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Expert comment: A written constitution for the UK would not have resolved recent Brexit arguments – here's why

Adam Ramshaw, Senior Lecturer in Law at Northumbria University, Newcastle, discusses why a written constitution for the UK would not have resolved recent Brexit arguments.

Recent accusations that the government has been sidestepping parliamentary scrutiny have led to renewed calls for the UK to have a written consolidatedconstitution.

It is said the UK has an unwritten constitution, although it's perhaps more accurate to say that it has an uncodified constitution. There may not be one document, as operates in the US, but there are many written sources of the UK constitution. These include Acts of Parliament and court judgments, which have constitutional significance.

There are also unwritten sources such as conventions and customs. Key among these is the unwritten principle that parliament is sovereign – although it seems this may now become a written principle. Parliament is able to make and unmake any law it wishes.

As a result of parliament's sovereignty it is also the responsibility of parliament to hold the government to account. This necessarily places parliament in opposition to the government. Usually, when the government has a strong majority in the House of Commons, this isn't a problem. It can rely on the support of its MPs to carry legislation through. However, when there is a minority government, a hung parliament, or a contentious issue at play, then the Commons is able to be more assertive.

Those in favour of a written constitution usually argue that it would clarify the role of institutions such as parliament, the courts and the monarch, as well as how far their powers extend. It might help us clarify what the monarch's powers are or when a government can and can't prorogue parliament, for example.

Some also think it would also offer the opportunity to re-imagine and modernise the British state after 400 years of piecemeal revision of the uncodified constitution. This might include introducing a new electoral system, such as using proportional representation, or federalising the nations of the UK.

But modernisation can be achieved without a wholesale reboot. Likewise, a written constitution does not necessarily amount to a modern constitution. It is open to parliament at present to modernise any aspect of the constitution which is able to secure a majority in the commons. Parliament introduced the Human Rights Act in 1998 and created the Scottish parliament, both of which modernise the UK constitution to some degree. Elsewhere, the provisions of written constitutions are not modern simply by virtue of being a written text. For instance, the use of the electoral college enshrined by the US constitution is criticised for being out of step with modern needs.

There is a sense from those proposing a written constitution that a consolidated document would somehow be a silver bullet for constitutional conundrums and guard against an overzealous executive. But that's far from certain.

Brexit in court

Take the Supreme Court's 2017 ruling that the government could not trigger Article 50 to begin the Brexit process without first seeking parliament's consent. The government argued it could go ahead because, acting on behalf of the crown, it has the right to renege on a treaty without parliament's consent. Campaigner Gina Miller disagreed, arguing that an act of parliament was required in this case. Leaving the EU might be an act of breaking a treaty, she proposed, but doing so would eventually lead to a change in domestic law. And parliament has the authority in that.

The friction stems from two points of domestic law – the right of the government to leave a treaty and parliament's authority over domestic matters. Let's say that these two principles were incorporated into a written

constitution. The tension between them in this case would still have to be reconciled in the courts. In such a case, the advantage of a written constitution is unclear.

Miller was back in court in 2019 to argue that the government acted illegally when it tried to prorogue parliament for five weeks in the run up to the Brexit deadline. The government argued that it was not up to the courts to decide the circumstances under which it can and cannot prorogue parliament. Miller argued that it was and that because the prorogation was intended to frustrate parliamentary oversight, it was unlawful.

Again, if we imagine that the principles in this Supreme Court judgment were recorded in a written constitution, the only apparent advantage is that we might get an instant answer to the question of whether this was a case for the courts or not. But even with clarity on this point, the bigger question of whether this particular prorogation was lawful is still unanswered.

A written constitution could include some conditions on when the power to prorogue could be exercised. For example, it might only allow for prorogation when a two thirds majority of the House of Commons consented. This seems a sensible proposal on its face but it quickly runs into problems. If the government commands a strong majority in the commons, then this safeguard against abuse is not particularly robust. And, when the government is in a minority, and seeks to exercise the power for sensible reasons in good faith, then it could struggle to get the votes it needs.

It isn't clear how, if the current constitution were written, this would, in itself, have helped the courts reach a decision in either of these Brexit-related cases. Rather than seeing suggestions for a written constitution as a call to consolidate the existing constitutional arrangements, they should instead be understood as calls for the constitution to be drastically changed to reflect the priorities of the people calling for the change.

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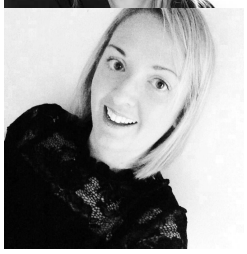

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