

Good Chaps No More?

Safeguarding the Constitution in Stressful Times

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Executive Summary

- A key characteristic of the British constitution is the degree to which the good governance of the United Kingdom (UK) has relied on the self-restraint of those who carry it out.
- Unlike nearly every other democracy in the world, we lack a ‘written’ or ‘codified’ constitution. The UK has, therefore, no single text setting out the core principles, institutions and procedures of the system, protected from casual alteration by amendment procedures, and enforceable by the judiciary.
- Instead, in the UK, we have trusted politicians to behave themselves. We have long assumed that those who rise to high office will be ‘good chaps’, knowing what the unwritten rules are and wanting to adhere to them.
- Recent events suggest it is worth considering the implications of a decline in the viability of the ‘good chap’ system in this country.
- The period since the European Union (EU) referendum of June 2016 has seen a series of disputes about whether constitutional abuses have taken place. They have touched upon many of the main governmental organs: the Cabinet, the Civil Service, Parliament, the judiciary, the devolved institutions, and even the monarchy.
- Whatever view one takes of each particular recent incident, collectively they serve to demonstrate potential weaknesses in the traditional model of constitutional regulation. If general standards of good behaviour among senior UK politicians can no longer be taken for granted, then neither can the sustenance of key constitutional principles.
- It may be that changed circumstances in the current political ecology, in particular the Brexit turbulence, have made it difficult for those who wish to behave properly to ascertain correct courses of action. Perhaps, more widely, the current political environment has tended to elevate ‘chaps’ who are less inclined to be ‘good’. It could, moreover, be that the ‘good chap’ system was always flawed, that it was neither desirable nor as effective as was imagined, and any success that it appeared to attain owes much to a measure of fortune, that has now expired, exposing its fragility.
- Prompted by these diverse and disturbing possibilities, the present paper performs three tasks. First, it considers what are the main rules of the political system, against which it is possible to judge the conduct of those who occupy positions of authority, and how well defined those rules are. Second, it evaluates the mechanisms by which they are protected against abuse. We approach both these tasks through considering in turn each of the three central branches of the UK constitution – the executive (including the Cabinet and the Civil Service), the legislature, and the judiciary. Third and finally, we propose means by which the core aspects of the UK system might be better defined and shielded in future, thereby reducing dependence on the presence of ‘good chaps’ in positions of authority.
- We do not claim that the UK constitution is on the brink of unravelling. A more likely

pessimistic scenario is a gradual fraying by stages. This outcome is particularly anxiety-inducing, since it would be hard to recognise and could be more readily accepted as normal. Even if, over coming months and years, the present difficulties appear to subside, it would be a mistake to assume that there was no threat. We should remember this experience, regardless of whether on this occasion it encounters even more serious problems.

- It may prove difficult to induce adherence to higher standards of conduct among those who do not wish to meet them or do not fully appreciate their importance. But it should be possible to formulate more fully and to promote the values and rules that underpin the system. We can also seek ways of strengthening the position of those – including within the Civil Service, Parliament and the judiciary – who have a role in upholding those norms.
- We offer a menu of proposals, ranging from the more established to the more experimental, by which the country might approach this task after the coming General Election. They are:
 - A Royal Commission;
 - A parliamentary inquiry;
 - A Speaker’s Conference or Commission; and
 - A Citizens’ Convention comprising a representative sample of members of the public chosen at random.
- We have great faith in the deep wells of civility, tolerance and good sense that still irrigate British public and political life most of the time. But the system by its normal standards has experienced a genuine shock, not confined to but exemplified by the great prorogation stand-off. It needs urgent attention. We need a

new equipoise between the moving parts of the British constitution on which the working of the system of government depends. It may be a source of regret for some, but certain elements of the venerable perhaps romantic ‘good chap’ state of mind need now to be codified in cold hard prose.

Introduction

Her Majesty the Queen showed considerable powers of prophecy with her parting words on leaving a constitutional seminar at Queen Mary and Westfield College, University of London, in the autumn of 1992. ‘The British constitution has always been puzzling and always will be’, she said.¹ Given that the constitution lives and breathes in her name, her words had real force a generation ago. They have an even greater bite today. The stresses and strains of three-and-a-half years of post-referendum Brexitry have left significant parts of the British constitution molten. The constitution has always been mercurial and more than a touch mysterious – a mixture of robust statutes, rather more fragile conventions, difficult to understand royal prerogatives, and some even more evanescent ‘tacit understandings’² about the conduct of those whose responsibility it is to ‘work’ the British constitution (to use a verb applied by Mr Gladstone³).

Of all the instruments of state an incoming government inherits, the constitution has special properties. It is a creation of history, the work of many hands and minds that reflects a myriad of experiences. A government-of-the-day is its custodian but not its sole owner. The constitution is a shared possession of the nation as a whole which imposes a special duty of care on Prime Ministers, Cabinets, and Parliament too. Changes

to it need to be very carefully crafted and to carry wide consent. Amidst the cacophony of a general election campaign it is usually very difficult for constitutional questions to get a hearing. But given their centrality to the kaleidoscopic nature of the current political debate, they deserve their own place within the often baffling threnody.

The nature of its constitution tells you a great deal about a country, its society and the way ruling power is calibrated and constrained within it. A key characteristic of the British constitution is the degree to which the good governance of the United Kingdom (UK) has relied on the self-restraint of those who carry it out. Unlike nearly every other democracy in the world, we lack a ‘written’ or ‘codified’ constitution. The UK has, therefore, no single text setting out the core principles, institutions and procedures of the system, protected from casual alteration by amendment procedures, and enforceable by the judiciary.⁴ Instead, in the UK, we have trusted politicians to behave themselves. We have long assumed that those who rise to high office will be ‘good chaps’, knowing what the unwritten rules are and wanting to adhere to them, even if doing so might frustrate the attainment of their policy objectives, party political goals, or personal ambitions – the argument being that ‘good chaps’ (of different sexes) know where the undrawn lines

1 Quoted in Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution* (Gollancz, London, 1995), p.33.

2 Sidney Low, *The Governance of England* (Fisher Unwin, London, 1904), p.12.

3 W. E. Gladstone, *Gleanings of Past Years*, volume 1 (John Murray, London, 1879), p.243.

4 Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government* (Cabinet Office, London, 2011), p.2.

lie and come nowhere near to crossing them: hence 'the good chap theory of government.'⁵ The 'good chap' principle emerged over a long period of time. Its existence was assumed rather than expressly defined. As Gladstone put it in 1879, the British constitution 'presumes more boldly than any other the good sense and good faith of those who work it.'⁶

What we might regard as the closest equivalent to a formal codification of what is expected of a 'good chap' came relatively recently in the form of the *Seven Principles of Public Life*. First issued by the Committee on Standards in Public Life in 1995, they are known as the 'Nolan Principles', after the inaugural chair of the committee, Lord (Michael) Nolan (who served in this post from 1994 to 1997).⁷ These standards supposedly apply to all exercisers of public functions, though they have no legal force. The principles, with official explanatory texts, are:

1. Selflessness

Holders of public office should act solely in terms of the public interest.

2. Integrity

Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or

their friends. They must declare and resolve any interests and relationships.

3. Objectivity

Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.

4. Accountability

Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.

5. Openness

Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.

6. Honesty

Holders of public office should be truthful.

7. Leadership

Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.'

We leave readers to judge how well those serving at

5 Clive Priestley, formerly a senior member of the Prime Minister's Efficiency Unit, referred to the 'good chaps [sic] theory of government' at an Adam Smith Institute conference at St. George's Windsor in 1985, speaking to a group of officials from the Ronald Reagan administration. See: Clive Priestley, 'Promoting the efficiency of central government', in Arthur Shenfield et al., *Managing the Bureaucracy* (Adam Smith Institute, London, 1986), p.117; Peter Hennessy, "'Harvesting the Cupboards': Why Britain has Produced no Administrative Theory or Ideology in the Twentieth Century", *Transactions of the Royal Historical Society* 4 (1994), pp.203-219, p.205. For recent analysis of the concept and its perceived decline, see eg: 'Goodbye, good chap: Britain's good-chap model of government is coming apart', *The Economist*, 18 December 2018.

6 Gladstone, *Gleanings of Past Years*, volume 1, p.243.

7 For a recent assessment of how ethical regulators promote these principles in practice, see: Committee on Standards in Public Life, *Striking the Balance: Upholding the Seven Principles of Public Life in Regulation*, Sixteenth Report, CM 9327 (Stationery Office, London, 2016).

high level have adhered to these principles in the current political cycle. Perhaps the need to write them down was itself the symptom of a long-term decline in the effectiveness of self-regulation.⁸ Recent events suggest it is worth considering the implications of a decline in the viability of the 'good chap' system in this country.⁹ Certainly, there has been much speculation, both in the UK and international media, that it is in peril.¹⁰ It is worth remembering that the Nolan Principles have been woven into the expectations of governing behaviour for nearly a quarter of a century and have a place in the *Cabinet Manual*¹¹ and *Ministerial Code*¹², with which we will deal shortly.

The period since the European Union (EU) referendum of June 2016 has seen a series of disputes about whether constitutional abuses have taken place. They have touched upon many of the main governmental organs: the Cabinet, the Civil Service, Parliament, the judiciary, the devolved institutions, and even the monarchy.¹³ From being a by-word for tedium the condition of the UK constitution has become a first order question cracking with political electricity. Whatever view one

takes of each particular recent incident, collectively they serve to demonstrate potential weaknesses in the traditional model of constitutional regulation. To provide a perspective on the extent to which previous assumptions have been challenged, it is worth considering an aforementioned document published in 2011, *The Cabinet Manual*. Subtitled *A guide to the laws, conventions and rules on the operation of government*, it provides an account, from the perspective of the executive, of the working of the political system.¹⁴ Like the *Seven Principles of Public Life*, it has no direct legal force. But it provides the fullest account, in an official text, of the overall configuration of the UK constitution. Its opening paragraph states:

'The UK is a Parliamentary democracy which has a constitutional sovereign as Head of State; a sovereign Parliament, which is supreme to all other government institutions, consisting of the Sovereign, the House of Commons and the House of Lords; an Executive drawn from and accountable to Parliament; and an independent judiciary.'¹⁵

8 For discussion of the possibility that the 'good chap theory' was already under pressure in the late twentieth century, see: Hennessy, *The Hidden Wiring*, p.137.

9 For a recent expression of concern regarding adherence to standards by the present chair of the Committee on Standards in Public Life, see: 'Open letter from Jonathan Evans, Chair of the Committee on Standards in Public Life, to all public office holders', 20 September 2019, available at < <https://www.gov.uk/government/news/open-letter-from-the-committee-on-standards-in-public-life-to-all-public-office-holders> > last accessed 1 October 2019.

10 See eg: 'Goodbye, good chap: Britain's good chap model of government is coming apart', *Economist*, 18 December 2018'; Ruadhán Mac Cormaic, 'Government by "Good Chaps" unlikely to survive much longer', *Irish Times*, 7 September 2019; Sam Knight, 'Boris Johnson's Brexit carnage', *The New Yorker*, 5 September 2019.

11 Cabinet Office, *The Cabinet Manual*, referred to pp.26; 59.

12 Cabinet Office, *Ministerial Code* (Cabinet Office, London, 2019), referred to p.1 and reproduced in Annex A, p.27.

13 For a provisional list of constitutional issues raised by Brexit, see: Andrew Blick, *Stretching the Constitution: the Brexit shock in historic perspective* (Hart/Bloomsbury, Oxford, 2019).

14 For an assessment of the Cabinet Manual by the present authors while it existed in draft form, see: Andrew Blick and Peter Hennessy, *The Hidden Wiring Emerges: the Cabinet Manual and the working of the British constitution* (ippr, London, 2011).

15 Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government* (Cabinet Office, London, 2011), p.2.

The manual makes no mention at this point of the role of referendums¹⁶, or that such exercises in direct democracy might override the fundamental principles set out in this paragraph. It does not suggest that the monarch, Parliament and courts might be required to facilitate the objectives of an executive claiming to be the vehicle for such a supposedly irresistible expression of popular will. Indeed, the word 'referendum' does not occur until page 37 of the manual. It is used a total of six times in the text, once in a footnote relating to suspensions of collective responsibility¹⁷; four times in an account of past referendums held in Scotland and Wales¹⁸; and once in a list of 'Reference Documents', one of which includes the word 'referendum' in its title.¹⁹

None of these applications of the term suggest that referendums could take on an overweening constitutional significance. Yet from the time of the public vote of June 2016 onwards, the UK government – including within it politicians who were ministers at the time the *Cabinet Manual* was issued in 2011 – maintained that a referendum had indeed upended arrangements as presented in its opening paragraph.²⁰ Nor does the *Cabinet Manual*

touch on the difficulty of reconciling plebiscitary democracy with representative democracy with which Parliament has wrestled for nearly three-and-a-half years.

On the basis of this premise, the executive has for more than three years exhibited patterns of behaviour that are troubling and ominous regarding the sustainability of constitutional norms and standards of behaviour in the UK.²¹ For the main triggers of this anxiety, see the section below. It is not only the executive that has been involved in a stretching of the constitutional boundaries. Partly prompted by the insistence of successive premiers on the ultimate authority of the government as implementer of the referendum result, both Parliament and the courts have chosen or felt forced to expand into areas of activity beyond their more regular terrain – the legislature, for instance, seeking to determine the diplomatic policy of the UK²²; and the judiciary making rulings with direct consequences for matters of immense political controversy.²³ These activities may have imposed control on the executive. But they have also added to the general condition of flux.

16 In our consideration of the draft manual, we called for some clarification of the role of referendums in the final text, that was not provided, though we did not anticipate the scale of disruption that has come about following the 2016 European referendum. Blick and Hennessy, p.27.

17 Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government* (Cabinet Office, London, 2011), p.37.

18 Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government* (Cabinet Office, London, 2011), p.64.

19 Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government* (Cabinet Office, London, 2011), p.106.

20 For an early and firm assertion of this proposition, see Theresa May's speech to the Conservative Party conference, 2 October 2016, available at: < <https://www.politicshome.com/news/uk/political-parties/conservative-party/news/79517/read-full-theresa-mays-conservative> > last accessed 1 October 2019.

21 For an outside view from the United States, see: James Grant, 'Boris Johnson, Brexit and Britain's Constitutional Quagmire', *The Atlantic*, 30 August 2019, available at: < <https://www.theatlantic.com/international/archive/2019/08/boris-johnson-brexit-and-britains-constitutional-quagmire/597097/> > last accessed 1 October 2019.

22 See eg: *European Union (Withdrawal) (No.2) Act 2019*.

23 JUDGMENT: R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland), available at: < <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf> >, last accessed 1 October 2019.

Constitutionally problematic conduct: some recent examples

On 2 October 2016, in her first speech to a Conservative Party conference as leader, Theresa May insisted that:

‘it is not up to the House of Commons to invoke Article Fifty, and it is not up to the House of Lords. It is up to the Government to trigger Article Fifty and the Government alone.

When it legislated to establish the referendum, Parliament put the decision to leave or remain inside the EU in the hands of the people. And the people gave their answer with emphatic clarity. So now it is up to the Government not to question, quibble or backslide on what we have been instructed to do, but to get on with the job.

Because those people who argue that Article Fifty can only be triggered after agreement in both Houses of Parliament are not standing up for democracy, they’re trying to subvert it. They’re not trying to get Brexit right, they’re trying to kill it by delaying it. They are insulting the intelligence of the British people. That is why, next week, I can tell you that the Attorney General himself, Jeremy Wright, will act for the Government and resist them in the courts.

Likewise, the negotiations between the United Kingdom and the European Union are the responsibility of the Government and nobody else. I have already said that we will consult and work with the devolved administrations for Scotland, Wales and Northern Ireland, because we want Brexit to work in the interests of the whole country. And we will do the same with business

and municipal leaders across the land.

But the job of negotiating our new relationship is the job of the Government. Because we voted in the referendum as one United Kingdom, we will negotiate as one United Kingdom, and we will leave the European Union as one United Kingdom. There is no opt-out from Brexit. And I will never allow divisive nationalists to undermine the precious Union between the four nations of our United Kingdom.’

These words set the general tone for what would follow, though it steadily deteriorated as time progressed. Such rhetoric presented Parliament, the rule of law, the devolved institutions, and other aspects of the constitution, as subordinate to a supposed popular will, to be interpreted and implemented by the UK executive. Within this constitutional context, a series of problematic tendencies and episodes manifested themselves. They include:

The attempted prorogation of Parliament of late August 2019, deemed illegal by the Supreme Court on 24 September 2019

All eleven members of the court found that: ‘the decision to advise Her Majesty to prorogue Parliament was unlawful because it had the effect of frustrating or preventing the ability of Parliament to carry out its constitutional functions without reasonable justification... This means that the Order in Council to which it led was also unlawful, void and of no effect and should be quashed. This means that when the Royal Commissioners walked into the House of Lords it was as if they walked in with a blank sheet of paper. The prorogation was also void and of no effect. Parliament has not been

prorogued.²⁴ This episode was regrettable both because it represented an improper attempt to circumvent Parliament; and because it drew the monarchy, its powers and functions into party political controversy. There is further worrisome evidence of disregard for the need to protect the neutrality of the head of state. The media, reporting a ‘senior source’, related on 6 October that, even if the Prime Minister lost a confidence vote and there was a clear replacement for him, he would refuse to resign and ‘dare’ the Queen to ‘sack’ him.²⁵ Even though this scenario never came to pass in the autumn of 2019, if ministers or ministerial aides were the source of such speculation, that they were promoting such possibilities was in itself constitutionally undesirable as well as demonstrating their tin ears for the subtle cadences of the ‘good chap’ theory.

Unsatisfactory behaviour of ministers with respect to the rule of law

The then-Lord Chancellor, Liz Truss, was criticised for failing to respond directly late in 2016 to hostile media treatment of the judiciary.²⁶ The legal challenge to the ability of the government to begin the process of leaving the EU by activating Article 50 of the Treaty on European Union had become a

subject of great contention. Most notoriously, the Daily Mail ran a story under the headline ‘Enemies of the People’, referring to the High Court judges who made an initial ruling against the government on 2 November 2016.²⁷ The Lord Chancellor is required (along with other ministers) by Section 3 (1) of the Constitutional Reform Act 2005 to ‘uphold the continued independence of the judiciary’, but the Act does not specify precisely how to do so. On 1 March 2017, when Truss appeared before the House of Lords Select Committee on the Constitution, Lord Brennan put it to her that:

‘a few months ago, in the *Daily Mail*, we had the headline “Enemies of the people” describing our Lord Chief Justice and those sitting with him. For many, that was simply abuse...can we look forward to you and your Ministry robustly defending judges against that kind of abuse in future?’²⁸

Truss responded that:

‘I will always speak out and say how important having an independent judiciary is. I have also said that the individuals involved in both cases—the High Court and the Supreme Court—are people of integrity and impartiality, and that is very important. Where perhaps I might respectfully disagree with some who have asked

24 From the judgement summary available at: < <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-summary.pdf> >, last accessed 13 October 2019. Full judgement available at: < <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf> >, last accessed 13 October 2019.

25 Tim Shipman and Caroline Wheeler, ‘“Sack me if you dare,” Boris Johnson will tell the Queen’, *Sunday Times*, 6 October 2019.

26 See eg: ‘Attacks on judges undermine law – Supreme Court president’, BBC website, 16 February 2017, available at: <https://www.bbc.co.uk/news/uk-38986228> >, last accessed 13 October 2019.

27 James Slack, ‘Enemies of the People: Fury over “out of touch” judges who have “declared war on democracy” by defying 17.4 million Brexit voters and who could trigger constitutional crisis’, *Daily Mail*, 3 November 2016, available at: < <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> >, last accessed 13 October 2019. For analysis of media coverage and reactions to it, see: Claire Phipps, ‘British judges react to judges’ Brexit ruling: “Enemies of the People”’, *Guardian*, 4 November 2016, available at: < <https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling> >, last accessed 13 October 2019.

28 House of Lords Select Committee on the Constitution, Corrected Oral Evidence, Oral Evidence session with the Lord Chancellor and Secretary of State for Justice, 1 March 2017, available at: < <https://www.parliament.uk/documents/lords-committees/constitution/Annual-evidence-2016-17/CC010317lordchancellor.pdf> >, last accessed 13 October 2019.

me to condemn what the press are writing, is that I think it is dangerous for a government Minister to say this is an acceptable headline and this is not. I am a huge believer in the independence of the judiciary; I am also a very strong believer in a free press and the value it has in our society...The best way to respond to criticism and scrutiny is to make the positive case.²⁹

Referring to this reply, when speaking to the Committee on 22 March 2017, Lord Thomas of Cwmgiedd, who as Lord Chief Justice of England and Wales had presided over the case at High Court stage, insisted ‘that the Lord Chancellor is completely and utterly wrong in her view’. Lord Thomas explained:

‘It is not understood either how absolutely essential it is that we are protected, because we have to act, as our oath requires us, without fear or favour, affection or ill will. It is clear in relation to the first part of the Article 50 case that the claimant had been subjected to quite a considerable number of threats, and it is the only time in the whole of my judicial career that I have had to ask the police to give us a measure of advice and protection in relation to the emotions that were being stirred up. It is very wrong that judges should feel it. I have done a number of cases involving al-Qaeda. I dealt with the airline bombers’ plot and some other very serious cases,

and I have never had that problem before.’³⁰

The failure to mount a sufficiently robust defence was a shortcoming over the Article 50 case. When the Supreme Court found the attempted prorogation of Parliament unlawful in September 2019, it was the active response of the government that was the problem. Speaking in New York on 24 September, the Prime Minister, Boris Johnson, while purporting to ‘respect’ the judiciary, stated that he ‘profoundly’ disagreed with the decision the Supreme Court had reached, and described those who had brought the case as seeking to ‘frustrate Brexit’.³¹

A story reached the media that the Leader of the House of Commons, Jacob Rees-Mogg, when taking part in a conference call of Cabinet members, had referred to the judgement as a ‘constitutional coup’; describing it as ‘the most extraordinary overthrowing of the constitution’; and claiming that ‘some elements of the judgment are factually inaccurate’. Other participants in the discussion supposedly also expressed doubts about the findings of the court.³² If the reports were accurate, the source for this story was a minister (or someone acting on their behalf). The act of leaking what are supposedly confidential discussions was another case of the political leadership of the executive undermining the judiciary, and by extension the rule of law itself.

29 House of Lords Select Committee on the Constitution, Corrected Oral Evidence, Oral Evidence session with the Lord Chancellor and Secretary of State for Justice, 1 March 2017, available at: < <https://www.parliament.uk/documents/lords-committees/constitution/Annual-evidence-2016-17/CC010317lordchancellor.pdf> >, last accessed 13 October 2019.

30 House of Lords Select Committee on the Constitution, Corrected Oral Evidence, Oral Evidence session with the Lord Chief Justice, 22 March 2017, pp.6-7, available at: < <https://www.parliament.uk/documents/lords-committees/constitution/Annual-evidence-2016-17/CC220317LCJ.pdf> >, last accessed 13 October 2019.

31 Peter Walker, ‘Boris Johnson indicates he may renew attempt to suspend Parliament’, *Guardian*, 24 September 2019, available at: < <https://www.theguardian.com/politics/2019/sep/24/boris-johnson-may-renew-attempt-to-suspend-parliament> >, last accessed 13 October 2019.

32 Jack Doyle, Arthur Martin and Stephen Doughty, ‘Jacob Rees-Mogg accuses the Supreme Court of a “constitutional coup” over its stunning ruling’, *Daily Mail*, 24 September 2019, available at: < <https://www.dailymail.co.uk/news/article-7500543/Jacob-Rees-Mogg-accuses-Supreme-Court-constitutional-coup-stunning-ruling.html> >, last accessed 13 October 2019.

A calculated lack of due respect towards Parliament, its members, and the legislation it produces

In October 2016 May expressed a desire to minimise parliamentary involvement in the response to the referendum. Reversals in the courts and Parliament, and the changed balance of power in the Commons after the General Election of June 2017, made this effort at executive domination untenable. However, May continued to pursue irregular courses of action, most notably seeking repeated parliamentary votes on what was the same or a very similar proposition.³³ The executive treatment of Parliament deteriorated further under Johnson. The most notable example of this disdain was the failed prorogation. But it took other forms also. When Parliament reconvened on 25 September, for instance, during his update to the Commons, Johnson insisted continuously on describing the *European Union (Withdrawal) (No.2) Act 2019*, passed earlier the month against the wishes of the government, as the ‘surrender Act’, or using other pejorative terms. When MPs pleaded with him to modify his tone, he responded by hardening it, as this exchange shows:

‘Tracy Brabin (Batley and Spen) (Lab/Co-op):

We are hearing from the Prime Minister words such as the “humiliation” Act, the “surrender” Act, and the “capitulation” Act. All of these words suggest that we, because we disagree with him, are traitors, that we are not patriots, but nothing could be further from the truth. Now this may be a strategy to set the people against the establishment, but I would like to gently

suggest that he is the establishment and we are still people. As the woman who has taken over the seat that was left by our dear friend, Jo Cox, may I ask him, in all honesty, as a human being that, going forward, will he please, please moderate his language so that we will all feel secure when we are going about our jobs? [Applause.]

The Prime Minister: The surest fire way— [Interruption.] Well, no. Of course there will be an attempt to try to obfuscate the effect of this Act—the capitulation Act, the surrender Act or whatever you want to call it. It does—[Interruption.] I am sorry, but it greatly enfeebles this Government’s ability to negotiate. What I will say is that the best way to honour the memory of Jo Cox, and indeed to bring this country together, would be, I think, to get Brexit done. I absolutely do. It is the continuing inability of this Parliament to get Brexit done that is causing the anxiety and the ill-feeling that is now rampant in our country. If we get it done, we will solve the problem.’³⁴

A further example of lack of respect for parliamentarians and their integrity came with the simultaneous expulsion of 21 MPs from the Conservative parliamentary party after they voted against the government on 3 September 2019.³⁵

The government has also displayed a reluctance to accept without equivocation the will of the legislature as expressed in an Act of Parliament. Alongside an insistence on using inflammatory terms to describe the *European Union (Withdrawal) (No.2) Act 2019*, the Johnson government created

³³ See: ‘Speaker’s Statement’, Hansard, 18 March 2019, cols 775-776, available at: < <https://hansard.parliament.uk/commons/2019-03-18/debates/AB031E78-C906-4833-9ACF-291998FAC0E1/Speaker'SStatement> >, last accessed 24 October 2019.

³⁴ Hansard Debates, ‘Prime Minister’s Update’, 25 September 2019, Vol. 664, col. 802, available at: < <https://hansard.parliament.uk/Commons/2019-09-25/debates/AD2A07E5-9741-4EBA-997A-97776F80AA38/PrimeMinisterUpdate> >, last accessed 13 October 2019.

³⁵ ‘Brexit showdown: Who were Tory rebels who defied Boris Johnson?’, BBC website, 5 September 2019, available at: < <https://www.bbc.co.uk/news/uk-politics-49563357> >, last accessed 13 October 2019.

the impression that it might seek to evade this legislation in some way.³⁶ The Act created the possibility for the Commons to force the Prime Minister to request from the EU an extension to the existing projected UK departure date of 31 October. The new date the government would ask for would be 31 January. The UK premier would have to agree with the EU if it accepted the request; and if the EU proposed a different length extension, the Commons could force the Prime Minister to consent to that also.

On 7 October, Lord Pentland announced the decision in a case brought to the Scottish Court of Session intended to obtain orders forcing the Prime Minister to comply with his duties under the Act.³⁷ Pentland noted that, on 2 September, while the legislation concerned was still passing through Parliament, Johnson had stated in a press conference that:

‘I want everybody to know – there are no circumstances in which I will ask Brussels to delay. We are leaving on the 31st of October, no ifs or buts. We will not accept any attempt to go back on our promises or scrub that referendum.’³⁸

Then an email sent to Conservative Party members on 3 September included the following assertion:

‘They just passed a law that would force me to beg Brussels for an extension to the Brexit deadline. This is something I will never do.’³⁹

Then on 9 September, in a debate on an early election, Johnson insisted:

‘I will go to Brussels – our Government will go to Brussels – on 17 October and negotiate our departure on 31 October, hopefully with a deal, but without one if necessary. I will not ask for another delay.’⁴⁰

The 2019 Act received Royal Assent on 9 September; but on the following day, a government response to a petition posted on the parliamentary website read:

‘The UK will be leaving the EU on 31 October whatever the circumstances. We must respect the referendum result.’⁴¹

In a BBC interview held on 16 September, Johnson stated that:

‘We’re going to come out on 31 October and it’s vital that people understand that the UK will not extend. We won’t go on remaining in the EU beyond October.’⁴²

Pentland noted further an answer Johnson had given to a parliamentary question that could be construed as foreshadowing possible evasion of the Act.⁴³ But Pentland concluded, on the basis of separate assurances received from the government, that:

‘there can be no doubt that the first respondent [ie: the Prime Minister] now accepts that he must comply with the requirements of the 2019 Act and

36 See: ‘PM “can’t be trusted” on Brexit delay, Court of Session told’, BBC website, 4 October 2019, available at: < <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-49924755> >, last accessed 13 October 2019.

37 Text of opinion available at: < <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csoh77.pdf?sfvrsn=0> >, last accessed 24 October 2019.

38 Para. 26.

39 Para. 27.

40 Para. 28.

41 Para. 29.

42 Para. 30.

43 Para. 31.

has affirmed that he intends to do so.⁴⁴

The spectacle of a court considering whether a Prime Minister intended to obey the law was startling. Principally it was the public utterances of Johnson and his government that had brought about this circumstance. The statement by Pentland that Johnson ‘now’ recognised the need to ‘comply’, moreover, appeared to leave open the possibility that previously he did not. Ultimately, when the House of Commons exercised its option to force the request for an extension, Johnson accompanied an unsigned letter fulfilling this obligation with another communication to the EU, that he did sign, stating his opposition to this idea.⁴⁵ While the Prime Minister may have been in compliance with the law, his tactic – which did not prevent the granting of his grudging, legally mandated request – represented a calculated discourtesy towards the clearly voiced preference of Parliament.

Lack of regard to the territorial balance of the Union and the post-devolution, post-Belfast/ Good Friday Agreement constitution

Scotland and Northern Ireland both produced ‘remain’ votes on 23 June 2016 (as did London). While Wales – like England as a whole – yielded a ‘leave’ outcome, all the devolved territories have a proper interest in whether Brexit happens, and if so, how. As shown above, from the outset, Theresa May sought to proceed on a basis that the divergent outcomes of the referendum were not relevant, and that it was the UK government that should dominate the handling of the response to this vote. During

44 Para. 42.

45 Daniel Boffey, ‘Brexit: Johnson sends unsigned letter asking for delay, and second arguing against it’, *Guardian*, 20 October 2019, available at: < <https://www.theguardian.com/politics/2019/oct/19/eu-will-grant-brexit-extension-if-johnson-sends-letter-says-brussels> >, last accessed 24 October 2019.

46 Welsh Government, *A brighter future for Wales: Why we should remain in the EU* (Welsh Government, Cardiff, 2019), p.24, available at: < https://gov.wales/sites/default/files/publications/2019-09/a-brighter-future-for-wales_0.pdf >, last accessed 13 October 2019.

the Brexit process, there were complaints from the devolved institutions about the UK executive failing properly to engage with them. In a recent policy paper the Welsh Government listed some of its grievances in this regard:

‘Despite agreeing to set up the Joint Ministerial Committee (EU Negotiations) with an explicit mandate to agree an approach to Brexit between the UK Government and the devolved governments, the UK Government has signally failed to honour this commitment. The Welsh and Scottish Governments were not consulted on or even given advance sight of a succession of key initiatives including:

- the terms of the Article 50 notification letter;
- the December 2017 agreement between the UK and the EU27;
- the then Prime Minister’s speeches in Florence and at the Mansion House;
- the Chequers agreement and the subsequent Future Relationship White Paper; and
- the Withdrawal Agreement and the Political Declaration.

Perhaps most significantly, there was no substantial consultation on the original EU (Withdrawal) Bill, which initially would have imposed sweeping restrictions on the powers of the devolved institutions to legislate in areas of devolved competence previously subject to the EU law restriction.⁴⁶

Tension between the Scottish institutions and those at UK level have been greater still, with the

UK government choosing to proceed with seeking to pass the European Union (Withdrawal) Act 2019 notwithstanding its express rejection by the Scottish Parliament. This decision raised questions about whether a violation had taken place of the so-called ‘Sewel Convention’, which stipulates that such overrides would not ‘normally’ occur. While the convention now has statutory recognition for Wales and Scotland, it is seemingly not justiciable. The viability of Sewel depends upon shared acceptance of what it means, and a willingness to abide by it.⁴⁷

The failure properly to take into account the implications of the referendum for Northern Ireland and the peace process was a shortcoming attributable to the David Cameron government. On the Northern Ireland question, Mrs May was committed in principle to the avoidance of the return of a hard border. But her insistence that the referendum result required the UK to leave both the Single Market and the Customs Union was in tension with this goal, leading to the negotiation of the ‘backstop’.⁴⁸ The controversy this measure generated contributed to the curtailment of her tenure at No.10. As successor to Mrs May, Johnson chose to make his determination to remove this safety mechanism from any possible agreement with the EU a defining feature of his premiership.⁴⁹ However, ultimately, he reached an agreement that satisfied the government of the Republic of Ireland

and the EU27.⁵⁰

A tendency towards misinformation

The present Prime Minister, during his time as Foreign Secretary, incurred criticism from Sir David Norgrove, Chair of the UK Statistics Authority. Norgrove engaged in public correspondence with Johnson, who insisted on making repeated references to a figure of £350 million that leave campaigners during the 2016 referendum had claimed would become available were the UK to depart the EU. One letter from Norgrove to Johnson read:

‘Dear Foreign Secretary,

I am surprised and disappointed that you have chosen to repeat the figure of £350 million per week, in connection with the amount that might be available for extra public spending when we leave the European Union.

This confuses gross and net contributions. It also assumes that payments currently made to the UK by the EU, including for example for the support of agriculture and scientific research, will not be paid by the UK government when we leave.

It is a clear misuse of official statistics.’⁵¹

Johnson refused to accept this criticism claiming

47 ‘Brexit and the Sewel (legislative consent) Convention, Institute for Government, 17 May 2018, available at: < <https://www.instituteforgovernment.org.uk/explainers/brexit-sewel-legislative-consent-convention> >, last accessed 15 October 2019.

48 See the withdrawal agreement, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf >, last accessed 13 October 2019.

49 See eg: ‘Brexit: Boris Johnson says “anti-democratic” backstop must be scrapped’, BBC website, 20 August 2019, available at: < <https://www.bbc.co.uk/news/uk-politics-49402840> >, last accessed 13 October 2019.

50 For the revised text, see: < https://ec.europa.eu/commission/sites/beta-political/files/revised_withdrawal_agreement_including_protocol_on_ireland_and_northern_ireland.pdf >

51 Sir David Norgrove, Chair of the UK Statistics Authority, to Rt Hon Boris Johnson MP, Foreign Secretary, 17 September 2017, available at: < <https://www.statisticsauthority.gov.uk/wp-content/uploads/2017/09/Letter-from-Sir-David-Norgrove-to-Foreign-Secretary.pdf> >, last accessed 15 October 2019.

that 'it was based on what appeared to be a wilful distortion of the text of my article.'⁵²

Evidence revealed during the prorogation case served to demonstrate that the Prime Minister agreed to the idea of requesting a prorogation included in a memorandum dated 15 August 2019.⁵³ Yet after this point, the government continued to deny that there was any prospect of such an action taking place, even though legal proceedings had begun in Scotland, the instigators of which hoped to preclude it.⁵⁴ From the beginning of September 2019 – and continuing through October – the government ran a large-scale advertising campaign, purporting to be an exercise in public information, using the words 'Get Ready for Brexit on 31 October 2019'.⁵⁵

Yet at the time this campaign commenced, it was certain neither that Brexit would take place on this date, or indeed at all. For a publicly funded campaign to promote this idea, particularly given that on 9 September Royal Assent was provided to legislation to enable the Commons to force the government to request and accept an extension from the EU beyond 31 October, was questionable.⁵⁶ As it transpired, the UK did not leave at this point.

At the time of writing, a new date – 31 January 2020 – has been set, but not yet reached.

Bad faith in the conduct of diplomacy

It seems that a central motivation for some of the conduct discussed in this paper has been the satisfaction of domestic political imperatives. But the actual policy issue that has dominated UK politics for more than three years involves its relationship with the outside world. A tension has arisen in this respect. The disruptive impact of Brexit, which is immense from the point of view of internal politics, is even more problematic from the perspective of the external engagements which lie at the core of the policy issue itself. Typically, dealings with other states and supranational organisations require a degree of continuity greater than that associated with internal politics. Providing for the necessary consistency within a democratic constitution such as that of the UK requires a high degree of responsibility on the part of the executive. Traditionally, it has enjoyed a higher degree of flexibility than it possesses in the domestic arena. For the system to work, ministers must exercise this

52 Rt Hon Boris Johnson MP, Foreign Secretary, to Sir David Norgrove, Chair of the UK Statistics Authority, 17 September 2017, available at: < <https://www.statisticsauthority.gov.uk/wp-content/uploads/2017/09/FS-letter-to-Sir-David-Norgrove-17-September-2017.pdf> >, last accessed 15 October 2019.

53 See: paragraph 17 of the full judgement available at: < <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf> >, last accessed 13 October 2019.

54 See: paragraph 23 of the full judgement available at: < <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf> >, last accessed 13 October 2019.

55 See: < <https://www.gov.uk/brexit> >, last accessed 13 October 2019. When accessed again on 24 October, the wording had changed, but not in a way that expressly allowed for doubt about the inevitability or timing of departure. When accessed on 4 November, the site was simply headed 'Brexit', stating that 'A Brexit deal has been agreed in principle with the EU'. While noting that 'the UK could still leave with no deal', it does not record that the UK could also revoke Article 50 and not leave at all. Available at: < <https://www.gov.uk/brexit> >, last accessed 4 November 2019.

56 Suzanne Moore, 'The 'Get Ready for Brexit' ads – mystifying in their uselessness', *Guardian*, 15 October 2019, available at: < <https://www.theguardian.com/commentisfree/2019/oct/15/get-ready-for-brexit-ad-campaign-expensive-useless> >, last accessed 24 October 2019; Richard Johnstone, 'Government guidance defends Get Ready for Brexit Countdown Calendar', *Civil Service World*, 10 October 2019, available at: < <https://www.civilserviceworld.com/articles/news/government-guidance-defends-get-ready-brexit-countdown-calendar> >, last accessed 24 October 2019.

power responsibly and be willing to cooperate with oversight mechanisms to an appropriate extent.⁵⁷

The May speech cited above demonstrated a reluctance to accept the latter part of this bargain, presenting the referendum as having supplanted more established forms of democratic authorisation. As is discussed below, May encountered difficulties in realising this thesis in practice; but her successor at No.10 pursued it more rigorously. The Johnson administration also wilfully fell short with regards to the responsible conduct of diplomacy. The behaviour of his government suggested that not only were the constitutional norms governing the internal operation of the UK deemed subordinate to the executive interpretation of the referendum result, but that its external dealings were also.

The tactical approach of the Johnson government appeared to include the dissemination of accounts of confidential discussions with supposed allies of a type that seemed to have little precedent, adding to a souring of the public atmosphere in the UK and in our relations with other states. Perhaps the worst example of such behaviour came in mid-October 2019 when No.10 was reported as briefing on the contents of a difficult conversation between Johnson and Angela Merkel. The Leave.EU group responded in a tweet stating that ‘We didn’t win two world wars to be pushed around by a Kraut’, accompanied an

image of Merkel holding her arm in the air.⁵⁸ The UK government could not be held directly responsible for this messaging; but the Prime Minister had courted similar kinds of controversy previously. For instance, when Foreign Secretary, in January 2017, Johnson had speculated, in comments made while he was in India, that the French President, Francois Hollande, might want to ‘administer punishment beatings to anyone who seeks to escape’ the EU ‘in the manner of some world war two movie’.⁵⁹ Ultimately, the UK government agreed to meet the basic requirements of an exit deal as had been laid out in the provisional joint statement by the EU and UK late in 2016, when Johnson himself had been Foreign Secretary.⁶⁰

Protective Mechanisms

Why has ‘chapocracy’ failed us? It may be that changed circumstances, in particular the Brexit turbulence, have made it difficult for those who wish to behave properly to ascertain correct courses of action. Much of the present difficulties might reflect a Prime Minister who, for all his gifts, is tone deaf on the melodies of the constitution. Perhaps, more widely, the current political environment has tended to elevate ‘chaps’ who are less inclined to be ‘good’. The supply of well-intentioned candidates might have diminished, as could the general level

57 For a discussion of these issues, see: Simon Burall, Brendan Donnelly and Stuart Weir (eds), *Not in Our Name: democracy and foreign policy in the UK* (Politico’s, London, 2006).

58 Philip Oltermann, ‘Can Anglo-German relations that disastrous London-Berlin phone call?’, *Observer*, 12 October 2019, available at: < <https://www.theguardian.com/politics/2019/oct/12/angela-merkel-boris-johnson-leaked-brexite-phone-call> >, last accessed 14 October 2019.

59 Rob Merrick, ‘Boris Johnson accuses EU of contemplating Nazi-style “punishment beatings” on Britain in revenge for Brexit’, *Independent*, 18 January 2017 < <https://www.independent.co.uk/news/uk/politics/boris-johnson-french-president-francois-hollande-nazi-brexite-eu-a7532981.html> >, last accessed 14 October 2019. For earlier controversy of this ilk involving Johnson, see: Rowena Mason and agencies, ‘Iain Duncan Smith backs Boris Johnson over EU-Hitler link’, *Guardian*, 15 May 2016, available at: < <https://www.theguardian.com/politics/2016/may/15/boris-johnson-likens-eu-to-nazi-superstate> >, last accessed 15 October 2019.

60 See: ‘Joint report from the negotiators of the European Union and the United Kingdom government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union’, 8 December 2017, available at: < https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf >, last accessed 15 October 2019.

of respect accorded to previously understood rules, possibly in society as a whole. It could, moreover, be that the 'good chap' system was always flawed, that it was neither desirable nor as effective as was imagined, and that any success that it appeared to attain owes much to a measure of fortune, that has now expired, exposing its fragility.

Prompted by these diverse and disturbing possibilities, the remainder of this paper performs three tasks. First, it considers what are the main rules of the political system, against which it is possible to judge the conduct of those who occupy positions of authority, and how well defined those rules are. Knowledge of the existing principles is likely to be useful in ensuring good conduct among those who wish to abide by them, and to be seen to do so. But what of those who do not? Simple knowledge of what standards of behaviour should be will not suffice. For this reason, as well as assessing what are the rules and the ways in they are described, the second task of this work is to evaluate the mechanisms by which they are protected against abuse. We approach both these tasks through considering in turn each of the three central branches of the UK constitution – the executive (including the Cabinet and the Civil Service), the legislature, and the judiciary. Where possible, we make reference to texts with official status of some kind, in particular Acts of Parliament and descriptions of conventions and other non-statutory rules issued by the relevant institutions themselves, since it seems appropriate to assess the system from the perspective of the rules that players within it

have set out.

Third and finally, we propose means by which the core aspects of the UK system might be better defined and shielded in future, thereby reducing dependence on the presence of 'good chaps' in positions of authority. All constitutions, however they are defined and enforced, require those who operate them to conduct themselves appropriately. But the system itself and the form it takes can also encourage, reward, penalise, permit and proscribe various forms of behaviour. Recent disruptions suggest that now is an appropriate time to identify ways in which we might recalibrate our protective mechanisms, to reduce our reliance on goodwill.

The Executive

It is a long-established tenet that the executive is subject to the law.⁶¹ Some of the principles by which it is supposed to abide are set out in Acts of Parliament. They include the Human Rights Act 1998; the Freedom of Information Act 2000; and the Constitutional Reform and Governance Act 2010. Executive action, whether carried out under statutory powers or under the Royal Prerogative (a residual set of monarchical authorities – nearly all of them exercised by her ministers on the Queen's behalf), is potentially subject to review by the courts.⁶² The law plays an important part in the maintenance of constitutional norms, as we discuss later in this report. But many of the most fundamental ethical and operational rules applying to the executive do not have full legal force, taking

61 The origins of this idea in the British Isles predate the Conquest, and can be found in such texts as the law code of Cnut, dating from the early 1020s. See: Andrew Blick, *Beyond Magna Carta: a constitution for the United Kingdom* (Hart/Bloomsbury, Oxford, 2015), p.34.

62 For an account of the legality of decision making from the point of view of the executive, see: Government Legal Department, *The judge over your shoulder – a guide to good decision making*, 5th edition (Government Legal Department, London, 2016).

the form of conventions.⁶³ These types of rules can be amorphous in nature. They rest on precedent, usage and interpretation, and can come into being, change, and disappear without any specific player within the political system intending them to. Conventions rely on those involved in their operation recognising and choosing to abide by them. They may not be written down in any official document; and disagreements may arise about whether they exist at all, their precise nature, and how they apply in a specific case.⁶⁴

Increasingly, however, the executive has taken to publishing descriptions of some of the most important conventions to which it is subject. The accounts contained in these texts should not necessarily be regarded as the final word, and may be disputed. But between them they take us as close as is presently possible to a formal account of a number of key features of the UK constitution.⁶⁵

Perhaps the most important of these documents is the *Ministerial Code*, the earliest origins of which can be traced as far back as the First World War.⁶⁶ It deals with such matters as collective Cabinet responsibility⁶⁷; the accountability of ministers to Parliament⁶⁸; the relationship between ministers

and officials⁶⁹; and the avoidance of conflicts of interest and the general maintenance of personal probity.⁷⁰ A central weakness with the *Ministerial Code* (as with other similar documents) is that it lacks a clear mechanism for independent enforcement. Outside observers can use the code for their own purposes, forming and expressing opinions regarding the conduct of ministers. The Prime Minister can choose to refer a possible violation to the Cabinet Secretary or the Independent Adviser on Minister's Interests (paragraph 1.4, see below). But neither office-holder can instigate their own investigations; and the text stipulates that ultimate responsibility for upholding the code within government rests with the Prime Minister (who also determines the precise content, with the assistance of the Cabinet Secretary).⁷¹ The code states:

'1.4 It is not the role of the Cabinet Secretary or other officials to enforce the Code. If there is an allegation about a breach of the Code, and the Prime Minister, having consulted the Cabinet Secretary, feels that it warrants further investigation, he may ask the Cabinet Office to investigate the facts of the case and/or refer the matter to the independent adviser on Ministers' interests...

63 A. V. Dicey, writing in 1885, brought the term 'convention' in the specific context meant here to wide attention, though others, including J. S. Mill, anticipated the concept he described. Generally a convention means a constitutional rule relying on political rather than direct legal force, and of somewhat malleable nature. Ivor Jennings subsequently referred to conventions as allowing 'a rigid legal framework . . . to be kept up with changing social needs and changing political ideas' and making it possible for 'the men who govern to work the machines'. See: Andrew Blick, 'The Cabinet Manual and the codification of conventions', *Parliamentary Affairs*. 2012 Jul 15;67(1):191-208.

64 See eg: Blick and Hennessy, p.23. For an amorphous convention, see the principle that a government must possess the confidence of the House of Commons, described generally in Cabinet Office, *The Cabinet Manual*, p.2. For confidence, see further below.

65 See: Andrew Blick, *The Codes of the Constitution* (Hart/Bloomsbury, London, 2016).

66 See: Amy Baker, *Prime Ministers and the Rule Book: the history of Questions of Procedure for Ministers* (Politico's, London, 2000).

67 Cabinet Office, *Ministerial Code*, pp.4-5.

68 *Ibid*, pp. 1; 23-24.

69 *Ibid*, pp. 1-2; 7; 12-13.

70 *Ibid*, pp. 2; 16-19.

71 *Ibid*, pp. 2-3.

1.6 Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions and conduct to Parliament and the public. However, Ministers only remain in office for so long as they retain the confidence of the Prime Minister. He is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards.'

We are therefore reliant on the integrity of premiers, both as upholders of the code as it applies to other ministers, and also as being willing to abide by it themselves – since there is no higher authority to impose it upon them. That the current Prime Minister might have priorities other than those stipulated in the *Ministerial Code* could be inferred from his introduction to the edition of the text he issued in August. Before proceeding to endorse the need to 'uphold the very highest standards of propriety', he opened by stating that:

'The mission of this Government is to deliver Brexit on 31st October for the purpose of uniting and re-energising our whole United Kingdom and making this country the greatest place on earth.

We will seize the opportunities offered by Brexit, investing in education, technology and infrastructure, unlocking the talents of the whole nation and levelling up across our United Kingdom so that no town or community is ever again left behind or forgotten. In doing so, we will make our country the greatest place to invest or set up a business, the greatest place to send your kids to school and the greatest place in the world to live and bring up a family.'⁷²

Aside from the desirability and plausibility of such objectives – and that this passage is already out of date as regards the timing of departure – they appear incongruous when inserted at the head of document the purpose of which is to set out fundamental ethical and procedural rules applying to political members of the UK executive. They sit rather oddly above the substance of the code.

An understanding of the centrality of the Prime Minister to the *Ministerial Code* begins to convey the importance of the occupant of No.10 to the maintenance of constitutional standards. It is worth focusing in more detail on the nature of the premiership. The office of Prime Minister in the UK is famously lacking in comprehensive statutory delineation, or any other kind of exhaustive official definition.⁷³ While they possess few legal authorities, premiers can wield extensive power if they are so inclined and if the Cabinet allows them to. They are in practice responsible for employing (and removing) ministers, and determining what their portfolios will be. Various other public appointments and forms of patronage also come within the remit of premiers. They set the agenda for Cabinet meetings, which they chair; and determine the structure of the Cabinet committee system. They have special responsibilities in areas such as the Civil Service and the machinery of government; foreign affairs; intelligence and security; and the nuclear deterrent. Premiers have principal responsibility for conducting the relationship between the government and the monarchy, and in particular for the advice that the former submits to the latter on the deployment of royal power. They have considerable general latitude for involving themselves in any subject that attracts their interest. Prime ministers also act as public figureheads for

72 Ibid, p.3.

73 For the fullest publicly available official account of the role, see: Cabinet Office, *The Cabinet Manual*, pp.21-22.

their governments.⁷⁴

They have, therefore, many levers within reach. Potentially, they could deploy them in ways that are inappropriate, or to shore up their power base with a view to carrying out acts in future that are ethically problematic. Furthermore, prime ministers have a role in ethical oversight itself (of which responsibility for the *Ministerial Code* is one manifestation). For instance, they are involved in the appointment of members of bodies such as the Intelligence and Security Committee of Parliament; and the Committee on Standards in Public Life. Various mechanisms, including statutory safeguards, exist to protect against abuse in these areas.⁷⁵ But in an environment in which evading or dispensing with rules became a more normal form of conduct, and in which there was confusion about their precise definition, these restrictions might not prove sufficiently resilient.

Two of the principal limitations on prime ministers, that can in theory act as a brake upon inapt conduct, involve senior ministers in government. Most powers to act rest with the political heads of Whitehall departments, that is secretaries of state and their equivalent. Parliament votes money to them, it vests statutory authority in them, and they answer to it individually for their actions and those of the officials working under them.⁷⁶ Prime ministers, therefore, often have to work through ministers when pursuing particular goals. Major decisions, moreover, are by convention taken collectively in a Cabinet committee or in full

Cabinet.⁷⁷ They are, therefore, potentially subject to group scrutiny and approval.

These two conventions – individual and collective ministerial responsibility – are potentially a check upon a Prime Minister contemplating a course of action that might be regarded as improper. They are both constitutional principles in their own right, and means of ensuring that other standards are adhered to, through peer oversight. But to be effective they require ministers who are inclined and feel able to withstand a premier who has appointed and can remove (or promote or demote) them; and who has the ability to condition the way in which decisions are made, and the wider structural context of the government.

Prime ministerial power will always be subject to significant practical and political limitations. But an inhabitant of No.10 in a position of political strength – for instance, having recently won a General Election – can be hard to oppose. Moreover, if a Prime Minister has placed likeminded individuals in key roles, the question of resistance might not arise. In other words, internal checks involving ministerial colleagues are exceptionally dependent upon the people involved. As discussed above, many of the relevant procedures – particularly those concerning Cabinet – are matters of convention, with no direct legal force. Failure to adhere to them can have only political consequences.⁷⁸ Collective responsibility, furthermore, is double-edged. It facilitates group participation in decisions, but – once a policy is adopted – it can be used to impose

74 See: Peter Hennessy, *Distilling the Frenzy: writing the history of one's own times* (Biteback, London, 2012), pp.103-123.

75 For appointments to the Intelligence and Security Committee of Parliament, which follow nomination by the Prime Minister but which either house of Parliament makes, see: *Justice and Security Act 2013*, s.1.

76 Cabinet Office, *The Cabinet Manual*, pp.23-26; Cabinet Office, *The Ministerial Code*, p.1.

77 Cabinet Office, *The Cabinet Manual*, pp.31; 33-34.

78 For the final statement on the subject by a preeminent observer of the variable nature of prime-ministerial power, the late George Jones, see: *The Power of the Prime Minister: 50 years on* (The Constitution Society, London, 2016), available at: < <https://consoc.org.uk/wp-content/uploads/2016/10/The-Power-of-the-Prime-Minister-PDF.pdf> >, last accessed 4 November 2019.

discipline on the entire government, including those who did not necessarily take part in the relevant discussion.⁷⁹ There is some scope to invoke this aspect of collective responsibility without allowing debate. The present Prime Minister seemingly made employment as a minister contingent upon a prior expression of willingness to countenance departure from the EU without a deal.⁸⁰ His previously discussed Foreword to the current edition of the *Ministerial Code* insists that there should be:

‘no misuse of process or procedure by any individual Minister that would seek to stall the collective decisions necessary to deliver Brexit and secure the wider changes needed across our United Kingdom.’⁸¹

The text does not define what constitutes a ‘misuse of process or procedure’ rather than insistence on a proper consideration of options. Nor does it explain what are the ‘collective decisions necessary’ for attaining the pre-determined goal of securing UK departure from the EU, or what constitute the ‘wider changes’ required.

If the political heads of a government are unwilling or unable to regulate each other, are there any other mechanisms internal to the executive that might hold them in check? One body we might look to is the Civil Service. The bulk of officials employed at senior level within this institution are permanent appointments. They are recruited ‘on merit on the

basis of fair and open competition’.⁸² Compared to many other countries, there are relatively few partisan appointments in the UK. Civil servants generally remain in place when ministerial posts change hands, or even if there is an alteration in the party-political make-up of the government. While they are responsible to ministers and obliged loyally to support them, career officials are required to retain the ability to work for other ministers in future, of the same or a different party. Their task is to support the government, not the cause of the party or parties in office at the time. Furthermore, civil servants, according to their code, now issued under the *Constitutional Reform and Governance Act 2010*, have a duty to give honest advice to ministers, founded in evidence, even if inconvenient.⁸³ Ministers, the *Ministerial Code* stipulates, must in turn give due consideration to the advice of their officials.⁸⁴

In these senses the role of civil servants is not simply to pander to the whims of ministers. But generally, once a decision has been reached by political heads, if it is within the law, civil servants are required to abide by it.⁸⁵ An exception exists in the form of nominated departmental Accounting Officers. If they are concerned about proposed departmental spending plans they can require ministers to issue a direction to proceed that is placed on the record with the Comptroller and Auditor General (an office with a statutory basis in the *National Audit Act 1983*),

79 Cabinet Office, *The Cabinet Manual*, p.31; Cabinet Office, *Ministerial Code*, p.4.

80 Elizabeth Piper, ‘Hammond to quit over no-deal Brexit if Johnson becomes PM’, *Reuters*, 21 July 2019, available at: < <https://www.reuters.com/article/uk-britain-eu-hammond/hammond-to-quit-over-no-deal-brexif-johnson-become-pm-idUSKCN1UG0AS> >, last accessed 4 October 2019.

81 Cabinet Office, *The Cabinet Manual*, p.3.

82 See: *Constitutional Reform and Governance Act 2010*, s.10.

83 Civil Service Commission, *Civil Service Code*.

84 Cabinet Office, *Ministerial Code*, p.12.

85 Civil Service Commission, *Civil Service Code*.

and normally made public.⁸⁶ In cases not involving the Accounting Officer function, there are means by which officials can raise propriety concerns internally. But ultimately, if they find a decision unacceptable, the only option that remains is to resign.⁸⁷ While Accounting Officers are individually responsible to the House of Commons Committee of Public Accounts, other civil servants do not have this direct line of accountability. When giving evidence to parliamentary committees, civil servants do so under the direction of ministers and not on their own behalf.⁸⁸ (A safeguard here is that officials are required by their code not to mislead Parliament.⁸⁹)

A minister who, despite the limitations on the autonomy of regular civil servants, finds them insufficiently compliant can utilise special advisers. These staff are appointed on temporary contracts the basis of individual ministerial patronage (subject to the consent of the Prime Minister).⁹⁰ This form of recruitment can be used in a legitimate way, and though most special advisers fit well within the

system, it is also vulnerable to abuse. It can lead to the employment of individuals unsuited to public office.⁹¹ Not only is the manner of appointing special advisers a potential problem. The way in which it is permissible for ministers to deploy them once in post can also create difficulties. Special advisers are not subject to the requirement that applies to permanent officials to be objective and impartial.⁹² They are allowed to engage in activities of a party-political nature in a way that career officials are not. There are supposed to be limits to this principle, so as to safeguard against use of public resources for purely partisan purposes.⁹³ But the precise demarcation lines are difficult to draw and enforce. Special advisers are not supposed to manage other civil servants, but in practice, if they are known to be close to their minister, they can become influential.⁹⁴ Their code permits them to:

‘convey to officials Ministers’ views, instructions and priorities, including on issues of presentation. In doing so, they must take account of any

86 Cabinet Office, *Ministerial Code*, pp.12-13. For the role of the Accounting Officer, see: HM Treasury, *Managing public money* (HM Treasury, London, 2013/2019), pp.15-20.

87 Civil Service Commission, *Civil Service Code*.

88 Cabinet Office, *Giving Evidence to Select Committees: Guidance for Civil Servants* (Cabinet Office, London, 2014), pp.4; 7.

89 Civil Service Commission, *Civil Service Code*.

90 Cabinet Office, *Ministerial Code*, p.7.

91 The most egregious example being a previous special adviser to a Prime Minister who was subsequently imprisoned for his earlier involvement in the phone-hacking scandal. The individual in question was Andy Coulson, employed by David Cameron at No.10 from 2010-2011. For Cameron’s account of the decision to recruit Coulson while in Opposition in 2007, see: David Cameron, *For the Record* (William Collins, London, 2019), pp.252-253. Cameron writes of his insistence on continuing to employ Coulson even as evidence mounted against him that ‘looking back...my stubbornness was misplaced...It wasn’t only that I believed his assurances, it was that I very much wanted to believe them. And that always affects your judgement’ (pp.256-257). After Coulson was found guilty in 2014 Cameron issued a statement that ‘I am extremely sorry that I employed him. It was the wrong decision.’ (p.266).

92 Cabinet Office, *Code of Conduct for Special Advisers* (Cabinet Office, London, 2016), para.8.

93 Ibid., para.10.

94 Ibid., para.5. The clearest exception to this rule was established in May 1997, when the incoming Prime Minister, Tony Blair, exempted up to three special advisers working at No.10 from the requirement that they were only employed to provide advice – and by implication, not to manage permanent officials. Blair achieved this modification through the *Civil Service (Amendment) Order 1997*. It was only taken up by two aides: Alastair Campbell, Blair’s Chief Press Secretary; and Jonathan Powell, his Chief of Staff. When Gordon Brown succeeded Blair as premier in 2007, Brown revoked the 1997 Order in Council that had provided for this power. For the history of special advisers, see: Andrew Blick, *People Who Live in the Dark: the history of special advisers in British politics* (Politico’s/ Methuen, London, 2004).

priorities Ministers have set;

request officials to prepare and provide information and data, including internal analyses and papers;

hold meetings with officials to discuss the advice being put to Ministers; and

review and comment on – but not suppress or supplant – advice being prepared for Ministers by civil servants.⁹⁵

These provisions contain much scope for intervention in the work of government. Their proper exercise requires considerable prudence on the part of the special adviser concerned. If it is lacking, ultimately, the appointing minister is supposed to be responsible. But the minister could well be the source of any problem that arises. The Prime Minister can also remove special advisers from their posts – though such dismissals can themselves take on an improper character.⁹⁶ Once again, a direct and autonomous means of implementing standards is absent, and the system is self-regulating.

Parliament

The emergence of the Westminster Parliament was precisely attributable to a need to constrain and influence the executive. Long before contemporary concepts of democracy came into being, it served the purpose of curbing the arbitrary power of

monarchs, on behalf of a wider community. That Parliament should perform such a function, holding the government to account, is a key principle of the UK constitution.⁹⁷ Parliament possesses a variety of mechanisms, some older, others more recently acquired, to enable it to exercise oversight of the executive. Its consent is required to every line of an Act of Parliament.⁹⁸ It can even – as it has recently proven – legislate contrary to the wishes of, and in ways that impose requirements upon, the executive.⁹⁹ Parliament scrutinises the actions of ministers through debates, questions and the work of select committees.¹⁰⁰ The House of Commons, the elected chamber, approves the Budget. It also installs and removes governments; and triggers (and denies) General Elections that come in advance of the set five-year time frame.¹⁰¹ That Parliament should exercise the oversight that these various mechanisms provide for is itself a key constitutional principle. It can in turn support other values and rules of the system. Parliament is equipped to carry out activities intended, for instance, to ensure the appropriate use of public money (for example through the work of the Committee of Public Accounts in the Commons); the safeguarding of human rights (a task that is a particular interest of the Joint Committee on Human Rights); and the upholding of constitutional standards generally (through, for instance, the work of the House of Lords Select Committee on the Constitution).

But there are limitations on what Parliament

95 Cabinet Office, *Code of Conduct for Special Advisers*, para.4.

96 Cabinet Office, *Ministerial Code*, p.7; Kate Proctor, 'Adviser sacked by Cummings may have case for unfair dismissal - expert', *Guardian*, 1 September 2019, available at: < <https://www.theguardian.com/politics/2019/sep/01/adviser-sacked-by-cummings-may-have-case-for-unfair-dismissal-expert> >, last accessed 2 October 2019.

97 Blick, *Beyond Magna Carta*, p.55.

98 Cabinet Office, *Cabinet Manual*, p.42.

99 See: *European Union (Withdrawal) Act 2019*; and *European Union (Withdrawal) (No.2) Act 2019*.

100 Cabinet Office, *Cabinet Manual*, p.41.

101 Cabinet Office, *Cabinet Manual*, p.15; *Fixed-term Parliaments Act 2011*, s.2.

can achieve. While government is in theory *politically* accountable to Parliament for all that it does, some of its powers – those exercised under the Royal Prerogative – are not within the *legal* scope of Parliament, and Parliament has tended not to involve itself as closely with them as with other areas. Since the conduct of diplomacy is a prerogative power, it is difficult for Parliament fully to engage with external policy. The executive can potentially use Orders in Council issued by the head of state to circumvent Parliament altogether, as it tried to do when ministers advised the Queen to prorogue Parliament in 2019. It was the courts, and not Parliament, that were able to halt this course of action.

The legal powers of the monarch are generally deployed on the advice of ministers.¹⁰² The traditional convention was that politicians would avoid seeking to deploy royal powers in ways that drew the office of the head of state into controversy, thereby compromising its neutrality.¹⁰³ (A distinction can be drawn between the use of the prerogative to implement a policy about which there is disagreement, and its deployment in a fashion that is according to a significant body of opinion in some way contrary to proper constitutional practice.) This rule was a safeguard against abuse. The non-prorogation episode of 2019 served to call into question its effectiveness. A government proved willing to counsel the use of powers in a way that was controversial.

In the absence of self-restraint on the part of

the executive, if the courts are not effective, the last line of defence is the monarchy itself. But while an hereditary head of state might in theory be able to decline to act upon an inappropriate recommendation from their government, they would surely – and rightly – be reluctant to do so. Even if one accepts the general proposition that there are some actions so improper that a monarch can refuse to countenance them, precisely identifying what they are and acting accordingly would be, in practice, difficult. The neutrality of the monarchy might be tested in the opposite direction. They might sense a need to act, rather than refrain from acting, but be reluctant to do so. If there were good reason to suppose not only that a sitting Prime Minister lacked the confidence of the Commons, but that there was clear majority support among MPs for a particular replacement, yet the incumbent refused to leave, the only means of evicting them would be for the head of state to exercise the personal prerogative to dismiss a premier. In this position, once again, the monarchy would be trapped between two different constitutional imperatives, with no easy option on offer. No contemporary ruler, nor any other supporter of hard-won principles of constitutional monarchy, would wish to see exposure to public discomfort of the sort that the young Victoria experienced with the so-called ‘Bedchamber’ incident of 1839.¹⁰⁴

Other powers not directly related to the monarchy are vulnerable to misuse by the executive. Statutory instruments – that is, legal measures issued under the delegated authority provided by a parent

¹⁰² A comprehensive account of prerogative powers is not possible, since their existence may not be certain until tested in court. For the fullest account produced by the executive in recent times, see: *Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, London, 2009), available at: < <http://data.parliament.uk/DepositedPapers/Files/DEP2009-2493/DEP2009-2493.pdf> >, last accessed 24 October 2019.

¹⁰³ Peter Hennessy, *The Prime Minister: the office and its holders since 1945* (Allen Lane, London, 2000), p.30.

¹⁰⁴ For the account provided to the Commons at the time by Sir Robert Peel MP, see ‘Ministerial Explanations’, Hansard, House of Commons Debates, 13 May 1839, cols 979-991, available at: < https://api.parliament.uk/historic-hansard/commons/1839/may/13/ministerial-explanations#column_984 >, last accessed 24 October 2019.

Act of Parliament – generally receive little or no parliamentary attention; and at most the legislature can only decide whether to reject or accept them in full, with no possibility of amendment. They provide ministers with considerable potential for discretionary action, even to amend Acts of Parliament (under so-called ‘Henry VIII powers’), a practice regarding which Lord (Igor) Judge, the former Lord Chief Justice of England and Wales, has persistently raised legitimate concerns.¹⁰⁵

While Parliament might be conceived of as responsible for preventing (with varying degrees of effectiveness) constitutionally damaging activity by the government, it could potentially become part of the problem. To understand why it might be so, it is important to appreciate the way in which Parliament developed as a restraint on the executive. It achieved this end not through becoming an institution that was separate from the Crown, but as an entity that incorporated the Crown into it. The doctrine of parliamentary supremacy or ‘sovereignty’ means that the monarch, Commons and Lords together have supreme law-making authority, superior to the ruler acting alone.¹⁰⁶ The legacy of this achievement is that the government and Parliament today are to some extent fused. In contemporary terms this constitutional quality means that governments are expected to possess what is termed the confidence of the House of Commons. Put another way, it means that a majority of elected Members of Parliament should be – as a minimum – willing to tolerate the existence of a given government, and vote in support of its core business, however defined. This is an

important constitutional principle since it ensures that the executive has democratic legitimacy. Yet the fulfilment of this purpose of Parliament – to be the basis for a government – can to some extent conflict with another key constitutional function: to hold that government to account.

During 2019, we have witnessed Parliament, and in particular the House of Commons, at its most assertive in its relationship with the executive. We cannot assume that Parliament will be so resistant to the executive in future – indeed, the recent stand-off hardly has been a less than desirable experience and would not be sustainable in the longer term. What if a government intent upon inappropriate action had a substantial supportive majority in the Commons, either after the General Election that is about to take place, or at some other point in the future? Advocates of the system used for elections to the UK Parliament (‘First-Past-the-Post’) have previously claimed that one of its advantages is that it creates an incentive for parties to gravitate towards the political centre ground.¹⁰⁷ This assumption now seems harder to sustain. It has become more plausible that a party (or alliance of parties) with a relatively low regard for constitutional norms, could, with a percentage vote share in the low to mid 30s, achieve a Commons majority. In such a circumstance, the House of Lords could offer some kind of check. It has the ability to delay and propose amendments to legislation; and by tradition it takes a close interest in constitutional matters, an area in which its members sometimes see themselves as performing a custodian role.¹⁰⁸ But the Lords is

105 They take their name from the *Statute of Proclamations 1539*, intended to strengthen the authority of the Crown in the time of Henry VIII. In fact, this law was subject to significant limitations and was repealed in 1547. See eg: Lord Judge, ‘Ceding Power to the Executive, the resurrection of Henry VIII’, lecture give at King’s College London, 12 April 2016.

106 Cabinet Office, *The Cabinet Manual*, p.2.

107 James Forder, *The Case Against Voting Reform: Why the AV system would damage Britain* (Oneworld, Oxford, 2011), pp.71-72.

108 See: Lucy Atkinson, *Talking to the Guardians: The Constitutional Role of the House of Lords* (Constitution Society, London, 2016), available at: < <https://consoc.org.uk/wp-content/uploads/2016/10/House-of-Lords-PDF.pdf> >, last accessed 24 October 2019.

clearly less powerful than the Commons. It has no part in installing or removing governments, nor in financial oversight. Moreover, while it is not as constrained as the monarchy, it always operates in the knowledge that it lacks the democratic legitimacy of the Commons, and it is reluctant fully to deploy even those powers that it does possess.

The Judiciary

The judiciary has a central responsibility for maintaining the rule of law, a principle universally accepted as a fundamental to any democratic constitution. But what precisely this concept means in practice, and how it should be enforced, is subject to varying interpretations. Part 1 of the *Constitutional Reform Act 2005*, which introduced various substantial changes to the legal system including establishing the Supreme Court, is entitled ‘The Rule of Law’. However, it consists of only one, unilluminating section. It reassures us that:

‘This Act does not adversely affect—
the existing constitutional principle of the rule of law, or
the Lord Chancellor’s existing constitutional role in relation to that principle.’¹⁰⁹

This section provides no explanation of the meaning of this concept (or what precisely the function of the Lord Chancellor is with respect to it). Generally the rule of law entails that all people and institutions should be required to abide by the law – including the government. The executive initiates legislation, and is responsible for implementing it and seeing that it is upheld. But it must also operate in a way

that is legal. Absence of such a constraint would enable the executive to behave in an arbitrary fashion, potentially overriding core constitutional and democratic principles.¹¹⁰

The courts enforce the principle of government by the law through carrying out judicial review. This practice involves assessing the legality of government activity from a number of possible perspectives, including whether a public authority had the power to carry out a particular action; whether it did so in a way that was rational and reasonable; and whether it followed proper processes. The courts can also assess (in accordance with the *Human Rights Act 1998*) compliance with the European Convention on Human Rights; and prior to exit from the EU, adherence to European law.¹¹¹ To be able to perform this constitutional role, the judiciary must be independent – that is, not subject to improper coercion or external influences.¹¹²

An important limitation on the capacity of the courts to uphold the rule of law involves the doctrine of parliamentary ‘sovereignty’. If a given Act of Parliament mandates a particular course of action then the clearly established practice is for a court to apply it, even if it violates a constitutional principle. A variety of earlier laws, dating back as far as *Magna Carta* (initially agreed in 1215) might assert important rules of the system, including those connected to the rule of law itself. But a later Act of Parliament, so the theory of parliamentary ‘sovereignty’ stipulates, takes precedent over any earlier one (in some instances an Act must make express its intention to repeal an earlier Act if it is to accomplish this outcome, though normally merely the implication that repeal of an earlier Act

109 *Constitutional Reform Act 2005*, s.1.

110 For the definitive modern account of the rule of law, see: Tom Bingham, *The Rule of Law* (Penguin, London, 2010).

111 Cabinet Office, *The Cabinet Manual*, p.50.

112 United Kingdom Supreme Court, *Guide to Judicial Conduct* (United Kingdom Supreme Court, London, 2019).

is necessary is sufficient).¹¹³ There is, therefore, no apparent legal limit to what an Act of Parliament can accomplish, including the dismantling of established constitutional architecture and principles. Parliament, for instance, could repeal the *Human Rights Act 1998*, and – even if the UK remained a signatory to the European Convention on Human Rights – there would no longer be direct recourse to the Convention in UK law. (Already, in the projected post-EU environment, the European Charter of Fundamental Rights will no longer be available as a source of protection.¹¹⁴)

In the possible circumstance discussed above, of a government backed by a clear majority in the House of Commons intent upon violating such norms, and were it able to overcome any resistance from the House of Lords or the monarchy, the courts would be in a difficult position. In other countries, they might be able to invoke a written constitution as a basis for declaring primary legislation void. In the UK, this option is not available. Nonetheless, according to a school of legal thought known as ‘common law constitutionalism’, judges can refuse to apply even Acts of Parliament if they take the view that they violate unwritten but vital standards, such as the prohibition of torture. But no court has yet followed – or perhaps needed to follow – such a bold course of action. To do so would require it to discern for itself what were the fundamental rules of the system and apply them in what would surely be an atmosphere of heightened political controversy. Such a course of action would be daunting for any member of the judiciary involved, and vulnerable to the plausible charge that it was lacking in democratic legitimacy.¹¹⁵

In as far as the existing legal framework allows them to, the courts are able to constrain the executive. They have done so in recent years in two particularly high profile cases, where the Supreme Court found in 2017 that the government had to obtain express statutory authorisation from Parliament to trigger Article 50 of the Treaty on European Union, commencing the process of departure from the EU; and in 2019 that the prorogation of Parliament was unlawful. It should be noted that, in both instances, the judiciary was reinforcing the power of Parliament. For such judgements to be constitutionally meaningful, Parliament had to have the desire and will to make use of the power that the courts have insisted it possess. Moreover, if Parliament was itself pursuing inappropriate courses of action, then the doctrine of parliamentary ‘sovereignty’ might be basis of a threat to constitutional standards, rather than the principle that needed to be defended. Furthermore, there are other areas of the constitution where the judiciary might not prove as useful. As part of the Article 50 judgement, for instance, the Supreme Court insisted that the ‘Sewel’ convention, meaning that the UK Parliament will not ‘normally’ pass Acts pertaining to devolved matters without the agreement of the devolved legislatures involved, was not justiciable, even though by this point it was included in an Act of Parliament.¹¹⁶

That the Supreme Court distanced itself from responsibility for Sewel, whether one agrees with this decision or not, is surely evidence that it was not firmly set upon asserting authority in political matters, nor was it determined to frustrate the UK

113 The depleted version of *Magna Carta*, comprising those few but symbolically immensely important portions of it that remain in force, can be viewed at: < <http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents> >, last accessed 2 October 2019.

114 Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (I.B. Tauris, London, 2019), pp.265-267.

115 For contrasting views of the doctrine of parliamentary sovereignty, see: Vernon Bogdanor, *The New British Constitution* (Hart, Oxford, 2009) and Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press, Cambridge, 2010).

116 *Scotland Act 2016*, s.2. Now also found in the *Wales Act 2017*, s.2.

executive in its pursuit of Brexit. But equally we should celebrate its capacity to reach conclusions that the government and its supporters have found inconvenient. The former Supreme Court Justice, Lord (Jonathan) Sumption recently told the House of Commons Public Administration and Constitutional Affairs Committee that ‘I sat in the Supreme Court for seven years and I have to say that the court includes a large number of people whose arms are very untwistable.’¹¹⁷ We should not assume that this quality on the part of our judiciary is invulnerable. Politicians, from positions within the executive and Parliament, perhaps with support from sections of the media, could seek to undermine it. The Lord Chancellor is required under the *Constitutional Reform Act 2005* to respect the rule of law;¹¹⁸ but, as we have seen, the Act gives little idea as to what this concept means.¹¹⁹ The Lord Chancellor and ministers generally are required to uphold the independence of the judiciary. As section 3 of the 2005 Act states:

‘Guarantee of continued judicial independence

The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.

...

(4) The following particular duties are imposed for the purpose of upholding that independence.

(5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.

(6) The Lord Chancellor must have regard to—
the need to defend that independence;

the need for the judiciary to have the support necessary to enable them to exercise their functions;

the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.¹²⁰

Notwithstanding these requirements, there are a variety of means by which ministers might seek to undermine or intimidate the judiciary. They might, for instance, make generalised comments or thinly disguised allusions, or criticism of judgements after a case is complete. Allies not in ministerial roles and therefore not covered by the 2005 Act, possibly in the media or in Parliament, perhaps using parliamentary privilege, could carry out such work for them. Ministers can also have an impact by default, through failure to condemn denigration from other sources. While the Constitutional Reform Act requires the Lord Chancellor to ‘have regard to... the need to defend...[judicial]...independence’¹²¹, it

117 Sumption was dealing here with a question about whether there was some kind of internal pressure among Supreme Court Justices leading to the unanimous verdict in the prorogation case; but he seemed to envisage his point as having a more general application. House of Commons Public Administration and Constitutional Affairs Select Committee, Oral Evidence, *Prorogation and Influence of the Supreme Court Judgement*, HC 2666, 8 October 2019, Q67, available at: < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/prorogation-and-the-implications-of-the-supreme-court-judgment/oral/106206.html> >, last accessed 4 November 2019.

118 See: *Constitutional Reform Act 2005*, s.1; s.17.

119 *Ibid*, s.17.

120 *Ibid*, s.3.

121 *Ibid*, 3 (6) (a).

does not specify in detail what this protective role entails.

A Way Forward

The preceding pages have shown that, if general standards of good behaviour among senior UK politicians can no longer be taken for granted, then neither can the sustenance of key constitutional principles. There is more work to be carried out in the categories we have considered, and areas we have not focused on at all, such as the position of the devolved institutions. However, given the centrality of the three aspects of system on which we have concentrated, there is no reason to suppose that more detailed work would undermine our core argument. We do not claim that the UK constitution is on the brink of unravelling. A more likely pessimistic scenario is a gradual fraying by stages. This outcome is particularly anxiety-inducing, since it would be hard to recognise and could be more readily accepted as normal. Already, a generation whose conscious experience of politics began mid-way through the present decade may regard ongoing turbulence, a lack of clear principles and flagrant challenges to the system as standard features of politics. This perception is liable to exploitation by those who wish to circumvent the rules, or change them for malign purposes. Even if, over coming months and years, the present difficulties appear to subside, it would be a mistake to assume that there was no threat. We should remember this experience, regardless of whether on this occasion it encounters even more serious problems.

It is hard to extract optimism of any kind from the recent performance of our political system, apart from our continuing gold standard constitutional monarchy. But some benefit might be derived if we can, in response to this episode and what it has

revealed, take steps to reduce reliance on a self-regulating mechanism that might too easily fall short. It may prove difficult to induce adherence to higher standards of conduct among those who do not wish to meet them or do not fully appreciate their importance. But it should be possible to formulate more fully and to promote the values and rules that underpin the system. We can also seek ways of strengthening the position of those – including within the Civil Service, Parliament and the judiciary – who have a role in upholding those norms. Their maintenance of the integrity of the system is a service carried out on behalf of the public, which as such they have a duty to perform. This refreshment of the ‘good chap’ theory might in turn promote a culture of better behaviour among holders of senior political office. But failing this it would at least provide greater protection against some of the conduct discussed in this paper.

We offer a menu of proposals, ranging from the more established to the more experimental, by which the country might approach this task after the coming General Election. All of them would need to include representatives of all parties and none, and have a strong link to Parliament, if they were to succeed. Equally, they would need to find means of engaging with the public in a constructive, considered and meaningful way. They are:

- A Royal Commission: the traditional means of addressing challenging dilemmas. It could include its membership senior politicians, other public figures and experts, and have the support of a secretariat. After taking evidence and deliberating, it could make recommendations for legislative or other measures.
- A parliamentary inquiry. Either an existing or specially convened committee could sit, taking evidence and producing one or a series

of reports. The best approach would be for it to combine members of both Houses, perhaps through the House of Commons Public Administration and Constitutional Affairs Committee and the House of Lords Select Committee on the Constitution creating a joint sub-committee.

- A Speaker's Conference or Commission. There is a genuine opportunity for the incoming holder of the post to set a conciliatory tone and seek to move on from a period of turmoil and division. He could make his first major initiative the announcement of a cross-party process designed to establish consensus around the core constitutional principles of the UK, and how best to uphold them.
- A Citizens' Convention comprising a representative sample of members of the public chosen at random. A large volume of evidence, from around the world and in the UK, now exists to suggest how such a process could operate. Participants, operating in an atmosphere of calm deliberation, would receive presentations from experts and consider a range of views, with moderated input from the wider public. After a suitable period, the Convention would make recommendations to Parliament. Were it successful, it could become a continuously functioning body.¹²² The creation of such a convention would also be a recognition that the British constitution is a shared possession as crucial to the wellbeing of society as it is to the provision of good government and to the quality of public and political life. This fourth option is the most radical. Were it

taken, it might be commissioned by one of the three other bodies proposed above, to which it could ultimately report. For it to succeed, it would be vital that it worked with the politicians whose support would be essential to the implementation of its proposals.

Whichever of these models was used or however they were combined, the following indicative list of possible subject matters would be the same:

- the executive (taking in ministers, the Cabinet and the Civil Service);
- the relationship between the executive and the monarchy;
- the relationship between the executive and Parliament;
- the internal organisation of Parliament;
- the position of the courts as upholders of the rule of law; and
- the relationship between the UK and devolved levels of governance.

In considering such issues, the process would be valuable were it to make it possible to assert in a consensual manner a principled approach to the operation of the UK constitution. But simply to seek to buttress or revive the existing convention-heavy model, this paper has suggested, might not be sufficient. For any system to function, those working within it must be willing to conduct themselves in a way that is supportive of established values, even if not legally prescribed, and to show respect for those rules that do have a legal basis, regarding them as something more than simply blockages to be managed, or tools to be deployed. In the day-to-day ecology of politics, we cannot realistically regard this

¹²² One of the present authors is currently director of a project, funded by the Joseph Rowntree Charitable Trust, the Joseph Rowntree Reform Trust and the Open Society Foundation, to design a 'Citizens' Convention on UK Democracy'. See: Interim report, Citizens' Convention on UK Democracy: *A User's Manual*, available here: < <https://www.kcl.ac.uk/political-economy/assets/uk-citizens-convention-v6-fa-lrs.pdf> >, last accessed 2 October 2019.

ideal fully to be realised at all times. But there has to be some kind of shared investment in the rules across partisan and institutional divides, whatever those rules may be.

Yet while this constitutional culture is essential, it may not be sufficient. A consensus between politicians of various alignments and a diverse group of members of the public could, if attained, form the basis for a new constitutional settlement. Plainly it would not all rest on one grand statute. Some components of it, certainly, might need firm legal expression in Acts of Parliament. Others would need incorporation into the law and custom of Parliament, as set out in the pages of *Erskine May*.¹²³ There is also likely to be a need to renew and amplify the inclusion of key conventions in an updated version of the *Cabinet Manual*.

Our purpose in preparing this paper is not to be alarmist. We have great faith in the deep wells of civility, tolerance and good sense that still irrigate British public and political life most of the time. But the system by its normal standards has experienced a genuine shock, not confined to but exemplified by the great prorogation stand-off. It needs urgent attention. We need a new equipoise between the moving parts of the British constitution on which the working of the system of government depends. It may be a source of regret for some, but certain elements of the venerable perhaps romantic 'good chap' state of mind need now to be codified in cold hard prose.

123 The 25th edition of which is available online, at: < <https://erskinemay.parliament.uk> >, last accessed 4 November 2019.

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