A VERY BRITISH CONSTITUTION

While the country celebrates 800 years since the signing of the Magna Carta, we face a growing climate of constitutional uncertainty. **Matthew Gass**, a solicitor with experience working in Parliament and the US Congress, examines the legal and political battles being fought and how they might be resolved.

What would a perfectly designed constitution look like? Does such a thing exist? There is an almost infinite range of results which can be produced when designing such a system from scratch. It seems unlikely, however, that anyone would design an uncodified constitution with an unelected upper house and head of state, and featuring a highly centralised government operating with little in the way of formal checks and balances.

Many people today are pushing for extensive constitutional reform. They see the British constitution as an antiquated and out of date institution that must be updated for the 21st century if the country is to have smart government. This would be a mistake. Such an overhaul would guarantee a political and legislative quagmire in the short term, as competing proposals are fought over. Furthermore the lack of a clear, consensus-driven alternative means that there would little prospect of an improved system at the end of it.

Instead we should recognise the constitution we have for what it is – something that no one would design, but which works both despite and because of its flaws. Its strength comes both from the traditions and precedents that have been built up around it, while retaining the flexibility to change and adapt over time. It is under this constitution that Britain has achieved smart government in its past and will continue to do so in its future.

THE SYSTEM AS IT STANDS

This year's General Election is set to be the most unpredictable in living memory, and 2015 also marks the 800th anniversary of the signing of the Magna Carta, the cornerstone of the British Constitution. However constitutional issues seem unlikely to play a major role. The economy, immigration and the NHS will loom over all while welfare and housing will be far more important in the minds of the electorate. The constitution is frequently an after-thought to voters with more pressing matters in their day to day lives.

This is not entirely a bad thing. When politicians do talk about the constitution, it is often in the context of a new idea intended somehow to fix what they see as broken. It is comparatively rare to see MPs defend Britain's constitutional principles, and the long history of freedom, justice and the rule of law.

You may think that this is a very old fashioned stance to promote in a forward-thinking publication. However, the constitution of any country provides the blueprint for how it is governed. A functioning constitution is essential for providing the conditions in which we can have smart government. This would not be provided by a radical constitutional overhaul. Recent history has shown this would only create the kind of confusion and uncertainty that would make smart government impossible.

It is certain that centuries of inconsistent evolution that define how the British constitution works have created flaws which can undermine good governance. An obvious example has been the overlap in powers between the regional and Westminster Parliaments, which has led to fierce debates about the 'West Lothian Question' and 'English Votes for English Laws'. These flaws would be best dealt with by the kinds of modest proposals that have allowed us to function for so long without a single written document. The more comprehensive proposals, while

offering neater solutions, risk landing us with an untested governing structure that may make sense in the minds of its designers, but would end as a messy compromise that would prove unworkable in the real world.

THE LAW AND UNINTENDED CONSEQUENCES

With the Magna Carta, the foundation of in Britain's constitutional architecture, turning 800, it would be too much to claim that the constitution is facing the greatest challenges in its history, although the past few years have seen a frenetic pace of constitutional change, much of which has proved to be ill-judged.

The New Labour government championed a programme of constitutional reform following 1997. This included a raft of legislation such as the Freedom of Information Act and the Human Rights Act. Other changes were structural, such as House of Lords reform and the establishment of the Supreme Court. Devolution was accelerated through referenda on regional assemblies in Scotland, Wales and Northern Ireland. Further changes took place, albeit unwritten and informal. The changing role of the Office of the Prime Minister and the Cabinet, increased use of special advisors and a 'sofa cabinet' style of government imposed lasting changes on the informal framework that makes up much of our constitutional settlement.

Despite flirting with ideas such as an elected House of Lords and even a full written constitution, further attempts at constitutional reform stalled during Gordon Brown's premiership. Following 2010 however, they have rarely been off the agenda. This has been in large part due to the untested waters of coalition and the influence in government of the Liberal Democrats, for whom constitutional reform is an enduring

mission, and the election of the Scottish National Party in 2011 paving the way for a Scottish referendum on independence.

Most of the changes that have been pushed through were promoted under the guise of transferring power to the people. Whether this has been the actual result is open to serious doubt. However, when offered the chance to enact constitutional reform at the ballot box, with the exception of setting up new national legislatures, people have repeatedly opted against.

A possible reason for this is that while faith in politicians and the way politics is conducted is low, the electorate understands that their dissatisfaction is with the individuals in charge and the political class they feel they represent, not with the system itself. Allowing these same people to radically redesign the system they operate in is unlikely to make things better.

The reaction to this has too often been to seek out a quick fix solution, instead of re-examining their own behaviour. Whoever forms the next government should, instead of constantly seeking far-reaching overhaul, recognise that change through necessity, not whim, is what would make the constitution strong. We do not have a single lone document; we have over 800 years' worth of statute, precedent and convention which have protected liberty and democracy in this country for centuries.

Many constitutional challenges still face us today: civil liberties, the fallout from the Scottish No vote, the relationship between the courts and Parliament and the changing role of the EU to name just a few. These problems won't be solved by today's politicians attempting to dictate their own priorities to future generations. At best they will provide temporary fixes. More likely they will sow the seeds of future problems.

THE CASE FOR AN UNWRITTEN CONSTITUTION

Attempts to define what the constitution is, and what it consists of, are always difficult. Much of it is already written down, but it is impossible to definitively list all the legislation that comprises it. The most commonly recognised starting point is Magna Carta but it includes acts as recent as the Fixed Term Parliaments Act 2011 and the Succession to the Crown Act 2013. There is also much in it that is not written down – conventions and traditions which form over time. An example would be the Salisbury Convention which states that the Lords should not prevent the passage of a bill that was in the governing Party's manifesto. This convention has secured the primacy of the commons without limiting the valuable role the Lords play in reviewing legislation.

Core to this is the concept of a parliamentary sovereignty which holds that the legislature is supreme over the executive and the judicial branches of government. In the UK, unlike the US for example, Acts of Parliament cannot be struck down by the Supreme Court and the executive cannot make primary legislation. Crucially it means that no Parliament can bind its successors.

A written constitution could perhaps more accurately be described as a codified or entrenched constitution. It could do this by effectively dissolving Parliament, and limiting the power of amendment of whatever body succeeded it. It could seek to further limit the decisions of future parliaments by granting full power to the judiciary to review decisions which it felt conflicted with the new constitution.

The doctrine of parliamentary sovereignty has been eroded in recent years, but remains far from redundant. The Human Rights Act 1998, which requires the courts to interpret legislation in line with the

European Convention on Human Rights (ECHR) has often led judges to engage in some creative mental gymnastics in order to interpret laws in line with the ECHR. However they explicitly cannot create new law in order to bring the UK into compliance. That responsibility remains with Parliament.

Furthermore there is nothing to prevent a future Parliament repealing the HRA or any other act. It would be legally and politically messy to say the least, but at the end of the day Parliament giveth and Parliament can still taketh away.

There is nothing wrong with introducing future acts to alter our constitutional settlement. These will be necessary to alter the settlement between the four territories of the UK in the aftermath of the Scottish referendum, and to deal with the other pressing constitutional issues. However we should not neglect other tools for solving these problems where they would do a better job. This would mean allowing new doctrines, traditions and conventions to develop. I will set out later why this represents the best chance to resolves the issue of English Votes for English Laws.

A written, codified, entrenched constitution on the other hand would seek to give away what cannot then be taken back. This would irreparably damage the ability of Parliament to represent the people of the United Kingdom and leave us a poorer democracy for it.

This is why the idea of a full constitutional convention has so much destructive potential. It can safely be said that no one would invent the British Constitution as it currently stands. However this is exactly what is currently being proposed by Labour, who are calling for a full constitutional convention should they win in May. Anyone who finds it difficult to imagine Ed Miliband as a credible future PM should consider the prospect of him as the framer of the British constitution.

There is little reason to think that the current political climate would create a better system. It would be more likely to create crowd-pleasing statements that dilute the fundamental attributes that are necessary for a functioning constitution. However whatever new system were to be put in place would likely prove irreversible and irreparable for at least a generation.

THE 'WEST LOTHIAN QUESTION' AND 'ENGLISH VOTES FOR ENGLISH LAWS'

The most important and divisive constitutional issue in the short term is how the relationship between the different nations of the United Kingdom will change in the wake of the Scottish referendum. Following the vote there has been renewed debate on the various possible solutions to the West Lothian Question. This heightened relevance was inevitable given the various pledges on greater devolution for Scotland that were made in the run-up to the vote and are now in the process of being enacted.

The problem created by the devolution of powers previously exercised by Westminster is that the MPs for these regions are able to vote on matters, such as health and education for Scotland, which do not directly affect the constituencies that they represent. This creates a fundamental democratic deficit.

The proposals to delegate new powers to the Scottish and other regional Parliaments would make this issue even more acute, expanding it further into tax and spending matters. There is no simple solution, and no clear consensus on how to deal with this problem. What is clear from recent history is that any reforms enacted would have far-reaching consequences, and considering the results from the

various reforms we have seen enacted over the past few decades it seems safe to assume that many of these will be unforeseen.

A number of potential solutions have now been set out by the Conservatives and Liberal Democrats. Labour has chosen not to set-out specific proposals, instead stating that this would be dealt with through the above mentioned constitutional convention. The Conservative proposals include barring Scottish MPs from any role in English and Welsh bills, allowing English MPs a greater say over the early readings of bills, including tabling amendments, before allowing all MPs to vote on the final stages or giving English MPs a veto over certain legislation at committee stage.

The Lib Dems have proposed establishing a Grand Committee of English MPs, with the right to veto legislation applying only to England. However it is also proposed that this committee would be comprised of representatives based on the share of the vote at the general election not the number of MPs that represent England. This is unfortunate because it has turned what could potentially be the best chance for a satisfactory solution to the English Votes issue into an attempt to hardwire proportional representation (PR) into mainstream politics with no mandate to do so. Whatever the merits of PR may be, there is no justification for using fallout from the Scottish referendum as an opportunity to sneak it in through the back door.

The proposals from the Conservatives are more promising but would benefit from a stronger framework within which to operate. The proposals of the McKay Commission, elaborated on by the Society of Conservative Lawyers on the morning of the referendum result, give a roadmap to that solution.

The reason why a Grand Committee would be the most practical solution is that it is one which answers the question at hand while

retaining the flexibility inherent in the UK's unwritten constitution by limiting the amount of constitutional change to that which is absolutely necessary.

The key proposal would be the creation of a Grand Commission of English MPs (EGC) to debate bills which deal with issues only affecting England. Additionally a Grand Committee of English and Welsh MPs would be established for issues which affect the two countries together, such as justice. GCs already exist for Welsh, Scottish and Northern Irish MPs meaning there is constitutional precedent for this settlement. While the size of this new committee, which would physically only be able to sit in the Chamber of the House of Commons, would be a novelty which pales in comparison to the mass overhaul that many other solutions propose.

This body could debate and vote on legislation which only affects England and its passage would be treated as a Legislative Consent Motion (also known as a Sewel motion), a parliamentary device used by the regional parliaments when a matter affecting the region in question requires action by the UK Parliament. The relationship between the EGC and the UK government on bills passed in this way could be set out in a memorandum of understanding, of the sort that exist between the UK government and the devolved regions currently.

This proposed solution has its shortcomings which would primarily occur if the UK government and the majority in the EGC were made up of different parties with incompatible agendas, although similar complications could easily arise out of different parliamentary make ups.

Firstly, the lack of an English executive means the UK government would still have power over the administration of the areas reserved to England, even if it did not have the support of a majority of English

MPs. This would also mean that the EGC only had an effective veto power over any legislation proposed by the government, and would not have the power to propose and enact positive legislation that did not fit with what the government wanted.

Secondly, because this proposal relies on new conventions and informal agreements it would be open to being abused and undermined. For example a government could attempt to justify circumventing the GC by ensuring that all legislation contained aspects affecting the whole of the UK, even if the bulk of the bill pertained only to England. This has been the argument used by the SNP to justify voting on NHS matters, claiming there would still be peripheral consequences to the Scottish health budget.

Neither of these is a problem which I believe could not also be solved through compromise and informal conventions, rather than with a more complex legislation-driven reorganisation.

Draft bills on individual issues could be independently suggested by members of the EGC, or groups within it, in the manner of Private Members' Bills in the Commons. It should also be a convention that the Secretaries of State for departments which cover exclusively English issues should be members of the Grand Committee. The ECG should have the ability to call for a vote of no confidence in this individual should their policies go against the wishes of English MPs.

This would be preferable to creating a separate English Parliament with its own executive. As it would act for the 84% of the UK population residing in England this would amount to an expensive and unnecessary layer of bureaucracy.

Furthermore, an English Parliament would only solve the 'West Lothian Question' to an extent, but unless the devolved powers of each

nation were matched up with perfect uniformity, the underlying problem would still remain unsolved. There would still be issues in one nation that could only be addressed by the UK Parliament made up of many members who do not represent it. It is hard to see how this level of uniformity could be achieved, given the level of powers currently being offered to Scotland, without achieving a de facto break-up of the union once tax and spending powers were effectively lost. The Westminster Parliament could be reduced to the level of a glorified Foreign Affairs and Defence committee.

Instead, a cabinet level position of 'Secretary of State for England' should be created to go along with the Secretaries of State for Scotland, Wales and Northern Ireland to manage the relationship between the UK government and the EGC and carry out executive functions as necessary.

As far as the potential for abuse and undermining goes, I have not yet seen a proposal which is not open to abuse in some way and I find it hard to believe one will be suggested that does. This is a problem which does not have a perfect solution. This problem is about how to share power, and sharing takes responsibility, maturity and good faith. This is where the flexibility of the constitution would be an advantage, allowing the new system to evolve and adapt organically over time.

An English Parliament and other suggestions such as multiple regional assemblies throughout England, devolution to existing local authorities or some form of PR have their merits. Each, however, fails to answer the underlying problem of the 'West Lothian Question', while creating new problems that would be impossible to solve painlessly once a new formalised legislative framework was in place.

The advantage of a solution based around an EGC is that it retains the flexibility which is the inherent strength of the UK constitution.

Problems will inevitably arise, but these should be dealt with when they have been properly identified and understood. Imposing an overarching but untested solution backed by legislation, when the underlying problem can be addressed within the existing framework, only guarantees future clashes which will only be harder to solve.

THE FUTURE OF DIRECT DEMOCRACY

Given what has been said above about ramifications of the Scottish referendum it seems worthwhile taking a look at the role of referenda and direct democracy in British politics. This is especially true in the context of the votes in this most recent parliament on AV and a potential future vote on EU membership.

Historically the role has been a limited one. In his 'Speech to the Electors of Bristol' Edmund Burke once said "A representative owes the People not only his industry, but his judgment, and he betrays them if he sacrifices it to their opinion." By and large this has been the convention and a referendum is used as a last resort, only on issues of fundamental constitutional change.

The AV referendum was the first UK wide referendum since the 1975 ballot on membership of the European Union. That referendum certainly fit this description and a further referendum would too, given the major constitutional changes which have taken place under the various treaties since then.

Recent votes on devolution to the nations and regions of the UK fit the bill too. It is more questionable whether AV qualified as a fundamental constitutional issue. The question itself was catapulted to the forefront by the Liberal Democrats as part of the Coalition Agreement.

In a climate of mistrust in politics, a referendum can offer a refreshing alterative that has the potential to make policy more reflective of what the public really wants. However this often becomes part of a cynical attempt to relieve politicians of their decision making responsibilities and prevent them from making unpopular but necessary decisions. If overused, this approach only creates a negative feedback loop which deepens mistrust of politicians.

Referenda on wide ranging issues have become a common part of American politics through 'ballot initiatives'. There have been positive cases in their history, where they have allowed the voting public to overrule a state legislature which has failed to act on an issue either through apathy or the influence of powerful interests, as was their initial purpose. However it has been more common in recent years to see the measures used either naively or cynically.

No doubt these issues are often mishandled by representatives too, but the expansion of rule by referendum goes too far in reducing complex and interlinked policies into simple 'yes or no' questions. This approach does not reflect the realities of governing and the unintended consequences can be devastating. For example ballot initiatives on controversial 'wedge issues' such as gay marriage and drug legalisation have been exploited to fire up base voters to influence the outcome of other races. With no guarantee that they would not be used in a similar way, we should be wary of adopting them in this country.

That is not to say there are not clear flaws in the current model that need to be addressed. Historically, a party went to the electorate to enact a specific set of policies laid out in a manifesto, and often resigned to force a new general election when it felt it needed a mandate to change course. This model has not been seen for some time and is unlikely to change in a fast changing world where coalitions and fixed term parliaments have the potential to become the norm.

In the increasingly convoluted business of legislating and governing people are feeling ever more isolated from the decisions being made about their lives and the people making those decisions. Direct democracy can give them a route through the system that voting for a representative does not provide. The huge turnout for the Scottish referendum shows people will get involved when they feel a decision is of real consequence and they have a say in its outcome. The question is how this spirit can be tapped without undermining the benefits of a representative democracy.

The best steps to resolving this problem, though, do not come from a constitutional overhaul but by making better use of the tools already at our disposal. Much of the responsibility lies within parties themselves. Giving more powers to constituents to pick their own representatives through US-style open primaries and enabling challenges to sitting MPs would go a long way to ensuring that Members are more responsive to the views of their electorate. This should be strengthened by further allowing constituents to recall their MP, not just if they are found guilty of "serious wrongdoing" (sentenced to more than 12 months in jail, or banned from the Commons for more than 21 days) as would be the case under watered down government plans. Having the courage to give party members a real say in policy platforms would encourage flagging membership. Once a party is in government more attention should be paid to ensuring the public is properly consulted and kept informed of the proposals affecting them, starting with an expansion of the Coalition's e-Petitions.

It is common today to say that politics has become broken. There is no agreement on how or when this occurred, but it concedes that there was a time when it wasn't. At that time, we were still living under this constitution, with its unique ability to change and adapt to new circumstances. Just because politics may be broken, it doesn't mean the constitution is and the conventions that are part of it are. Trying to opportunistically 'fix' what they

think is wrong in the name of restoring faith in politics will only drive a further wedge between Westminster and the public.

Burke concluded his address by saying "Your faithful friend, your devoted servant I shall be to the end of my life: a flatterer you do not wish for." In a world of growing connectivity, through easier travel, the internet and social media, we can expect our representatives to be closer and more attentive friends than ever before. If they don't live up to this we can and should demand better. Trying to take them out of the equation altogether though would present a fundamental risk to the British model of democracy which has defended liberty and the rule of law for centuries. As we continue to explore this path we must ensure we don't end up undermining the very thing we are seeking to protect.

THE ROLE OF THE CONSTITUTION

Given how the governance of the country has changed in recent years it is easy to see why some argue that its constitutional framework needs to be updated as well. It is worth considering, though, why the countries that execute fundamental constitutional change do so. Historically it has tended to be following a seismic-level event that entirely changes the context within which that country functions. Examples historically generally include a country achieving independence or concluding a bitter war.

Whatever your answer to my initial questions might be, the result would not be a real working constitution. It could not answer the questions raised by a nation which has just achieved independence with no home grown governing institutions; one with no defined tradition and experience of democracy, populated by warring factions with a history of atrocities against each other sharing territory.

Nation states are not created in a vacuum, and neither are the constitutions that govern them. Britain has a centuries-old tradition of democracy and the rule of law. It did not always have these though and the real significance of

the 800th anniversary of Magna Carta is that is the the 800th anniversary of a tradition of holding authority to account. There are times when it has been far from perfect, but this legacy has served us well in the past and will serve us better into the future as it continues to change and adapt, in the way only an unwritten constitution can.