

Should constitutions be written?



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Constitutions should be written. Discuss.

Choose one country with a case law system and one with a civil law system and discuss the advantages of each.

ANSWER

1. Introduction

A constitution can be defined as a system or framework which enshrines the principles and rules by which a body is governed. In the context of states the term makes reference specifically to the national constitution of the state, which serves to define the fundamental political principles, the legal environment and *modus operandi* of the state and which establishes the duties and powers of the government of the state. [1]

National constitutions can be classified as either codified or uncoded.

Codified constitutions are those which are contained in a single document, containing the single source of the constitutional law of a state, and perhaps the most well known example is the Constitution of the United States. [2]

Uncodified constitutions are those which are not contained in a single document, but consist instead of several different sources, which can be written or unwritten.. It should be noted that there are hybrid systems which seem to fall between the two classes such as the Australian Constitution [3], in which constitutional law largely derives from a single written document, but other written documents are also considered part of the constitution [4].

Probably the best example of a pure uncoded constitution is the constitution of the United Kingdom which does not rely on any single written

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fundamental document, but rather consists of a patchwork of written and unwritten sources.

The term *written constitution* makes reference to a constitution which is entirely written and by definition this would include every codified constitution. Indeed, in academic writing the term *written constitution* is synonymous with *codified constitution*, and in similar fashion the term *unwritten constitution* is interchangeable with *uncodified constitution* (although as stated this is not always entirely accurate: see Australian constitution).

In the modern world, codification is the norm. Most states have evolved written constitutions which stand as the supreme and overarching statements of national law. Unwritten constitutions are certainly in the minority, but it is submitted at the outset that this should not be taken as proof that a written constitution is a prerequisite to success or stability.

2. A Common Law System: England

The United Kingdom is notable in that it operates under an unwritten constitution, although this term has been criticised by commentators such as Bogdanor as a “misleading platitude”^[5]. In this paper we will confine ourselves to an examination of the legal system of England and Wales, within the United Kingdom, because the Scottish legal system derives from Roman Law – a very different legal heritage and tradition.^[6]

The modern English system of law can be traced back to the Norman conquest of 1066. The Norman kings, while promising to respect local rights

and customs, dispatched judges to travel around the country on circuits and these judges gradually began following each other's decisions to preserve the consistency of the application of law in different parts of the country. This practice became formalised and is today known as the doctrine of judicial precedent. This doctrine was extremely successful in underpinning the English common law system (ie a law *common* to all parts of the kingdom). One advantage of this uncodified model is that it is free to grow and develop organically to suit the changing environment it must regulate – something which is more difficult when one is bound by a rigid set of general principles such as that which would underpin a fully written system.

As the Parliament at Westminster fully established itself and grew in power and authority over the Monarch it took its place alongside the common law. Together, the common law and Parliamentary legislation came to offer a coherent and comprehensive system of law, which has matured and refined itself over centuries of stable government. It can be argued that an unwritten system puts its faith in untrammelled democratic process and in those charged with its maintenance. There are, it is submitted, obvious risks attached to this strategy, but in simple terms England has never found the need to adopt an overlaying written constitution, because of the strength and scope of its existing system.

However, this is not to say that the English 'constitution' is entirely unwritten. Aspects of constitutional-style law are evident in venerable statutes such as the 1215 *Magna Carta*,^[7] the 1689 Bill of Rights^[8], the 1701 Act of Settlement^[9] and the 1911 and 1949 Parliament Acts.^[10] More

recently the United Kingdom has adopted quasi-constitutional law in piecemeal fashion by means of the European Communities Act 1972, which provides the legal framework necessary for the country's membership of the European Union, and the Human Rights Act 1998, which imports the rights and freedoms enshrined in the European Convention of Human Rights into UK law, conferring those rights on citizens of the United Kingdom. This means that the English system achieves an effect equivalent to that which is delivered by a written constitution without the formality of the latter model and therefore some of the advantages of written systems are to some extent rendered nugatory. That said, the principle that stands at the very heart of the English legal system and overrides all other provisions and considerations cannot be found set out in any of these documents.

The highest rule of UK law, which has the potential to override any principle of a constitutional or quasi-constitutional nature, is the Doctrine of Parliamentary Sovereignty. This unwritten rule declares that the Parliament of the United Kingdom enjoys full and unchallengeable sovereignty in all its actions. In practice, this means that the Parliament of the day (namely the House of Lords the House of Commons, and the Monarch acting together) [11] has supreme authority over all aspects of English governance and all other institutions of the state, including the courts and other executive bodies.

This ensures that the situation in England differs with that which prevails in many states operating under codified or written constitutions, where supreme courts are often empowered to strike down legislation deemed to

be unconstitutional in nature. ^[12] The Constitution of the United States' is one example of such a system and the so-called "checks and balances" it employs to safeguard the integrity of the constitution and the governance of the state are much cherished.. In the English system, given that

Parliamentary supremacy is unquestioned, although complex procedures for judicial review are in place, by which courts can review and challenge laws considered defective in some way, the final word is left to Parliament itself.

In the *Introduction to the Study of the Law of the Constitution* (1885) ^[13]

Dicey :

" Parliament has the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."

This is the most important law of the English legal system and it is this rule above all which explains the country's lack of a written constitution. As a direct consequence of the application of this principle the UK Parliament has the power to make, amend and revoke law on any issue at any time. No Parliament has the power to bind a successor Parliament to its will, meaning that no Parliament could enact a so-called constitutional law which could not later be repealed or amended by some future Parliament as easily as any other piece of legislation. Moreover, the only body with the ultimate power to vary a law brought into force by the UK Parliament is Parliament itself.

This gives the English system considerable flexibility and adaptability, and this is clearly an advantage. However, given that the system relies

exclusively on the integrity of Parliament, its success is predicated on a fluctuating democratic mechanism. To date, the United Kingdom has enjoyed good and stable government and its citizens have not expressed any cogent desire for the protection of a written constitution.. However, that is not to say that at some point in the future the “ checks and balances” and clarity typically provided by a written constitution might prove useful.

3. A Civil Law System: France

The French legal system is a good example of a civil law system operating under a written constitution. The current Constitution of France, which is known as the Constitution of the Fifth Republic, was adopted in 1958. ^[14] It has been amended on various occasions, most recently in 2003. The French model is particularly interesting as it was used as a template for the foundation treaties of the European Economic Community, which has now evolved to become the European Union, which itself is now seeking to establish its own written constitution. ^[15]

National legal systems characterised as Civilian are those which see their origins in the model of governance adopted in ancient Rome by the Emperor Justinian (sometimes known as Roman law systems). Civil law systems are systematic (based on an organised code of conceived principle) and inductive (where a specific ruling is induced from a general first-principle) as opposed to Common law systems which are empirical (based on a bank of actual cases) and deductive (where a general principle is deduced from a specific instance or series of instances).

As to which system is to be preferred, both give rise to a variety of advantages and disadvantages and both have the potential to provide a state with a fair and effective system of government. Codified or written systems are always of the Civil school, given that a code of law is a prerequisite of that legal tradition, and consequently common law or case law systems are far better suited to an uncodified or unwritten constitutional arrangement.

In very general terms the advantages of written systems of law such as the French system are those of certainty, consistency, clarity and stability, while its main disadvantage is rigidity. Unwritten case law systems benefit from being more fluid and adaptable and assuming this flexibility is not abused an uncodified model can be extremely successful. The main disadvantages of case law systems are that it is more difficult to predict the law's response to new situations, and that the fundamental guiding principles of the legal system are harder to identify.

The preamble of the French constitution refers to the 1789 *Declaration of the Rights of Man and of the Citizen*. As such it establishes the identity of the French state as a democratic secular republic which derives its sovereignty from the people of France. This gives the French constitution a clear mandate and provides it with a strong foundation, something which is lacking in unwritten, uncodified systems such as the English. This may be construed as an advantage, given law is an amorphous concept which can benefit from grounding in any context, but unless the authority of law is subject to challenge the advantage is theoretical only and the people of

England appear satisfied to adhere to the law without such conceptual underpinning..

A written constitution such as the French offers a “ one-stop shop” for provisions relating to the election of the President of France and the French Parliament.. It also sets down mechanisms for the appointment and selection of the Government of France, and specifically details the powers of each of these bodies and the relations between them. The French constitution also guaranteed the autonomy and authority of the judiciary and establishes the Constitutional Council, the High Court of Justice, and an Economic and Social Council. This is a clearly useful, and probably stands as an advantage over the English system, where such matters are dealt with in piecemeal fashion and without the simplicity and some might say methodological strength of an written system. When dispute arises in the French system there is therefore one and one only sovereign authority to turn to for guidance and this may prove beneficial in its resolution. In rebuttal, those defending the unwritten English system can point to many states which operate under a written constitution which suffer considerably more administrative difficulties and enjoy significantly less stability than it does. The maxim “ if it isn’t broke, don’t fix it” appears to suit the English experience and explains the reluctance or at least ambivalence of English government and people in this context.

The French constitution also provides for a politically strong President and this could be seen as another advantage, although again it is hard to argue that the British Prime Minister is prejudiced by the fact that his role is not similarly enshrined.. The French constitution also permits the ratification of

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international treaties such as those necessary for membership of the United Nations and European Union.. However, this is not necessarily an advantage. It is submitted that in modern times the trend has been towards greater and deeper international association. It could be argued that national written constitutions have the potential to frustrate international integration given that the international association may also wish to establish a sovereign constitution and that there will inevitably be conflict between the two sets of laws.

There are tensions, for example, between the French constitution and the constitution which has been proposed for the European Union, and even with existing provisions of EU law. It can thus be contended that the English unwritten system is more adaptable to assimilation with an international body incorporating its own constitutional framework. Moreover written constitutions can be bypassed – something done by French President Charles de Gaulle in highly controversial circumstances in 1962, ^[16] and this can leave a new law in a state of limbo.

4. Concluding Comments

In summary, it is submitted that perhaps the most obvious advantage of a codified or written constitution is that it provides coherent, comprehensive and certain body of rules.. Being contained in a single document a codified constitution is accessible to all and can, if well crafted, establish an equitable and effective system of governance and rights. Written constitutions also promote consistency and concrete points of reference for law which can be applied to shape a legal system's response to changing conditions within a

state. That said however, written constitutions which become *entrenched* may suffer from rigidity and it is flexibility that perhaps stands as the greatest advantage of the unwritten, uncodified system operated in the United Kingdom. It is true that constitutional courts may offer a wide range of interpretations of constitutional principles under a written system, but it is not possible to lend a codified system that flexibility and adaptability enjoyed by an unwritten one.

The title to this work asserts that “ constitutions should be written”. It has been shown that this is not necessarily the case, given that states can function successfully and for long periods of time without the foundations of a codified or written constitutional framework. A good example is that of the United Kingdom itself, which is one of the most stable and successful democracies in the world, and which has grown to become such without being underpinned by a written constitutional document. While it has been suggested that the United Kingdom adopts a written constitution there appears to be no urgent pressure or compelling need to make the change. Therefore, while it is acknowledged that most states around the world have adopted a codified constitution this commentator contends that the statement under review should be subject to the caveat that states do not require to make reference to such a system of law as a prerequisite to effective government or a robust and equitable society. The fact that a constitution is unwritten does not necessarily undermine the integrity of a national legal system, as the relative success of the United Kingdom and such countries as New Zealand and Israel testifies.

There are, has been noted, risks attached to an unwritten system which puts its faith exclusively in the democratic process. However, in closing it is worth noting that there are also risks attached to written systems bound to overarching constitutions, because those constitutions can be abused or manipulated in a way that can deliver excessive power and authority. A constitution is, after all, only as good as the words that comprise it. Ironically, the elliptical doctrinal patchwork of an unwritten system can frustrate the intentions of nascent dictatorial ambition. In conclusion it is undeniably true that the great majority of states have chosen the certainty and clarity of a written system, but that is by no means the only way to run a country well.

THE ENDWORD COUNT : 2808 (excluding footnotes)

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Footnotes

[1] For an insightful overview see: A. Bradley and K. Ewing, *Constitutional and Administrative Law*, 13th ed., (2003) Longman, chapter 1.

[2] See: http://en.wikipedia.org/wiki/Constitution_of_the_United_States.

[3] See: http://en.wikipedia.org/wiki/Constitution_of_Australia.

[4] In the Constitution of Australia, most fundamental political principles and regulations regarding the relationship between branches of government, and regarding the government and the individual are codified in a single document, the Constitution of the Commonwealth of Australia. However, the existence of statutes with constitutional significance, namely the Statute of Westminster, as adopted by the Commonwealth in the Statute of Westminster Adoption Act 1942, and the Australia Act 1986 means that Australia's constitution is not incorporated in a single constitutional document.

[5] See: http://news.bbc.co.uk/1/hi/uk_politics/talking_politics/88136.stm.

[6] See P. Spink and N. Busby *et al*, *Scots Law*, (2003) LexisNexis, chapter 1.

[7] See: <http://www.bl.uk/treasures/magnacarta/translation.html>

[8] See: http://en.wikipedia.org/wiki/English_Bill_of_Rights.

[9] See: http://en.wikipedia.org/wiki/Act_of_Settlement.

[10] See: http://en.wikipedia.org/wiki/Parliament_Acts.

[11] Although the participation of the Crown is essentially ceremonial and formal only.

[12] See: <http://www.archives.gov/national-archives-experience/charters/constitution.html>.

[13] Albert Dicey, *Introduction to the Study of the Law of the Constitution* (1885): http://www.constitution.org/cmt/avd/law_con.htm.

[14] Which replaced that of the Fourth Republic dating from October 27, 1946.

[15] Ironically this plan has been frustrated by a negative referendum vote in France itself.

[16] See: http://en.wikipedia.org/wiki/Constitution_of_France.