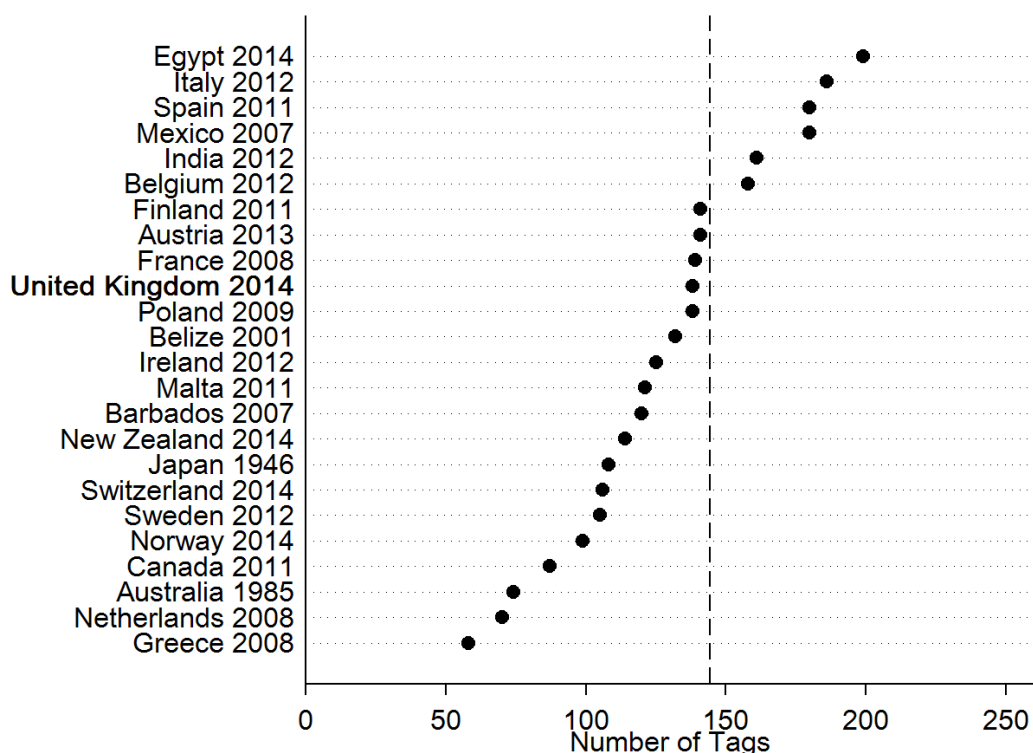
Figure 2: Attachment of topic tags to constitutional texts



The topic-based searches on Constitute are enabled by attaching the topics described in the previous paragraph to individual provisions within the world’s constitutions. Figure 2 provides an example using [Article 113](#) from [Angola’s 2010 constitution](#). Article 113 specifies the term length of the President as well as the number of terms that a President is allowed to serve. There are two corresponding topics in the CCP’s topic list: `hosterm` and `hosterml`. Using a semi-automated process, involving a combination of data on the contents of constitutions from the CCP and a team of highly trained ‘taggers’, the text of Article 113 is tabulated and the tags are added next to the appropriate provision from the constitution (see the table in the bottom of Figure 2). In this case, `hosterm` is attached to article 113.1 and `hosterml` is attached to article 113.2. This data structure allows for easy retrieval of provisions associated with certain topics from the Constitute databas, so if one [searched for ‘head of state term limits’](#) on Constitute, section 113.2 of Angola’s 2010 constitution would be displayed.

We applied this process to tag the consolidated UK constitution. In total, 138 of the 329 tags in Constitute’s ontology were assigned to provisions in the UK’s constitution. At

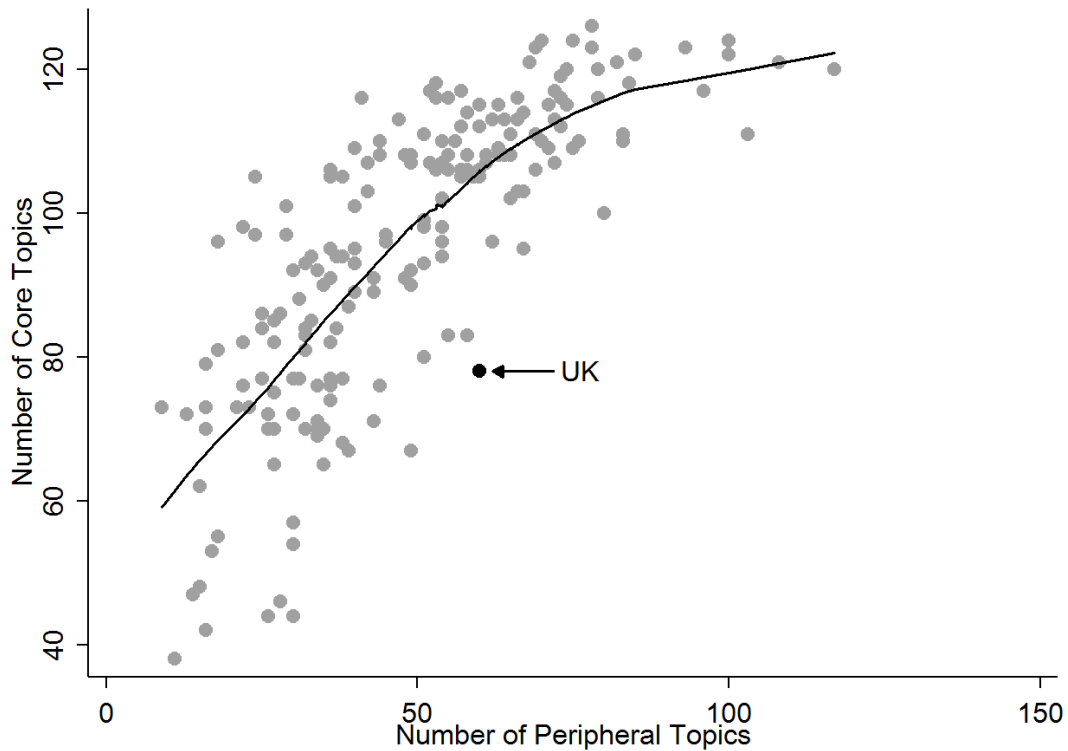
Figure 3: Number of tags in 24 constitutions



138 tags, the UK’s constitution has just slightly fewer tags than the average constitution, which contains 144. Figure 3 compares the number of topics addressed in the UK’s constitution to a select set of constitutions in force in commonwealth and neighbouring European countries, as well as some important constitutions from other regions. The vertical line in the figure indicates the mean number of tags across all constitutions currently in force, and the year next to each country name indicates the year of the last constitutional change in that country.

While the UK’s constitution covers more topics than a number of European and Commonwealth constitutions, ranking 10<sup>th</sup> out of the 24 countries in Figure 3, the number of topics covered by the UK’s constitution is relatively low when we take into consideration its length. Long constitutions – e.g. India’s (approx. 146,000 words) and Mexico’s (approx. 57,000 words) – tend to cover lots of topics. There are exceptions to this rule, however, which, like the UK, tend to be common law jurisdictions – e.g. Belize (approx. 40,000 words) and Malta (approx. 32,000 words). Common law countries generally have relatively long constitutions but, like the UK, their constitutions address less than the average number of topics. In part, this is a result of the age of common law constitutions. Recent constitutions contain many relatively new features that were absent from constitutions written just 20 years ago. For example, recent constitutions tend to have a number of independent monitoring institutions for the scrutiny of elections, the protection of human rights, control over monetary policy, the elimination of corruption, etc. Newer constitutions also entrench significantly more de jure rights. Both the

Figure 4: Core versus peripheral topics in national constitutions



UK's constitution and many other Commonwealth constitutions lack these features, at least in the texts of their constitutions, and as a result, they receive a relatively low score in regard to the number of topics addressed. The length of common law constitutions also suggests that, like the UK's constitution, the topics that are addressed are covered in great detail.

The fact that the number of topics covered in the UK's constitution is similar to the average number addressed by national constitutions is slightly deceptive. Even though the number of topics addressed in the UK's constitution is fairly typical, the specific topics covered are systematically different than the topics addressed in other national constitutions. To illustrate, we differentiate between 'core' and 'peripheral' topics. Core topics are those topics from the Constitute ontology that are found in more than half of in force constitutions; peripheral topics are those found in fewer than half. About 60% (198) of the 329 topics in the Constitute ontology are peripheral and 40% (131) are core. The average constitution contains 95 core topics and 49 peripheral topics. In contrast, the UK's constitution has fewer core topics (78) and more peripheral topics (60) than the average constitution. Given the length of the UK's constitution and the total number of topics that it contains, this makes the UK a bit of an outlier. Figure 4 illustrates this point by plotting the relationship between the number of core and peripheral topics in national constitutions. The unique combination of core and peripheral topics exhibited by the UK's constitution places it further from the trend line than the majority of other in force constitutions.

Having established that the UK's constitution is a bit of an outlier with regard to the scope of topics that it covers, we will turn to a deeper exploration of the core topics that it fails to address. We dub these the 'missing' elements of the UK's written constitution because, if the UK had a fully codified, single-document constitution, it would almost certainly include them (see the Appendix for a full list of missing topics). In our analysis of the specific topics missing from the UK's constitution, we will primarily focus on the central aspects of the constitutional order found in most countries: the structure and powers of the executive, legislative and judicial branches of government and the rights guaranteed to citizens. However, we will also consider some other anomalies about the UK's constitution towards the end of this section. For each topic addressed, we will present a figure, similar to Figure 3 above, which presents an overall understanding of similarity regarding that topic, before exploring in detail some of the specific differences and addressing why the UK is different from other countries.

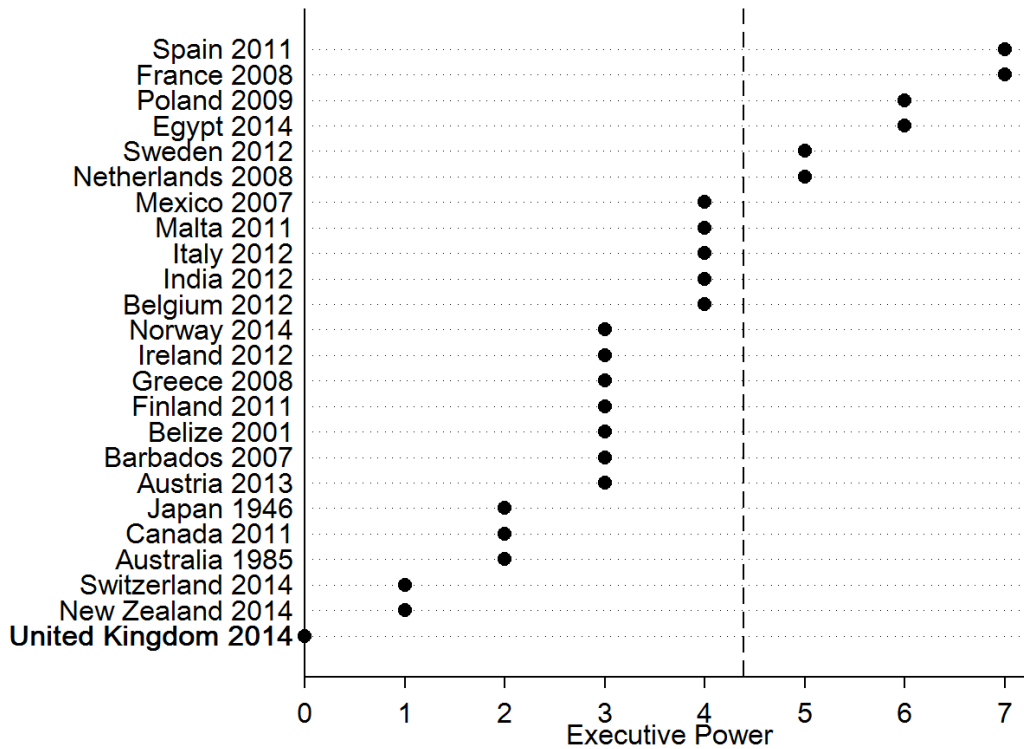
We should note from the outset that the rules regarding virtually all of the topics that we identify as missing do exist as conventions and, in many cases, missing topics are even codified. For instance, although it lacks legal force, the Cabinet Manual thoroughly specifies the relationship between the executive and legislative branches, filling in many of the most important gaps that we identify below. Other topics are found in parliamentary statutes that, at least according to our decision rules, lack constitutional significance. A good example is citizenship, which is defined in the British Nationality Act (1981). Another example is restrictions on the eligibility to vote, which are set out in great detail in the Representation of the People Act (1983). Neither the British Nationality Act (1981) nor the Representation of the People Act (1983) cross the (subjective) threshold that we established for a statute to be considered constitutionally relevant, even though both clearly have some constitutional significance.

Importantly, as noted above, the UK is not much different from other countries in respect to the number of topics included in its written constitution. Although the vast majority of our 329 topics are addressed by all countries' constitutional orders, constitutional texts rarely address more than half of the topics. In other countries, just like in the UK, the remaining topics are addressed by statute or convention. In this respect, the UK's constitution is not much different from constitutions in force in other countries. What is notable about the UK is that, after identifying a set of statutes that is comparable to other countries' constitutions, there are still a significant number of 'core' topics not addressed by the UK's constitutional text.

Note that our focus on the written, or *de jure*, constitution has important implications for interpreting the indices described in the remaining parts of this section. This means that our ranking of countries below may or may not conform to practice. Take, for example, the level of *de jure* executive power illustrated in Figure 5. In practice, executives may have significantly more power than the constitution allots them. This could be granted to them through norms and conventions or result from the fact that the head of state's party dominates the legislature. The United States is a good example of the difference between *de jure* and *de facto* power because the President of the United



Figure 5: De jure executive power in 24 constitutions



States is typically thought to be relatively strong, especially when his party controls both houses of Congress. However, according to our measure of executive power, it is constitutionally one of the weakest executives in the world. Nonetheless, a careful accounting of de jure constitutional attributes is a necessary first step to understanding their de facto counterparts as well as for understanding the relationship between the de jure and de facto constitution.

## Executive power

We start with executive power. Figure 5 compares the level of executive power in the UK to the level found in a number of similar countries. To operationalize executive power, we borrow from Elkins, Ginsburg and Melton (2014*b*), who develop an additive index that captures the presence or absence of seven important aspects of executive law making: (1) the power to initiate legislation; (2) the power to issue decrees; (3) the power to initiate constitutional amendments; (4) the power to declare states of emergency; (5) veto power; (6) the power to challenge the constitutionality of legislation; and (7) the power to dissolve the legislature. The index score indicates the number of these seven powers given to any national executive (president, Prime Minister, or assigned to the government as a whole).

The statutory definition of executive power in the United Kingdom is particularly low compared to other countries around the world. Perhaps unsurprisingly, countries like Egypt, which is ruled by the military, rank highest for executive power. Similarly, both the French and Polish constitutions were drafted under the influence of strong executives, so one might expect that their constitutions would have high levels of executive power. The constitutions more similar to the UK are traditional parliamentary systems - e.g. those of Austria and Finland - and constitutions written in multi-ethnic states, which attempt to disperse power to reduce the stakes of politics and elections - e.g. Switzerland.

The low ranking of executive power in the UK can therefore be attributed to a combination of the dispersion of de jure executive power, which is typical in parliamentary systems, and the omission of the executive from constitutional statutes. In most constitutional texts, defining the structure, detailing the selection process and identifying the powers of the executive are fundamental elements. Since the government is often considered the most likely to violate the rules and regulations set forth in the constitutional order, the powers of the executive branch are often articulated in great detail in national constitutions. This helps those charged with enforcing the constitution to identify executive misdeeds and punish them accordingly.

Even compared to other parliamentary systems, though, the UK's written constitution still falls far short of the level of executive power because the UK's constitution fails to spell out the role of the executive. In our collection of constitutional statutes, there is not even an explicit statement of who holds the executive power. In reality, it is widely known that executive power is exercised on behalf of the Crown by the government, headed by the Prime Minister. However, the roles of these actors, especially the Prime Minister, in the UK's system of government are barely mentioned in the text of its constitution. There is no provision, like [Article 26\(2\)](#) of the Greek constitution, which explicitly states "[t]he executive powers shall be exercised by the President of the Republic and the Government." If the UK were to have such a statement, it might look something like the text of another constitutional monarchy such as Norway. Norway's constitution states in [Article 3](#) that "[t]he Executive Power is vested in the King, or in the Queen." Then, [Article 12](#) goes on to explain the structure of the executive:

*The King himself chooses a Council from among Norwegian citizens who are entitled to vote. This Council shall consist of a Prime Minister and at least seven (7) other Members.*

The Crown is certainly present in the text of the UK's constitution. For instance, the Act of Settlement 1701 provides detailed rules of succession to the throne as well as restrictions on eligibility. Where details are sparser is with regard to the government. Nowhere in statute law is the office of the Prime Minister established, nor is there a single reference to the Cabinet. There are some passing mentions of the Prime Minister, as described in the introduction, but those provisions are recent additions to the UK's

constitutional text and do not articulate either the rules for selecting the Prime Minister or the powers held by the individual who holds that office. For instance, the office is mentioned in both the Scotland Act (1998) and the Constitutional Reform Act (2005) in reference to making recommendations for appointment or removal from certain offices. Nowhere is the office or role of the Prime Minister explicitly defined, nor is any indication given of the selection process of the Prime Minister and the Cabinet. Lack of clarity resulting from the omission of these procedural rules led to controversy in 2010 when the general election returned a hung parliament and questions arose over whether the incumbent Prime Minister or the leader of the party winning the most seats had the first right to try to form a government. *The Sun* even went so far as to refer to Gordon Brown, the incumbent Prime Minister, as a ‘squatter’ in 10 Downing Street because he was reluctant to relinquish the office of Prime Minister despite the fact that his party lost its majority in the House of Commons (Newton Dunn 2010).

The one place where details of the office of the Prime Minister, the existence of the Cabinet and the formation of government are all provided in written form is in the Cabinet Manual (Cabinet Office 2011). The Cabinet Manual lists a number of conventions that have developed around the office of the Prime Minister. For instance, paragraph 3.1 of the Cabinet Manual specifies that the leader of the party which commands a majority in the House of Commons will normally be Prime Minister and that the Prime Minister is always a member of the House of Commons. Details are also provided as to government formation in the event of an overall majority not being achieved in the Commons (paras. 2.12-2.17) as well as about the structure and selection process for the Cabinet (paras. 3.7-3.23). The reason that the Cabinet Manual is not included in our list of constitutionally relevant statutes is that it is not a statute. It is simply a statement of important conventions surrounding the executive that was drafted by the cabinet secretary to transfer information from one government to the next. As a result, it cannot be considered binding on the executive because it lacks the force of law.

Aside from major omissions about the structure and selection of executive officials, there are more minor omissions as well. For instance, most constitutions (approximately 80%) define the position of the commander-in-chief and most (approximately 64%) specify who has the power to declare war. The UK’s constitutional text, however, has nothing to say on these important matters. Instead, the arrangement that the sovereign is the Commander-in-chief of the British Armed Forces exists only by long-established convention. The power of governments to engage the armed forces in military conflict is derived from the Crown and is one of many prerogative powers exercised by the Cabinet on behalf of the monarch, although again, this arrangement is nowhere defined in law. It is this omission from the UK’s constitution that has led to increasing demands from the House of Commons for a role in authorising the use of military action.

As with details about the office of the Prime Minister and the formation of government, rules relating to the deployment of the armed forces do exist in the Cabinet Manual. Details of who holds the power to deploy the armed forces are explicitly stated:

*Prerogative executive powers: these are the powers that are exercised on the Sovereign's behalf by ministers. Most prerogative powers fall into this category. They include powers in relation to foreign affairs, to deploy the Armed Forces and to grant mercy. (Cabinet Office 2011, p. 25)*

Details of the convention for consulting parliament before engaging in combat are, however, altogether less clear:

*In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate. (Cabinet Office 2011, p. 44)*

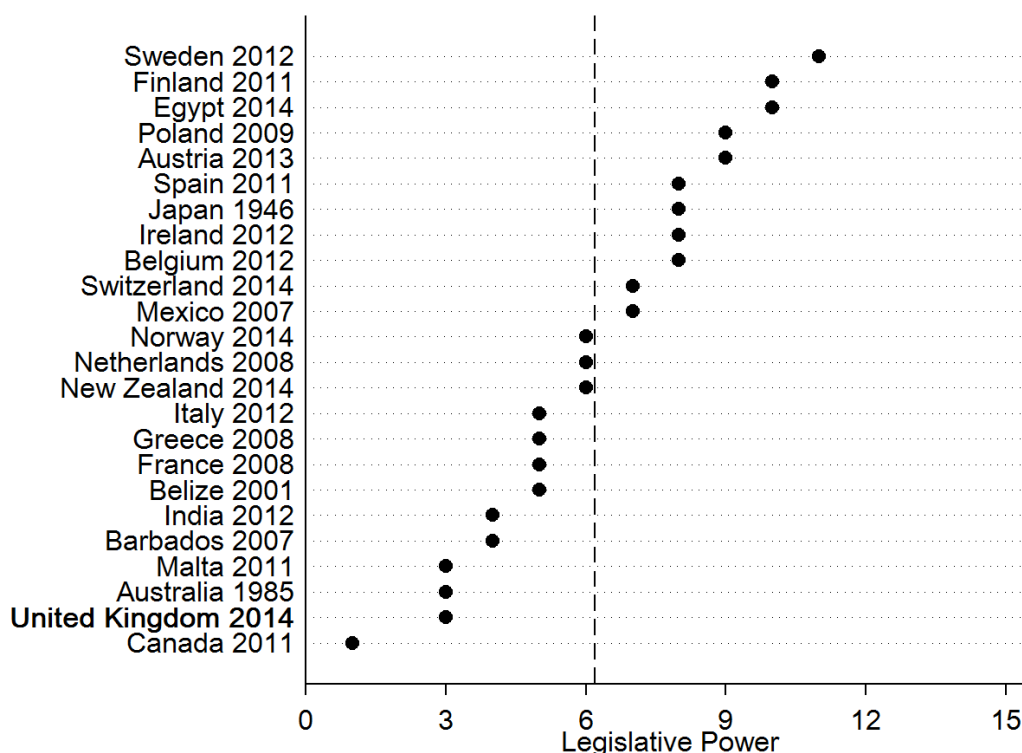
The Cabinet Manual recognises that the government acknowledged this convention in 2011 but does not definitively state whether all future governments are obliged to do so. The potential for ambiguity in interpretation, in combination with the non-legal status of the Cabinet Manual, suggests that at present the government has some room for manoeuvre.

This is, in fact, no different from most other countries' constitutions, which are unlikely to specify the executive's war powers with any more precision than the UK's Cabinet Manual. For instance, although Congress technically has power to declare war in the United States ([Article 1, Section 8](#)), the War Powers Resolution (50 U.S.C. 15411548) authorizes the President to commit troops for a period of up to 60 days without Congressional approval. The situation is similar in France. The French Parliament has the power to declare war according to the 1958 French Constitution ([Article 35](#)), but the President can commit troops abroad without such approval and has done so repeatedly over the last 60 years (Zoller 1996). Thus, even if the UK had a codified constitution that explicitly gave the House of Commons the power to declare war, disputes between the executive and legislative branches over the use of UK troops abroad would likely continue.

## **Legislative power**

Figure 6 compares legislative power in the UK to legislative power in other countries. Legislative power is an aggregate measure composed of thirty-two items which track the authority and autonomy of the legislative branch (Elkins, Ginsburg and Melton 2009). Higher scores indicate higher levels of legislative power. Like executive power, the UK's constitutional text also ranks relatively low for this measure. This is contrary to what we would expect from a parliamentary system because, traditionally, parliamentary systems tend to rank higher on legislative power than executive power. France,

Figure 6: De jure legislative power in 24 constitutions



as we would expect from a country with a constitution drafted under the influence of a strong executive, scores much lower on legislative power than on executive power. The UK’s institutional structure seems to look much more like that of commonwealth countries, including Australia and Canada, which score low for both the executive and legislative power measures.

Perhaps the most notable omission regarding the legislative branch is the relationship it has with the executive. Parliamentary scrutiny is an essential check on the powers of the executive and is key to holding government accountable. 77% of constitutions include provisions that describe the executive oversight powers given to the legislative branch. To find the written rules regarding parliamentary oversight we have to consult another non-legal document. The Ministerial Code states that ministers have a duty to account to and inform Parliament about their policies (Cabinet Office 2010, Part 1, para. 1.2b). The Code is very similar to the Cabinet Manual in that it is a non-binding rule book designed to serve as a guide for how ministers should behave. The Cabinet Manual also touches on parliamentary oversight, listing the mechanisms through which the executive can be scrutinised: “the select committee system, Parliamentary questions, oral and written statements, debates in both Houses and the Parliamentary Commissioner for Administration” (para. 0.10). Further, the Commons Standing Orders (SO No 152) can also be consulted for a description of the function of select committees “to examine the expenditure, administration and policy of the principal government departments”. Thus, to understand the framework for parliamentary oversight, various non-legal doc-

uments can be consulted. The relationship between different government branches is fundamental to constitutional texts because such provisions reduce the likelihood that policy disputes will turn into constitutional disputes, which question the constitutional rules. The UK's constitutional text falls short on this account.

Another omission from the UK's constitution regarding the legislative branch relates to the presiding officer of the first chamber, a topic present in 88% of in force constitutions. Provisions to this effect refer to the individual who presides over the lower chamber, which in the UK's case is the Speaker of the House of Commons. Although a very important parliamentary position, the office of Speaker is not established in any statute.<sup>10</sup> The Cabinet Manual is equally quiet on the Speaker's role. As a matter of parliamentary procedure, the election and re-election processes for the Speaker are, instead, found in the Standing Orders of the House of Commons (SO No 1). Standing orders are generally regarded as binding, but they do not hold the force of law and can either be approved or set aside by a parliamentary majority (Norton 2001).

Provisions on calling extraordinary legislative sessions are found in 76% of in force constitutions, but there is no provision for doing so in the UK's constitutional text. As with the rules regarding the office of the Speaker, provisions for recalling parliament are found only in the Standing Orders of the House of Commons (SO No 13). Despite this absence from the constitutional text, there has been a recent trend showing an increase in the number of recalls. Since 1948, the House of Commons has been recalled in response to 28 separate events (Recall of Parliament SN/PC/01186).<sup>11</sup> The current Parliament has seen the House of Commons recalled 5 times, more than any other post-war Parliament.<sup>12</sup> Such an increase suggests that perhaps the recall procedure should be firmly established in law, clarifying who has the power to recall the legislature and preventing whoever has that power from abusing it.

## Judicial independence

Figure 7 compares the level of de jure judicial independence in the UK to that in other countries. Melton and Ginsburg (2014) identify six features of constitutions that can enhance the independence of the judiciary: (1) an explicit statement that the judiciary is independent; (2) selection procedures that enhance independence; (3) removal procedures that enhance independence; (4) requirement that judges can only be removed for grave offences; (5) protection of judicial salaries; and (6) life terms for judges. Out of the six features thought to enhance judicial independence, the UK's constitutional

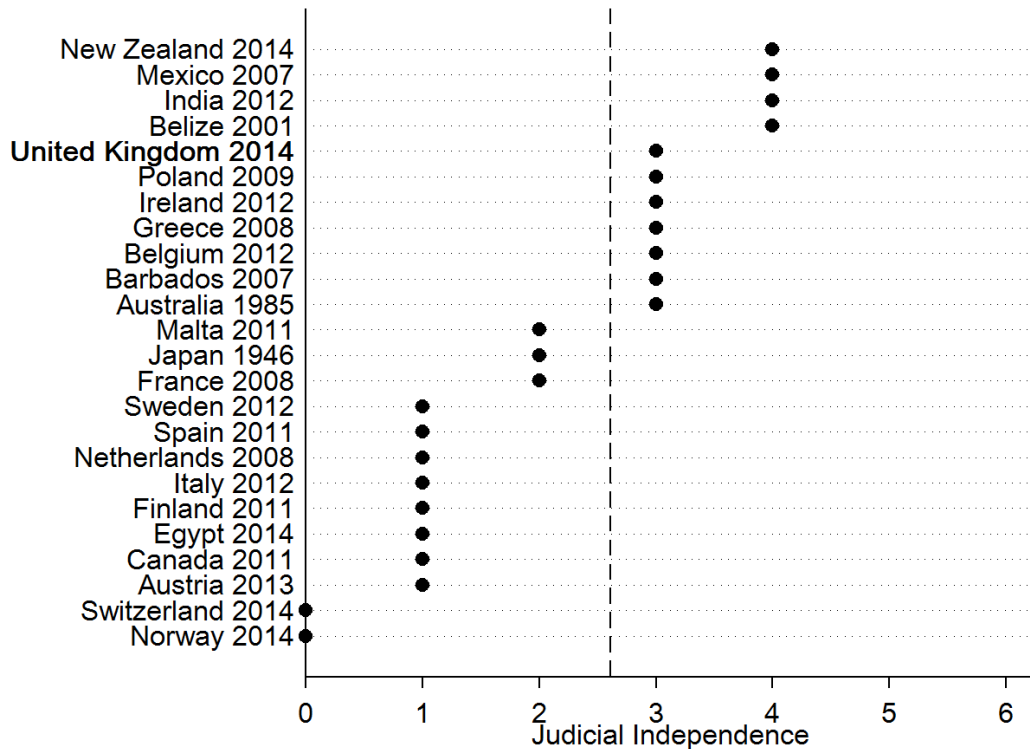
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<sup>10</sup>The Speaker of the House of Commons is mentioned in passing in a number of statutes, for instance, in the Parliament Act, the Speaker is mentioned as the individual who certifies a Money Bill. But despite such mentions in passing, the office of Speaker is never defined.

<sup>11</sup>The most recent recall over Iraq in 2014 occurred after the cited Standard Note was produced, and has been included in the figure of 28 recall events.

<sup>12</sup>The recall events include the phone hacking scandal (2011), the English riots (2011), the death of Margaret Thatcher (2013), Syria (2013) and Iraq (2014).

Figure 7: De jure judicial independence in 24 constitutions

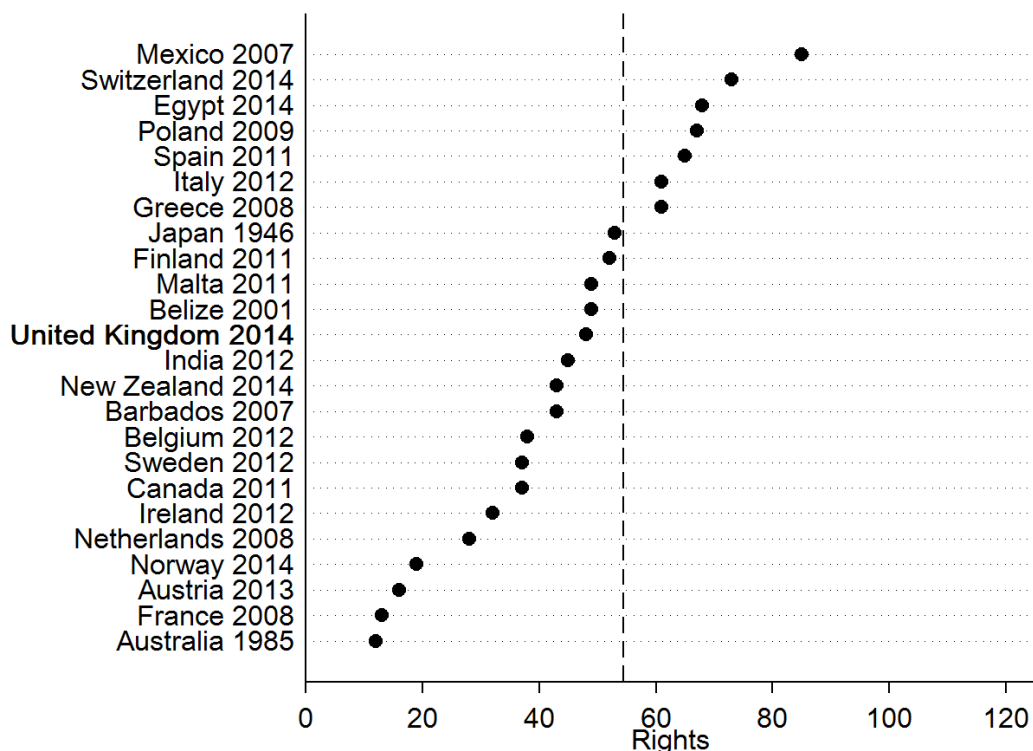


text incorporates three of them. This is entirely due to the Constitutional Reform Act (2005), which comprehensively addressed the issue of judicial independence, especially with regard to the UK Supreme Court established by the Act. Perhaps most importantly, the UK’s constitution details the procedures for selecting and removing judges, placing those powers in the hands of an independent judicial appointments commission. It is this feature of the UK’s constitution, more than any other, which enhances the independence of the UK’s judiciary. The presence of these features gives the UK greater de jure protection of the judiciary than the vast majority of countries in the world. Notably, prior to the recent bout of constitutional reforms and the implementation of the 2005 Act, the UK would have scored zero for this measure.

## Rights

We next consider the volume of rights found in the UK’s constitution in a comparative context, as illustrated by Figure 8. The volume of rights is simply the number of de jure rights which are protected in a constitution, out of a possible 116 distinct rights which the CCP have identified as characteristically constitutional. The number of rights included in national constitutions has increased steadily over the years. Early in the modern constitutional era, constitutions had, on average, only 10 rights, a number skewed upward by Latin American constitutions that had many more rights than their

Figure 8: De jure rights in 24 constitutions



European counterparts. Since 1789, there has been a fivefold increase in the number of rights in constitutions such that, today, the average constitution has upward of 50 distinct rights.

The UK constitution has slightly fewer rights than the average constitution. Notably, the UK only ranks as high as it does due the promulgation of the Human Rights Act 1998. Prior to 1998, the UK protected very few rights within constitutionally relevant statutes, e.g. Magna Carta (1297) and the Bill of Rights (1689). Other countries with low levels of rights protection include Australia, which does not have a Bill of Rights in its constitution, and France, though France directly incorporates the French Declaration of the Rights of Man into its constitution. The countries that score highest on our rights scale are those which have written and enacted constitutions relatively recently, such as Ecuador (not shown) and Egypt.

Of the rights which are not found in the UK's written constitution, two are particularly noticeable in their absence due to their common presence in constitutions across the world. These are freedom of movement and freedom of the press. Freedom of movement is markedly absent from the Human Rights Act (1998). Its omission is striking because it is found in 83% of in force constitutions and was incorporated into the European Convention on Human Rights (ECHR) by Protocol No. 4. This Protocol was never ratified by the UK and, as a result, freedom of movement was omitted from the Human



Rights Act, which largely incorporated the provisions of the ECHR into UK statute law. That said, freedom of movement has an implicit role in the UK's constitution. Freedom of movement is not only protected by common law norms but is also enshrined in the Treaty of Rome 1957, which was signed by Britain upon its accession to the European Community in 1972, so there is some legal basis for freedom of movement, even if such a right is not entrenched in one of the statutes that we have judged to be constitutionally relevant.

Freedom of the press is another fundamental right which is not guaranteed by the UK's constitution, despite being found in 76% of constitutions across the world. From Princess Diana to the phone hacking scandal, the tension between freedom of the press and the right to privacy has been a controversial and politically charged issue. Indeed, the unresolved dispute between the government and the press over the Leveson Report and the subsequent Royal Charter on Self-regulation of the Press highlight the need for clarity (Barnett 2013; Rigby 2014). That said, it is unlikely that a blanket guarantee that freedom of the press will not be infringed, like that found in many of the world's constitutions, would add much clarity to this debate.

## **Other missing topics**

In addition to the large omissions relating to the executive and legislative branches of government, a number of other features of the UK's constitution are conspicuously absent as well. Constitutions often contain provisions of a more general and less substantive nature. For instance, 91% of in force constitutions state the type of government envisioned, usually in the preamble or first article. For example, [Article 5](#) of the Irish constitution states that "Ireland is a sovereign, independent, democratic state," and the [preamble](#) of the Indian constitution states that India is a "sovereign socialist secular democratic republic." Due to its very nature, the UK's constitutional text does not have a preamble, and it nowhere outlines the general aims and principles of the nation. The Bill of Rights (1689) and Act of Settlement (1701) limit the power of the monarch in favour of parliament, so one might argue that they implicitly define the UK government as a 'constitutional monarchy'. However, the UK constitution does not do so in explicit terms.

There are also some symbolic features missing from the UK's constitution. For instance, 76% of constitutions provide for an official language. English is the de facto official language of the UK, but this is not specified by statute. The only references to language in the UK constitution are in the devolution Acts. The Government of Wales Act (2006) seeks to put Welsh on the same terms as English in the principality. The Northern Ireland Act (1998) briefly mentions the need for a policy on Irish and Ulster Scots, but it does not make either an official language. The Scotland Act (1998) does not mention Scots or Scottish Gaelic at all. Another omission is the constitution's failure to mention either the UK's national anthem or capital, both of which are stated

in 59% of constitutions. Another symbolic feature of countries is their flag. 68% of constitutions describe the nation's flag. While the Union with Scotland Act ([Article 1](#)) describes the flag of Great Britain as a conjoining of the crosses of Saint George and Saint Andrew, nowhere does the UK constitutional text describe the current flag of the United Kingdom of Great Britain and Northern Ireland, which also conjoins the cross of Saint Patrick.

Lastly, the constitutionally relevant statutes in the UK lack provisions that entrench them as the highest level of law in the UK. Entrenchment is the safeguarding of certain laws which are recognised as more important than others, making them more difficult to amend through procedural mechanisms such as parliamentary supermajorities and popular referendums. Entrenchment is often backed up by some form of judicial review, where the courts have the power to strike down legislation deemed incompatible with the constitutional text. Although there are no formal mechanisms of entrenchment in the UK, there is evidence to suggest that the UK has been gradually moving in that direction. In particular, members of the judiciary have suggested that constitutional statutes are more important than other legislation. In *Thoburn v Sunderland City Council* (2002 EWHC 195), Lord Justice Laws declared that we “should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes” (para. 62). In the Supreme Court case *H v Lord Advocate* (2012 UKSC 24), Lord Justice Hope gave further credence to the idea that constitutional statutes are ‘quasi-entrenched’ (Perry and Ahmed 2013). He argued that the later Extradition Act (2003) could not supersede a provision in the earlier Scotland Act (1998) “because of the fundamental constitutional nature of the settlement” (H, para. 30). The wider implication is that constitutional statutes can only be explicitly amended. Judges have also recognised the importance of constitutional, particularly devolutionary, statutes by interpreting them differently. They have, for instance, placed the wider aims of the statute - such as peace and good governance in Northern Ireland - before the letter of the text (Khaitan 2012).

The importance of certain constitutional matters has also been recognised by Parliament through the provision of referendums. There is a growing consensus that UK citizens will be consulted in a referendum prior to transferring power away from Westminster or to changing the way MPs are elected. This convention may well continue to develop as more areas of constitutional change are put to the electorate. By deferring to referendums, Parliament effectively concedes that there are certain issues which it cannot decide on its own. As Bogdanor put it, “[i]n Britain, the referendum has proved to be, as Dicey predicted, a method of securing de facto entrenchment in a country without a rigid constitution” (Bogdanor 1996, p. 16). Referendums make it more difficult to achieve constitutional reforms, such as devolution and electoral reform, and have the potential to thwart government policy. Beyond convention evolving around referendums, there are no explicit constitutional provisions which make it more difficult for Parliament to amend the constitution. The UK's constitutional text is comprised of ordinary statutes which can be changed through standard parliamentary procedures. This stands in stark contrast to 98% of in force constitutions which detail the specific proce-

dures for constitutional amendment. Indeed, 38% of countries have certain provisions which cannot be changed at all. The lack of entrenchment of the UK's constitutional statutes serves to protect the long-established principle of parliamentary sovereignty.

## Considerations for future reform

Despite the myriad of constitutional reforms implemented over the last twenty years (see Figure 1), there is still pressure on the UK government for further reform. In part, this pressure is prompted by a feeling that the constitutional reforms begun by the Blair government are incomplete. In her book *Constitutional Reform in the UK*, Dawn Oliver suggests that “there has been no master plan or coherent programme for the reform of the UK constitution” (Oliver 2003, p. 3). Instead, constitutional reforms have been largely a result of political pressures, rather than a comprehensive vision for the structure and rules of the political system.

Failure to articulate a coherent reform plan means that there is no predetermined end to the reforms intended by the Blair government. The result is an atmosphere where dissatisfaction with government is translated into pressure for further constitutional change. One certainly does not have to look very hard to identify such demands. In addition to the promised referendum on the UK's membership of the EU, there are appeals for an English Parliament and more symmetrical devolution arrangements, suggestion of a new Bill of Rights for the UK and calls to make the House of Lords an elected body. The combination of these demands and the promises made during the Scottish independence referendum campaign last September suggest that future constitutional reforms of some kind are inevitable.

Given this inevitability, a text that consolidates all of the UK's constitutional statutes is particularly timely. Constitutional reform requires that actors fully understand the existing constitutional arrangements, which is difficult when those arrangements are spread across a number of documents. The constitutional text that we have put together, and made available on *Constitute*, helps overcome this difficulty by consolidating all of the constitutionally relevant statutes in one place and making the consolidated text searchable by topic. Importantly, the constitutional text that we put together is not an idealistic vision of what the constitution should be like, nor does it attempt to codify the UK's many constitutional conventions. The UK's written constitution, as we present it, is simply a reflection of what is currently written into law. Our consolidation of constitutionally relevant statutes aims not only to help educate citizens and political actors about the current constitutional arrangements operating in the UK but also to aid those individuals seeking constitutional change, who need fully to understand the system which they are looking to reform. In particular, our consolidated constitutional text offers three lessons for those involved in the debate over further codification of the UK constitution.

## **1. Significant portions of the UK's constitution are already codified**

The UK not only has a written constitution but a significant proportion of its constitutional order has been written into law. Recent years have witnessed a large expansion in both the length of the UK's constitutional text and the number of topics covered by it. At present, the UK's constitutional text addresses 138 out of 329 typical constitutional topics, just 6 less than the average constitution. Continued pressure on lawmakers for further constitutional change means that the trend towards writing down more of the UK's constitutional order is likely to continue in the future.

## **2. Key aspects of the UK's constitution remain uncoded**

Despite the fact that the UK's constitutional text addresses a comparable number of topics to other constitutions, the nature of the topics it addresses is different. Comparing the contents of the UK's constitution with the contents of other countries' constitutions reveals that a number of topics which are found in a majority of the world's constitutions are missing from the UK's text (see the Appendix for a full list of such topics). In fact, many of the most fundamental principles of the UK's political system have not been formalised in law. From the structure of the executive and the office of the Prime Minister to the oversight powers of the legislature, there are glaring omissions from the written part of the constitutional order. Throughout history, constitutions have always sought to elaborate the structures and selection procedures for the executive and legislative branches of government. If demand had at some point over the last two centuries been strong enough in the UK for a purposive, revolutionary constitutional text to be drafted, its contents would almost certainly have addressed these areas. Instead, constitutional change in the UK has been more organic, evolving over the centuries through piecemeal reforms. Through those reforms, elements of the UK's constitutional order that were controversial, either because they were unclear or they were in need of reform, were written down to provide clarity. The uncontroversial elements were left uncoded. As a result, some core elements of written constitutions are absent from the UK's constitutional text.

## **3. Further codification is not essential**

Recall that the main objective of this report is to contribute to the debate over further codification of the UK constitution. In particular, we hoped that, by consolidating the UK's constitutional text and identifying the elements missing from that text, we might be able to provide some insights about whether or not further codification is warranted and, if so, what form that codification should take. We are not the only ones interested in these questions. This project started more than a year ago, and in the interim,

the PCRC has released a report entitled *A New Magna Carta?* that attempts to answer these very same questions (Political and Constitutional Reform Committee 2014). More recently, the PCRC released the results of a public consultation about codification (Political and Constitutional Reform Committee 2015), based upon which they recommend further codification of the UK's constitution:

*Drafting a codified constitution which sets out clearly and coherently the settlement envisaged as a result of constitutional change would be a sensible approach to any major constitutional reform.* (para. 44)

The PCRC is not the only organisation pressing for further codification. In the aftermath of the Scottish Independence referendum, both civil society organisations and the major political parties have advocated a constitutional convention (Campion 2014). The purpose of such a convention would be to bring together a range of delegates to discuss constitutional change, or perhaps even the writing of a new constitution. In addition, the Constitution UK project (2015), housed at the LSE, has also been promoting a constitutional re-write. They are currently seeking to write a constitution for the UK using crowdsourcing, where ordinary citizens will not only decide the topics that should be addressed by the UK's constitution but also how to address them.

All of the aforementioned projects envision further codification. In contrast, we think that further codification is not strictly necessary and recommend that the UK maintain its written, but uncodified, constitution. This recommendation stems from our perception of the codification options available to the UK government, which are extremely similar to those set out in the PCRC (2014) report released last year:

1. The status quo – maintain an uncodified constitution, where the constitutional order continues to be slowly written down as constitutional controversies arise.
2. A Constitution Act – a statute that codifies many of the ‘missing’ elements from the UK's current constitutional text, focusing on those elements related to the executive and legislative branches of government.<sup>13</sup>
3. A Constitutional Consolidation Act – a statute that consolidates the UK's constitutional order into a single text by codifying many of the ‘missing’ elements from the UK's constitutional text and combining those elements with the constitutionally relevant provisions from the statutes identified in Table 1.
4. A written Constitution – a purpose built constitution, probably written by an independent constituent assembly, that combines elements of the current constitutional order with elements of reform.

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<sup>13</sup>This is similar to the ‘constitutional code’ described by the PCRC (2014). We prefer the term constitution act to maintain consistency with other commonwealth countries that have adopted such acts.

Here, we consider the first three possibilities. We ignore the fourth because it conflates codification with constitutional reform.<sup>14</sup> Although there are almost certainly some elements of the UK’s constitutional order that need reform – e.g. appointments to the House of Lords (Russell and Semlyen 2015) –, identifying those elements is beyond the scope of this report, so we restrict our focus to those options that are exclusively about codification.

Among those options, we advocate the status quo for three reasons. The first is that further codification is unlikely to increase transparency about the UK’s constitution. A chief argument for codification is that it will increase knowledge both about the constitutional rules and where to find those rules. However, in practice, this knowledge is already realized. As detailed in this report, virtually all of the UK’s constitutional order has already been written down in some form. The key pieces of the UK constitution which are not codified in constitutionally relevant statutes are written in other documents, the primary one being the Cabinet Manual. These texts mitigate the need for a Constitution Act (option #2 above), whose primary benefit would be to increase understanding of unwritten constitutional conventions. Since those conventions already exist in textual form, albeit not in statute form, there is little need for a Constitution Act to clarify them.

Thus, if one is contemplating further codification, the most meaningful action would be to simplify the existing constitutional structure by consolidating all of the constitutionally relevant provisions from dozens of texts into a single document (option #3 above). Such an exercise would enhance the transparency of and accessibility to the UK’s constitutional text, potentially generating greater knowledge about the UK’s constitution among the general public. The PCRC (2015) notes this as an important reason for further codification, noting that “the public is entitled to know the processes by which it is governed and the fundamental rules on which the constitution is based”; such knowledge “will contribute greatly to more informed public debate” (para. 58).

Of course, this argument assumes that the UK’s constitutional text has not been consolidated, which is increasingly untrue. The *Constitute* website, for example, allows one to access a consolidation of the UK’s constitutionally relevant statutes and to search those statutes by topic, significantly increasing the accessibility of the UK’s constitutional text. In addition, the PCRC has created a [constitution consolidation act](#), that extracts

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<sup>14</sup>Note that advocates of further codification tend also to be advocates of constitutional change. In fact, most recent attempts at codification are by those who want to change the content of the UK’s constitution. For instance, in 1990, the Liberal Democrats published a codified constitution in “We the People...” – Towards a Written Constitution. Its proposed changes embodied party policy and included the introduction of the single transferable vote and replacement of the Lords with an elected Senate. The following year saw two attempts at codification. The first being Tony Benn’s radical proposal, the Commonwealth of Britain Bill. It called for - inter alia - the abolition of the monarchy, a ‘House of the People’ in lieu of the aristocratic Lords, and equal parliamentary representation of men and women. The second was an attempt by the Institute for Public Policy Research (IPPR), aptly titled ‘The Constitution of the United Kingdom’. It called for devolution, four-year fixed-term parliaments, the election of the Prime Minister by MPs, and amendments to the electoral system.

all of the constitutionally relevant provisions from a wide variety of texts, including the Cabinet Manual and House of Commons Standing Orders, into a single document. The PCRC has also drafted a [pocket constitution](#), that condenses the most important pieces of the UK's constitutional order into a few pages of readily understandable bullet points. These efforts have significantly contributed towards making it easier for the public to access and understand the UK's constitution. One might object that these are not legal texts or that they lack legitimacy because they were never approved by parliament. However, given the existence of these texts and the fact that a Constitutional Consolidation Act passed by parliament is unlikely to change the way that politics operate in the UK, we feel that such an act is more of an optional nicety than a political necessity.

The second reason that we advocate for the status quo is that codification is unlikely to make interpretation of the constitutional rules easier. Proponents of codification argue that a major disadvantage of the UK's current constitutional system is the uncertainty about the rules created by a heavy reliance on conventions (PCRC 2014). To quote constitutional theorist Geoffrey Marshall (1985, p. 34), “[a] convention’s existence may not be doubted but many of its applications to particular factual situations may be open to argument.” In other words, lack of codification creates an environment where uncertainty exists over the application of conventions. This not only increases the likelihood of constitutional disputes but also allows powerful political actors, like the Prime Minister, to use this uncertainty to enhance his (or her) political power. Codification, it is argued, facilitates knowledge about the constitutional rules, reducing the number of constitutional disputes and better constraining power hungry executive officials.

The trouble is that the certainty created by codification is probably overstated. We have already mentioned that many constitutional conventions have been written down in the Cabinet Manual and other non-legal texts. This informal codification has already reduced uncertainty about the application of the conventions that operate in the UK (Blick 2014). In addition, one should keep in mind two points briefly touched upon in this report. The first is that all constitutional texts are incomplete. Even if all of the most important elements of the UK's constitutional order were written into a single consolidated statute, there would still be uncertainty about the application of the constitutional rules in some situations. Those drafting the consolidated text simply cannot foresee every possible constitutional problem that could arise in the future (Persson, Roland and Tabellini 1997; Maskin and Tirole 1999). The second is that the pieces of the constitutional order most likely to be codified are those features where the conventions are strongest. As a result, formal codification is likely to have little or no effect on the operation of those conventions in day-to-day politics.

Our third argument for the status quo, which reinforces our belief that a consolidation act should be viewed as optional, is that the UK's constitutional order functions relatively well without having a codified constitution. The UK is widely recognized as one of the most democratic countries in the world (Pemstein, Meserve and Melton 2010), and it also has one of the highest levels of human development (United Nations 2014). Thus, by international standards, although there is room for improvement, the UK is

doing well.

Aside from these cross-national indicators, UK citizens tend to think that its government does well on a wide range of governance indicators. Consider two factors from the World Justice Project's Rule of Law Index (2014) that are central to arguments for codification. The first is constraints on government powers, a major area of concern since there are no formal limits in the power of the executive in the UK. The World Justice Project asked UK citizens to assess whether or not the powers of executive are limited by a wide range of political actors, including the legislature and the judiciary. On a scale from 0 to 1, where 1 is the most constrained, the UK scored a 0.81. Out of the 99 countries surveyed, only 9 scored higher, suggesting that, despite a lack of formal limits, UK executives are perceived to be more constrained than most of their peers.

The second factor to consider is the stability of laws. As we mentioned above, no laws in the UK are entrenched, which creates the possibility for significant constitutional change whenever a new party holds the reins of government. Despite the significant number of amendments made to the UK constitution each year (see Figure 1), UK citizens tend to view their laws as relatively stable. On a scale from 0 to 1, where 1 means the most stable, the UK scores 0.74. Only 18 countries out of the 99 surveyed score higher.

In summary, the primary benefits of further codification are a reduction in uncertainty and an increase in transparency about the constitutional rules governing the UK. Our argument is that recently drafted non-legal texts already provide these benefits. Furthermore, government in the UK has, at least according to international standards, functioned relatively well without a formally codified constitution for generations. These facts suggest that the benefits of further codification are likely to be minimal. Therefore, we believe that, rather than using their scarce resources on codifying the constitution, UK lawmakers should focus on initiatives where the benefits are more apparent.



## Appendix: Missing topics

Table 2: Topics missing from the UK's constitutional text

Topic	Category	Constitutions with Topic (%)
Name/structure of executive(s)*	Executive	98.4
Mention of Cabinet/ministers*	Executive	96.9
Type of government envisioned*	Principles and Symbols	90.2
Leader of first chamber*	Legislature	88.1
Requirements for birthright citizenship*	Culture and Identity	87.6
Selection procedure for Cabinet*	Executive	87
Restrictions on voting*	Elections	84.5
Freedom of movement*	Rights and Duties	81.9
Designation of commander in chief*	Executive	79.3
Head of state term length	Executive	77.7
Legislative oversight of the executive*	Legislature	76.7
Extraordinary legislative sessions*	Legislature	75.6
Mention of human dignity	Rights and Duties	75.1
Freedom of press*	Rights and Duties	74.6
Referenda	Elections	73.6
Attorney general	Executive	73.1
Removal of individual legislators	Legislature	72.5
Right to culture	Rights and Duties	71.5
Quorum for legislative sessions*	Legislature	70.5
Minimum age of members of first chamber	Legislature	70.5
Representative of the state for foreign affairs	International Law	67.9
Judicial council	Regulation and Oversight	67.4
Right to health care	Rights and Duties	66.8
Right to work/state duty to provide work	Rights and Duties	66.3
Head of government selection procedure*	Executive	66.3
Size of first chamber*	Legislature	65.3
Conditions for revoking citizenship	Culture and Identity	65.3
Claim of universal suffrage	Elections	64.2

Table 2: Topics missing from the UK's constitutional text (cont.)

Topic	Category	Constitutions with Topic (%)
Rights of children guaranteed	Rights and Duties	64.2
References to science or sciences	Principles and Symbols	63.2
Power to declare/approve war*	International Law	62.7
State support for the disabled	Rights and Duties	62.2
Free education	Rights and Duties	61.7
Deputy executive	Executive	60.6
Duty to obey the constitution	Rights and Duties	60.6
Right to form political parties	Elections	60.1
Requirements for naturalization	Culture and Identity	60.1
Ownership of natural resources	Principles and Symbols	59.6
Veto override procedure	Legislature	59.1
Inalienable rights	Rights and Duties	59.1
State support for the elderly	Rights and Duties	59.1
National capital*	Principles and Symbols	59.1
National anthem*	Principles and Symbols	59.1
Duty to serve in the military	Rights and Duties	58.5
References to art or artists	Principles and Symbols	58.5
Head of state immunity	Executive	57.5
Selection of active-duty commanders	Executive	54.9
Compulsory education	Rights and Duties	54.9
Length of legislative sessions	Legislature	54.4
State support for children	Rights and Duties	54.4
Head of state term limits	Executive	53.4
Public or private sessions	Legislature	52.8
Right to choose one's occupation	Rights and Duties	52.8

Notes: The table lists all topics found in more than 50% of the world's constitutions but not found in the UK's constitutionally relevant statutes. Topics marks with an asterisk (\*) are discussed in the text of this report.

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The UK lacks a codified constitution. Instead, it has eighteen constitutionally relevant statutes that collectively comprise its constitutional text. This situation creates uncertainty about the contents of the UK's constitution and prompts some to call for further codification. The purpose of this report is to bring some clarity to the textual status of the UK's constitution. To do so, we draw on data from *Constitute*, a project that identifies the topics addressed in all national constitutions in force at the end of 2014. We use these data to identify topics that are typically addressed in constitutions but absent from the constitutionally relevant statutes in the UK. These 'missing' topics offer potential areas for further codification if more of the UK's constitution were to be written down in statute form. After identifying these 'missing' topics, we assess whether codifying these aspects of the UK's constitutional order would actually solve any of the constitutional problems facing the UK today. We argue that further codification is not strictly necessary because much of what is not already recorded in statute has been written down in other texts.

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