

*The constitution after coronavirus: a discussion paper*

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Executive summary:

- The coronavirus emergency is profound in its constitutional implications. They involve both the immediate response and the longer-term context. Coronavirus is not only a problem for any one country or region in the world, but for all of them, and its impact is more severe for each precisely because of its consequences for all.
- The following paper is a preliminary discussion of some of the issues, arranged thematically. It is intended to inform further possible work in this field, the importance of which does not require explanation.
- When considering the constitutional implications of the coronavirus episode, it is necessary to take into account that it has manifested itself against a pre-existing background of doubt about certain aspects of the UK constitution.
- Unavoidably, public authorities in the UK (as elsewhere), and in particular the UK executive, have taken on and will continue to assume enhanced authorities, expanded functions, and greater discretionary powers. It is essential that those in whom this added responsibility is vested can be relied on to exercise it in appropriate fashion.
- Coronavirus and its aftermath could lead to the Conservative government placing less priority on constitutional reform proposals that it might otherwise have pursued.
- It is notable that the UK government chose not to employ the legal ability it already possessed to issue 'Emergency Regulations' in the form of statutory instruments under Part 2 of the *Civil Contingencies Act 2004*. Instead it chose to create bespoke legislation in the form of the *Coronavirus Act 2020*.
- Advocates of the so-called 'unwritten' constitution of the UK often argue that one of its benefits is the flexibility it provides, allowing for effective and rapid responses to unexpected new circumstances. It would be difficult to claim – on that which has transpired so far – that countries with written constitutions have necessarily been slower or less successful in their responses than has the UK.
- The UK government – like its counterparts around the world – is in the process of expanding the scope of its socio-economic activity at a considerable speed and scale. It will not be possible to deploy this vastly enlarged governmental role in a way that is neutral or uncontroversial. Choices will need to be made, for instance, about where precisely to direct resources, in what quantities, and for what purposes. The systems through which such matters are ultimately settled are constitutions.

- Emergencies require central organisation, including a concentration of power within the executive. The removal of the premier through ill-health revealed the informal nature of the UK constitution, in that there was no pre-existing plan for such an eventuality (in the public domain at least), nor were ground rules made openly available subsequently. This concern was more than theoretical, since issues arose during this period that pertained very clearly to the brief of the Prime Minister.
- Another common feature of major emergencies is that normal competitive party politics tend to some extent to lessen in their intensity.
- Prior to the coronavirus pandemic, there were signs of tension between the political leadership in the UK government and permanent officials. Present difficulties, it might be hoped, could preclude any escalation of this conflict, though evidence has emerged of continued difficulties.
- A number of observers have noted an irony that a government, participants in which are associated with a denigration of experts, is now justifying its actions on the grounds that they are in line with scientific advice. It is of course correct that decision making should rest on a basis of evidence processed by those who are qualified to do so. But the firm constitutional principle is that ministers must take responsibility for decisions.
- The Civil Service, along with other public sector entities, can now expect a period of new, extensive demands. They will be taking on responsibilities they have not possessed for a number of decades.
- Just as the functions of the UK executive have expanded, so by implication will the roles of those branches of the constitution responsible for holding it to account: Parliament and the courts.
- Parliament provides the political aspect to the task of executive oversight. Traditionally, Parliament has afforded a degree of discretion to the executive in emergency circumstances. But in order to ensure meaningful accountability, the executive needs to be as cooperative and forthcoming with Parliament as is reasonably possible.
- As public authorities necessarily take on enhanced powers, it is important that the courts are able to scrutinise the legality of their actions, ensuring – for instance – that they are not arbitrary, are proportionate, and are compliant with human rights.
- An emergency of the present nature might seem to call for a degree of uniformity of action across the UK. In the context of the contemporary UK, achieving this consistency involves coordinating both central and devolved tiers of governance. The use of the COBR committee format appears to have played useful role here, enabling the incorporation of the devolved institutions into decision-making. There have been some problems involving communications, with information pertaining to England and to the whole UK becoming confused with one-another. There has also been some differentiation between the UK and devolved levels in Scotland.

- In recent years, an increasingly preeminent form of communications, the Internet, had acquired a poor reputation. A number of observers depicted it as detrimental to democracy. In circumstances of social distancing and a need for wide and rapid dissemination of information, some of the more positive aspects of the Internet have come to the fore. From a constitutional perspective, it has provided the different branches – executive, Parliament and judiciary – with opportunities to continue functioning in ways that might not otherwise have been possible.
- Pre-existing concerns about the constitutional impact of the Internet certainly had some justification. It could well be the case that enhanced reliance on this technology as a consequence of coronavirus will intensify these problems, but that in such a climate they will no longer receive the full attention they merit. Furthermore, efforts by some of the previous targets of criticism to respond to it through adopting self-regulation may generate further dilemmas. For instance, censorship – in cooperation with the government – of posted content by social media sites may to some extent address complaints about dis- and mis-information, but in the process raise concerns about freedom of expression
- Allegations about politicians distorting the truth and manipulating the media are far from new; and ultimately controlling the public narrative has always proved impossible for governments or parties in the past. However, without doubt, at the point of the onset of coronavirus, highly divisive disputes about the reliability of official information, bias in media coverage, neutrality, and the nature of truth itself were central to political debate: an unhelpful condition at any time, and particularly regrettable in an emergency.
- Both world wars produced international movements supporting the establishment of permanent bodies to achieve better coordination between states, in pursuit of goals such as security and prosperity. In recent years, in the UK as elsewhere, such systems of international rules-based governance have come under pressure of a ‘populist’ nationalist character. Perhaps coronavirus will undermine these arrangements further. But it might also create an imperative for more effective cooperation, in areas such as health and the economy. There might be a need for a greater focus on regional trade. If so, an organisation such as the EU could have an important role to play, whatever pressure it is under at present.
- We do not know how long it will be until concerns about the pandemic can safely subside. Moreover, even when they have done, the threat of a different outbreak might figure prominently; and the economic consequences of coronavirus could significantly outlast the medical. Emergency expedients might become normalised. Certainly, there will be no return to a world precisely as it was in early 2020. It is also possible that we are entering a period in which emergencies of global reach more generally – for instance, those connected to climate change – become more pronounced and regular, generating additional constitutional pressures.

### ***The constitution after coronavirus***

The coronavirus emergency is profound in its constitutional implications. They involve both the immediate response and the longer-term context. The following paper is a preliminary discussion of some of the issues, arranged thematically. It is intended to inform further possible work in this field, the importance of which does not require explanation.

### **The nature of the problem**

The coronavirus emergency is notable for the way in which it combines three features:

- a) Its intensity of impact, leading to occurrence of infection, illness and death, stringent containment measures, and a cessation of much economic activity;
- b) The global reach of the virus and its consequences;
- c) The speed with which this impact has achieved this global spread.

Therefore, coronavirus is not only a problem for any one country or region, but for all of them, and its impact is more severe for each precisely because of its consequences for all. At present we do not know for certain how long this emergency will last and what all of its consequences will be. But even if we are passing through the worst phase of the health emergency now, the consequences, already experienced and yet to come, are and will be immense. In some senses the steps taken to combat the medical emergency – and their effect in areas such as the economy and for personal freedom – are equal in significance to the virus itself and its direct impact.

When considering the implications of the coronavirus episode, it is also necessary to take into account that it has manifested itself against a pre-existing background of doubt about certain aspects of the UK constitution. Lingered uncertainty of this kind has existed in previous times. We should not assume that any system at any time is entirely static or appears wholly stable. Yet there are some at least arguable tendencies that should be considered for present purposes. As Peter Hennessy and myself have previously discussed in a previous Constitution Society pamphlet<sup>1</sup>, they involved the idea that UK constitution has traditionally relied heavily on what is known as the ‘good chap’ school. This label implies that – in the absence of a ‘written’ constitution to limit them – participants in political processes use self-restraint. They choose to act in accordance with a shared body of norms rather than exploit opportunities to achieve advancement through the circumvention of standards of proper behaviour. We argued that recent events, many of which were connected to the Brexit episode, might point to an erosion of adherence to this principle. Such a deterioration would be a problem at any time. The difficulty is magnified in a serious public emergency.

The following paper shows that – unavoidably – public authorities in the UK (as elsewhere), and in particular the UK executive, have taken on and will continue to assume enhanced authorities, expanded functions, and greater discretionary powers. It is essential that those in whom this added responsibility is vested can be relied on to exercise it in appropriate fashion. Moreover, they should behave in a way that inspires confidence on the part of others, for instance in other branches of the constitution, the media, and the among the wider public. Furthermore, they should evince a firm commitment to abiding by and accepting the authority of such constitutional safeguards and limitations that do apply to their conduct. These mechanisms, properly configured and employed, do not undermine efforts to respond to difficult circumstances. Rather, they ensure that policy is developed and pursued in a way that upholds the values of the society it is intended to protect, and is focused on dealing with the actual problems faced. Though it is anachronistic, and the model to which it refers has weaknesses, the ‘good chap’ phrase conveys a genuinely meaningful concept. Any constitution, written or unwritten, relies to a significant extent for its viability on the behaviour

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<sup>1</sup> See: < <https://consoc.org.uk/wp-content/uploads/2019/11/FINAL-Blick-Hennessy-Good-Chaps-No-More.pdf> >

of those who operate it. Their conduct will never be perfect from this point of view. But it can generally serve to support key shared principles. Resisting any urge to abandon norms becomes more critical in an emergency, if policy is to succeed and minimise the harm caused alongside the good.

### **Reordering of priorities**

A first constitutional outcome connected to coronavirus is one of possible non-events. The Brexit issue devoured political attention for a period of nearly three-and-a-half years from mid-2016, leaving matters that were not connected to it neglected. Coronavirus and its aftermath are likely to have a similar effect, presumably even more intense. Whatever plans the Conservative administration may have had, including setting up a ‘Constitution, Democracy and Rights Commission’, will not receive the same level of attention they would otherwise have done, at least for the time being. The government will also have the opportunity to discard ideas which were perhaps ill-conceived, and were likely to generate political difficulties with few tangible gains, and for which there might be a lack of genuine enthusiasm at high level anyway. Along with specific policies, the government might be well advised to modify what has been a combative underlying approach towards institutions including the permanent Civil Service and the judiciary. It seems reasonable to assume further that other pressures of constitutional significance, for instance for an independence referendum in Scotland, will lessen for a significant period of time.

To return to the EU issue, the UK government at present remains committed, publicly, to ending the post-Brexit transition period, with or without a Free Trade Agreement with the EU in place, at the end of 2020. In a sense, this position is constitutionally derived: it supposedly arises from an obligation held to be created by the 2016 referendum, and subsequently reinforced by the General Election of 2019. According to such a school of thought, it seems that the overriding popular will was not only to leave the EU, but to do so in a way that entailed a firm break from the organisation of which the UK was once a member. If it wished to do so, the government could plausibly hold that current circumstances are so grave as to temporarily override this supposed imperative and seek an extension to the transitional period. As of yet, it has chosen not to do so. A final Brexit-related point is that, if there is a major inquiry into the handling of the coronavirus response, then it would seem to be harder to mount a similar investigation into aspects of the process of departure from the UK, were such an exercise a possibility.

### **Emergency powers and the unwritten constitution**

A perennial concern surfaces in democracies in times of emergency. It involves the need to provide public authorities with sufficient capacity to respond to extraordinary circumstances without compromising basic freedoms and the principles of legal and political accountability more than is necessary. The right to vote has already been modified, for the purposes of English local elections, that were delayed for a year. The *Coronavirus Act 2020* includes provisions entailing infringement of freedom of movement, and perhaps the right to liberty of person. All these measures, however, are taken on the basis that they are necessary to protect another, even more fundamental right – to life. There are never easy answers to the questions that arise from this dilemma. Discussion turns on matters such as what powers, precisely, the executive and those acting on its behalf should take on; the nature of the oversight to which they should be subject; and how and when they should come to an end. The most important emergency provision to date in the UK with respect to the current position has been the *Coronavirus Act 2020*. The chief argument that arose during its passage through Parliament involved its duration. Initially, it was intended to last for two years; subsequently, an amendment to the Bill

required approval of its continued operation by the House of Commons on a six-monthly basis (under s. 98).

It is notable that the UK government chose not to employ the legal ability it already possessed to issue ‘Emergency Regulations’ in the form of statutory instruments under Part 2 of the *Civil Contingencies Act 2004*. The Coronavirus Act was devised to address a specific emergency while it was taking place. Conversely, the drawing up of the Civil Contingencies Act took place in a time of relative calm; and a draft bill was the subject of detailed scrutiny by a parliamentary joint committee. While it might not have been perfect, the 2004 Act included safeguards intended to avoid the abuse of emergency powers, including a requirement that they be proportionate to the circumstance they addressed, and could not amend the Human Rights Act or Part 2 of the 2004 Act itself. The heavy use of statutory instruments for important policy purposes, rather than Acts of Parliament, is rightly a matter of constitutional sensitivity. But the secondary legislation envisaged by the drafters of the Civil Contingencies Act would come under parliamentary control and be constrained by time limits to an extent that might lessen the force of any objections about the use of this form of law-making. A regulation had to be expressly approved by both Houses of Parliament within seven days if it were to remain in force; Parliament could amend or annul it at any point; and it lapsed after thirty days.

For whatever reason or reasons, the present government chose not to utilise the Civil Contingencies Act to address coronavirus. Whatever view one takes of the constitutional merits or otherwise of the *Coronavirus Act 2020*, there is a strong case for arguing that emergency legislation should take place subject to principles provided by a pre-existing structure devised in times of calm. Part 2 of the Civil Contingencies Act was intended to provide this framework. But it has never been used; and recent experience suggests it might never be. The UK therefore lacks this kind of constitutional mechanism. As is discussed further below, it may be that, in future, circumstances calling for the use of extraordinary powers become more frequent – even to the point that they cease to be extraordinary. We do not know how present difficulties will develop, how and when they will end, or what other problems might follow. Notwithstanding the existence of time-limits, special powers taken on during the present circumstance might be retained in some form on a longer lasting basis. A clear, consistent framework, delineating the general purpose, scope and limitations of emergency powers, that the 2004 Act was supposed to provide, might become increasingly necessary.

In other countries, this delineation might come from what is known as a ‘written’ constitution. This approach is not available at all in the UK. I have argued elsewhere in support of such a text being introduced here. We should be cautious about overclaiming for the advantages it might bring. But it is important to ask how far the UK benefits from the lack of a written constitution in the area of emergency powers. Advocates of the UK system often argue that one of its benefits is the flexibility it provides, allowing for effective and rapid responses to unexpected new circumstances. According to this school of thought, written constitutions – by contrast – are more rigid, and can be a source of weakness in emergencies. Recent experience provides an unusual opportunity to compare responses to a similar challenge across a number of different states. It would be difficult to claim – on that which has transpired so far – that countries with written constitutions have necessarily been slower or less successful in their responses than has the UK. The main differences have involved matters such as political culture, robustness of public services, leadership, and perhaps general contingencies. Furthermore, the pronounced informality of aspects of the UK constitution allowed the development of a circumstance in which it was unclear who was exercising the powers of the Prime Minister and how they were doing so. A vacuum at the centre was not ideal at such a

time, from the point of view of both of coherent policy-making and democratic accountability, calling into question romantic notions about ‘muddling through’. (We return to the subject of the temporary absence of the premier below.)

Much of the constitutional debate in relation to the coronavirus response has involved the powers taken on by government, their exceptional scale, and the checks to which they should be subject. But there is a parallel issue that merits consideration. It involves the capacity of public agencies in the UK, such as the National Health Service, law enforcement bodies, and the armed forces. Debate about the accrual of authority takes place on the implicit assumption that it can and will be effectively deployed. But what if the different bodies responsible for exercising this power lack the resources – for instance in personnel and equipment – to do so? This question has a constitutional aspect. A constitution is in part a vehicle for ensuring that decisions are made and put into force. If it is not possible to implement policy, then the constitution loses its meaning. It may be that, in the wake of the coronavirus emergency, there is a need substantially to expand the capacity of governmental institutions, in order to enable the proper fulfillment of the outcomes of constitutional processes. Comparisons might be drawn with other states – perhaps elsewhere in Europe or beyond – that have more extensive capability, and are treated as models to move towards. Such a shift might be deemed necessary to deal with the consequences of the emergency, and to safeguard against future threats. It would have implications in areas such as the relative size of the public and private sectors, levels of taxation, and the means of securing accountability, some of which are discussed further below.

### **Expansion of the socio-economic role of government**

The UK government – like its counterparts around the world – is in the process of expanding the scope of its activity at a considerable speed and scale. Perhaps it was already implicitly a guarantor across the areas listed below. Now it is – or shortly will be - fulfilling this role expressly and extensively across fields including the following:

- Public health;
- Public welfare – for instance, ensuring supplies of food and their distribution;
- The livelihood of those who have suffered significant loss of income – presumably a large portion of the population;
- Protection of those who are already vulnerable and are now more endangered;
- The solvency of an extensive range of public and private sector bodies; and
- Possibly, the viability of the financial system.

How exactly all these roles will be exercised, the complications that will arise, and ways in which they might expand further, is unclear. Some of them will need to be carried out in conjunction with other states, and possibly at global level. How, when and to what extent the government will be able to scale back its interventions are further subjects of uncertainty. It might be that the world is passing through a transition that can never fully be reversed. Circumstances might force fundamental adjustments to the way in which we perceive concepts previously taken for granted such as markets, services, debt, trade and money itself, for individuals, corporations, states, and international organisations.

These convulsions will have many consequences, including of a constitutional nature. It will not be possible to deploy this vastly expanded governmental role in a way that is neutral or uncontroversial. Choices will need to be made, for instance, about where precisely to direct resources, in what quantities, and for what purposes. The particular decisions taken will unavoidably have social outcomes. The values of policy makers will shape their decisions, consciously or otherwise. They will also be subject to outside pressures that are themselves conditioned by various belief systems. For instance, should government use its enhanced economic role to promote a fairer society? It is likely that politicians across the spectrum will argue that it should, but will disagree about what achieving this goal means in practice. There will also be discussion about what amounts to an abuse of governmental authority, and how to prevent it. Previous emergencies have occasioned these kinds of discussions: for instance, those surrounding the Beveridge report of 1942, and the accusation that Churchill made during the 1945 General Election campaign about the supposedly authoritarian tendencies inherent in the Labour programme.

The systems through which such disputes are ultimately settled are constitutions. Whether written or unwritten, they deal with issues such as the acquisition of political legitimacy and legal authority, how different public authorities reach and implement decisions, how they relate to each-other; and their relationship with the public they serve. The constitution provides the framework through which policy is determined and implemented. It is also the structure through which executive activity is held to account, from perspectives such as good governance, democracy, the rule of law and human rights. It could be that existing mechanisms will struggle with these enlarged tasks, and require augmentation and alteration.

### **Leadership and competitive politics**

Emergencies require central organisation. In the First World War, for instance, when David Lloyd George became Prime Minister late in 1916, he established a slimmed down War Cabinet and introduced the minuting of Cabinet meetings to achieve better coordination. He also established a team of advisers supporting him across specified policy areas. Winston Churchill used similar methods during his 1940-1945 premiership. Before the present crisis, the Boris Johnson government was concentrated in nature, with a significant degree of authority vested in the prime-ministerial team (though the Prime Minister himself was less focused on detail). The removal of a premier through ill-health would be significant at any time; but in the context of an already centralised government, in a major emergency, it was of augmented significance. What followed revealed the informal nature of the UK constitution, in that there was no pre-existing plan for such an eventuality (in the public domain at least), nor were ground rules made openly available subsequently. This concern was more than theoretical, since matters arose that pertained very clearly to the brief of the Prime Minister. It seems that tensions developed within Cabinet over the extent and duration of containment measures. Resolving such disputes is a key function of the Prime Minister, the absence of whom was therefore a problem. There was also evidence of difficulties involving participation in an official expert advisory group and evidence given by a senior permanent official to a parliamentary committee. Again these were matters that could well require the attention of a Prime Minister, were one available.

A further sensitive point that arose concerned the staff of the Prime Minister. Under Johnson, his aides – and one adviser in particular – appear to have had unusual levels of political authority vested in them. All No.10 staff answer to and derive their status from the premier, who ultimately is accountable for them. If the Prime Minister is incapacitated, an important

question arises. Should these officials persist in operating in the way they did beforehand? Do they, for instance, continue communicating to ministers and officials across government what the views of No.10 are, with the expectation that they be acted upon, even though the person from whom they derive the authority to do so is unavailable, and is unable to authorise their actions at the time, or meaningfully to account for them subsequently? What happens – as appears to have been the case – if one of those aides becomes involved in heightened public controversy relating to their role during the period of prime-ministerial absence (though the adviser in question seems to have been absent for some of this period)? I do not claim that there are easy ways of dealing with these dilemmas. The absence of a premier, moreover, is unlikely to become a frequent occurrence. Nonetheless it was a constitutionally important episode that merits attention. It might become significant to any public inquiries into the coronavirus response that take place, and is therefore important from the point of view of democratic accountability. It is also relevant more generally to an understanding of the nature of the UK constitution, and to how the UK system responds to emergencies, both now and in the future.

While an absent Prime Minister is a problem, so too is an excess of intervention. Over coming months, there will be a need for decisive leadership from the centre. Though necessary at such times, it can create tension within the constitutional system. It is a longstanding principle (the contemporary viability of which, admittedly, is sometimes questioned) that Cabinet takes major decisions collectively, not under instructions from the Prime Minister, who has relatively few firm powers; while statutory authority and money tends to be vested in ministers, who are individually accountable to Parliament for matters within their portfolios. Reconciling this principle with the demands of the day, in the context of parliamentary accountability, will be an ongoing challenge.

Another common feature of major emergencies is that normal competitive party politics tend to some extent to lessen in their intensity. This is a constitutional matter in that it relates to the ability of the system to adapt and respond appropriately to extraordinary circumstances. Partisan interests never entirely disappear but can be subdued. Politicians of different persuasions seek to put aside some of their differences (and to be seen to do so) to enable a focus on dealing with the transcendent problem of the day. The postponement of English local elections fits within this pattern. The move was based on practical public health considerations, but was suggestive of consensus in that it meant that a scheduled partisan contest did not occur; and because there was cross-party support for this measure. Cooperation can take the form of agreement to specific emergency measures, such as this cancellation of elections. In the past – as in both world wars – it has also extended as far as the formation of multiparty coalitions to help achieve and sustain a political and social consensus for the drastic measures and sacrifices that were required. In this sense, acceptance of centralised leadership and an absence of dissent is balanced by the inclusion of diverse representation at the highest level of decision-making. So far, the idea of a coalition has not come seriously onto the agenda during the coronavirus emergency. It now looks unlikely to do so, though no one can fully predict the exact form the emergency may take over coming months.

### **The Civil Service**

Prior to the coronavirus pandemic, there were signs of tension between the political leadership in the UK government and permanent officials. This tendency was constitutionally significant because it pertained to a relationship that is fundamental to the working of the UK executive and its relationship with Parliament. Ministers, on the one hand, are supposed to take into account the advice of career civil servants and respect their impartiality. Those officials, on the other hand, are required to provide honest advice to and ultimately implement the decisions of

ministers who hold office at the present time, while retaining the ability to provide the same type of support to their successors in future. Open conflict between these two groups is therefore a constitutional problem, since it compromises the confidentiality and trust that are essential to this arrangement.

With hindsight it might be seen as regrettable that a department that would have a lead role in responding to the emergency lost its permanent secretary a matter of weeks before the scale of the challenge became apparent. Present difficulties, it might be hoped, could preclude any escalation of this conflict, calculated or otherwise, or any attempted overhaul of Whitehall aimed at correcting supposed unresponsiveness or lack of necessary expertise. The government is perhaps best advised to work largely with the Civil Service it has – though there have been some traces of briefing from the political leadership of the government against permanent officials for their supposed shortcomings during the emergency. There has also been evidence of a difference between ministers and a senior official over an account given of procurement policy, and perhaps of the former applying pressure to the latter in this regard.

A number of observers have noted an irony that a government, participants in which are associated with a denigration of experts, has now begun habitually to justify its actions on the grounds that they are in line with scientific advice. It is of course correct that decision making should rest on a basis of evidence processed by those who are qualified to do so. But the firm constitutional principle is that ministers must take responsibility for decisions.<sup>2</sup> Government scientific officers cannot. To recognise this point is not the same as the contemptuous dismissal of expertise. Science does not necessarily point directly and simply to a single possible policy approach. There might be different sources and kinds of evidence; and varied philosophical approaches towards it. Definitions of what is an appropriate form of science and of what is a genuine expert can diverge. Different practitioners might be at variance with each-other on certain issues. Such disagreement may take place within government, or between government and experts on the outside. The manner and form in which advice reaches ministers can influence the outcome. The way in which the scientific evidence and conclusions are processed and transmitted within the executive can shape the way they are received and the impact they have. People and the fallibilities they bring with them are involved. So too are politics, both personal and partisan. There may be a need to balance scientific recommendations with other considerations – for instance, human rights or economic imperatives. Far from neutralising controversy, scientific advisers can become a source of it, as was Lord Cherwell (Frederick Lindemann), physicist and aide to Churchill. Ministers are responsible for treating scientific advice with the utmost seriousness as part of their deliberations, and then reaching conclusions that must be their own, and which they can defend as such. A claim that a decision or overall policy is justified simply on the grounds that it rests in scientific advice is not a satisfactory way to close a debate. There is a danger that, rather than eliminating potential controversy, the over-deployment of claims to be following expert advice could contaminate the concept of expertise with that very controversy. At present, reflecting the tension that can develop, the membership and participation in meetings of the Scientific Advisory Group for Emergencies (SAGE) has become a focus of public interest.

The Civil Service, along with other public sector entities, can now expect a period of new, extensive demands. After a long period in which the prospect of leaving the EU was a predominant concern, it now faces a further distorting and disruptive challenge (that will interact with this pre-existing issue). The pressure of responding to the emergency is great,

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<sup>2</sup> Though for discussion of the Accounting Officer principle see below.

aggravated by the practical difficulties associated with social distancing that have afflicted most sectors in the UK. A more fundamental concern relates to the expansion in the role of government discussed above. The Civil Service will be taking on responsibilities it has not possessed for a number of decades. Staff numbers are – historically speaking – relatively low. It could prove necessary for Whitehall to recruit more personnel with a wider range of skills. This expansion might well prove lasting.

### **Executive accountability: parliamentary and judicial**

Just as the functions of the UK executive have grown, so by implication will the roles of those branches of the constitution responsible for holding it to account: Parliament and the courts. Potential for tension is inherent in these functions, since they involve one institution potentially restricting the actions of another. In recent years, controversy about what limitations it is proper to place upon the executive acquired a special and fraught salience. Following the ‘leave’ vote produced by the European Union referendum of June 2016, the administrations of both Theresa May and then Boris Johnson presented themselves as custodians of an irresistible obligation to exit the EU. At times they suggested that other organs of governance – including Parliament and the courts, as well as devolved institutions – had little or no significant role to play in interpreting and implementing the referendum result. Furthermore, they held, Parliament, though in theory ‘sovereign’, should not obstruct government policy. Such claims received firm support from sections of the media. Though they were far from universally accepted or established interpretations of the UK constitution, those who advocated them had a tendency to present them as self-evident, and to depict those who questioned them as opposed to democracy and the will of the people. The aggressive pursuit of these claims was connected to the erosion of the so-called ‘good chap’ principle discussed above. It might be tempting for the government and others to present the needs of the emergency or the authority of scientific advice (however defined) as possessing a similar force to that supposedly attached to the referendum outcome. Indeed, the case for doing so would have more precedent to support it than did the arguments about the supposed necessity of Brexit. But claims about the need for executive discretion must always have their limits. If overplayed, particularly over a prolonged period of time, constitutionally unsatisfactory outcomes will develop.

Parliament provides the political aspect to the task of executive oversight. Government, which rests on the confidence of the House of Commons, is drawn from and accountable to Parliament. Traditionally, Parliament has afforded a degree of discretion to the executive in emergency circumstances, perhaps most notably by providing it with special legal authorities that allow it to act with greater flexibility than would otherwise be the case, and also by exercising critical scrutiny in a more constructive and less combative manner than is usual. But Parliament nonetheless retains responsibility for monitoring and evaluating policy and implementation on behalf of the public; and the executive needs to be as cooperative and forthcoming as is reasonably possible. The specific characteristics of the coronavirus episode create particular difficulties in this regard. Social distancing has made physical meetings of parliamentarians difficult (and potentially senior ministers can be, for health reasons, unavailable for scrutiny). Technological means of overcoming such challenges, and their implications, are discussed below. If a healthy consensus over both the way of handling the emergency, and the sharing of respective constitutional roles, is not attained, then tensions could develop. A recent episode in which a senior official appears possibly to have been subjected to pressure to provide Parliament with a version of events with which he was not wholly comfortable creates cause for concern about how far the executive is committed to facilitating meaningful accountability.

Beyond the emergency, as discussed above, it seems likely that government will take on, for an indefinite period, an expanded socio-economic role; and that political disagreements will – unavoidably and entirely properly – develop over questions such as how and to what ends it should exercise its new functions. Parliament is the principal constitutional organ for enabling an informed public debate in these areas. Carrying out this task will be demanding, in various ways. If government is doing more, there will be more to scrutinise. For instance, parliamentary financial auditing – carried out by the Committee of Public Accounts, Comptroller and Auditor General (C&AG) and National Audit Office (NAO) – might need to broaden in its scope, and perhaps methodology. How will it assess, for instance, the attainment of value for money in the immense interventions currently underway?

The Committee of Public Accounts, however, is in a stronger position than other parliamentary committees in two senses. First, it has far more substantial support in carrying out its tasks from the aforementioned C&AG and NAO. Second, it is able to hold Whitehall Accounting Officers (permanent secretaries or their equivalents) personally responsible for the use made of public money within their departments or other management units. Accounting Officers can, in turn, raise concerns internally about planned expenditure and ultimately require ministers to issue them with an instruction to proceed, formally placing their reservation on the record. These principles do not apply elsewhere in the Civil Service, and broadly for good reason, because of the nature of the relationship between officials and ministers set out above. Any advice civil servants offer, including criticisms of particular options, should generally remain confidential. The so-called ‘Osmotherly Rules’ (never formally agreed by Parliament) prohibit civil servants appearing before select committees from answering questions on their own account, and require them to provide their evidence under ministerial instructions. The rules are intended to prevent them from being drawn into commenting on the merits of policy options other than those adopted by the government, and from giving their own opinions on matters of controversy. It is ministers, not civil servants, who answer to Parliament.

These principles might present a particular problem in circumstances where ministers rely heavily on the claim that particular policies were founded in expert advice. As noted above, it may become difficult to diffuse all potential controversy by this response. Parliament might want to look behind such assertions and consider the nature of the advice given, by whom, when, in what manner, and so on. At this point, committees might find themselves confined by existing constitutional principles. It might seem inapt that proper consideration of matters of such grave importance as the coronavirus response should be precluded in this way. If the government is insistent upon attributing decisions to scientific advice, it might become appropriate to consider an adaptation of the Accounting Officer principle (as has been proposed in other areas). Under such a model scientific officers (perhaps individually, or as a group) could be required to sign off on policies justified in this way as being in accordance with scientific evidence and analysis. They could be obliged to account personally for decisions made; and as a corollary, might be able to convey reservations and require an express instruction if a minister insisted upon proceeding notwithstanding their concerns. If – as is entirely likely – scientists were reluctant to take on such a role, then there might be a need for a reappraisal of the way in which ministers account for decision-making with a strong scientific component, and perhaps the agreement of new ground-rules between the executive and Parliament in this regard.

A further, related, consideration that the present episode gives rise to is of a technological nature. Increasingly, high-level decision making in the public sector (including over the coronavirus response) is based on analysis of vast quantities of information or ‘big data’. It is

carried out by computer systems that produce policy models on a basis of patterns identified in the data. This process – sometimes known as predictive analytics – involves algorithms, or sets of instructions, that can in turn write new algorithms in the light of outcomes. From a constitutional perspective, decision-making based on so-called ‘machine learning’ presents accountability problems. It may be hard for a human user to understand and articulate why the system has produced a particular policy recommendation. Its purpose is to establish connections between trends, not to explain why something might happen. Yet in the same way that reference to expert advice cannot always be expected to dampen criticism surrounding policy, claims that computer modelling pointed in a certain direction surely have their political limits. Policy, however formed, can potentially become a matter of controversy, in turn leading to attempts to secure political accountability, for which Parliament is the principle vehicle. Ministers may be called on to answer for a policy, and to do more than simply attribute it to a computer system. A wholly neutral model – whether operated by humans or computers – is not possible, since its initial design reflects the perspectives of those who instigated it. Moreover, it may perform in unanticipated ways, with some groups feeling they have received unfair treatment as a consequence.

As such technological approaches become more pervasive, therefore, accountability practices may need to change. For instance, Parliament could seek to utilise computer systems of its own to assess executive decision-making processes that are themselves founded in machine learning. Moreover, the adaptation of the Accounting Officer principle suggested above, could be extended to such systems, with nominated individual officials required to attest to their being suitable to the attainment of defined policy goals, and to operating in accordance with established objectives and norms. The coronavirus episode may not fully expose these issues, but data modelling seems to have played a part in policies that have not been entirely free from controversy, and such tendencies could well intensify in future.

Legal oversight of the executive – a critical component of the rule of law – falls to the judiciary. As previously discussed, the present government was elected on a manifesto that suggested an intention to restrict the scope of the courts to review the actions of the government, seemingly on the grounds that they had improperly exercised their power during the Brexit episode. Senior ministers in the post-referendum period had attracted criticism for comments they made about judicial proceedings, or for failure to be sufficiently robust in their defence of the independence of judges when under pressure from other sources. The coronavirus emergency therefore commenced at a time of uncertainty regarding the future constitutional role of the judiciary, arguably deliberately engineered by the government of the day. Yet, as public authorities necessarily take on enhanced powers, it is important that the courts are able to scrutinise the legality of their actions, ensuring – for instance – that they are not arbitrary, are proportionate, and are compliant with human rights. Litigation of some kind arising from this episode and its aftermath is inevitable. There is no reason to suppose that the judiciary will set out to sabotage a proper and legal response to the undoubted emergency that exists. The way in which ministers respond to any cases that may develop will be a test of their willingness to approach the coronavirus response in a fashion that is constitutionally constructive, rather than deliberately divisive.

### **The Territorial Constitution**

As already noted, an emergency seems to call for concerted common action. To achieve this type of response in the context of contemporary UK entails coordination between the central and devolved tiers of government (along with local authorities). Health, for instance, is a devolved responsibility; as is education. Major macro-economic policy-making, foreign

affairs, and defence and security, remain reserved. There has been both success and some tension in this regard. The adoption of the COBR format appears to have played a useful role, enabling the incorporation of the devolved administrations into policy-making in a way that might not have been possible with a more regular Cabinet committee. There seems to have been effective working between devolved and UK-level officials. One problem that has emerged has been confusion of messaging. This difficulty arises partly from an underlying issue. The UK government is also, in areas such as health, the government of England. Statements its spokespeople make that only apply to England might not be clearly represented as such, or may not be reported by the media with sufficient distinctions made.

There has also been some tussling between the UK and Scottish devolved levels, and some confusion over the measures in place. The clearest example of conflicting guidance is that provided to the construction sector. The Scottish Government guidance in early April was (and remains) that all non-essential construction work should stop, irrespective of the specific circumstances on site.<sup>3</sup> The UK government position at the same time was that construction work may continue provided guidelines on matters such as social distancing can be observed. The position at the time of writing is that in Scotland virtually all construction sites are closed. It is evident that Scottish firms believe they must follow the guidance of the Scottish Government, even if it seemingly lacks the force of law and is in conflict with guidelines from the UK government. In the rest of the UK, some – but not all – construction sites and firms ceased activity around late March and early April. Recently, some have reopened. Major government-commissioned schemes like HS2 are working as normal.

This kind of disparity, and possible motives contributing to it, reminds us that the UK has a degree of instability contained within it. The government of one of its components has the ultimate objective of exiting the UK altogether. The SNP government may be pursuing a deliberate differentiation tactic, as part of a wider strategy of working towards independence. On the other hand, as noted before, the coronavirus emergency may have removed the possibility of a referendum on this subject from the agenda for a significant period of time.

Another longstanding constitutional issue involves the role of local government, both in England and the whole of the UK. Government within the UK and its constituent components is highly centralised relative to other democracies worldwide. The lack of autonomy and access to resources from which local government has suffered has, in some accounts, made local level responses in areas such as testing and the tracing of contacts difficult to achieve. A counter argument here might be that the centralised nature of the NHS, particularly in England, is a strength from the point of view of procurement and planning.

### **Communications**

Communications – that is the processes by and nature in which information is disseminated and received – has a number of constitutional dimensions to it. It pertains to the ability of institutions such as the executive, the courts and Parliament – to function; and involves the principles according to which those bodies interact with the outside world. Communications also concerns the way in which political debate takes place, and the vital but conceptually complex right of freedom of expression.

The transmission of information is a vital activity during an emergency. Those responsible for governing must be able to interact swiftly with one-another; and the public must be kept

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<sup>3</sup> See: < <https://www.gov.scot/news/guidance-for-construction-industry/> >

informed on essentials. Communication is needed for the making and implementation of policy; for the scrutiny of those decisions and the way they are put into practice; and for the maintenance of public confidence in policies and those who are responsible for them. In recent years, an increasingly preeminent form of communication, the Internet, had acquired a poor reputation. A number of observers depicted it as detrimental to democracy. Their criticisms included that it was a source of misleading information, and that it was used for the inappropriate acquisition and deployment of personal data, for the psychological manipulation of voters, and for the augmentation of public divisions for malign ends.

In circumstances of social distancing and the need for rapid and wide dissemination of information, some of the more positive aspects of the Internet have come to the fore. This tendency has applied across the whole of society. From a constitutional perspective, it has provided the different branches – executive, Parliament and judiciary – with opportunities to continue functioning in ways that might not otherwise have been available. The significance of Cabinet meetings, and parliamentary and court procedures taking place virtually are immense, if difficult fully to assess at this moment. Since its mediaeval origins, for instance, the meeting of Parliament has involved people gathering together in a given physical location: the exact location of which was mobile up to the mid-sixteenth century, and thereafter usually on the site of the Palace of Westminster. Now it has become possible to participate in parliamentary proceedings without being present in body. Whatever the full consequences may be, at the very least, the coronavirus episode will have accelerated the development of such techniques and created important precedents that may be followed in future, even outside of emergencies. Changes in practice are always likely to have unforeseen consequences for power dynamics and outcomes.

Pre-existing concerns about the constitutional impact of the Internet certainly had some justification. It could well be the case that enhanced reliance on this technology as a consequence of coronavirus will intensify these problems, but that in such a climate they will no longer receive the full attention they merit. Furthermore, efforts by some of the previous targets of criticism to respond to it through adopting self-regulation may generate further dilemmas. For instance, censorship of posted content by social media sites may to some extent address complaints about dis- and mis-information, but in the process raise concerns about freedom of expression, given the prominence of these applications as channels for public discourse. For instance, the government working with social media sites to agree on posts to remove may be a necessity at present. But it is not a pleasant development to witness, and should surely have no regular place in a democracy.

The controversy surrounding the democratic role of the Internet connects to a central theme of this paper: what the coronavirus emergency has revealed about recent tendencies in the UK constitution. Senior figures in the present government, including the Prime Minister, have been subject to criticism for their supposedly misleading use of information, for instance in relation to the financial benefits that might accrue as a consequence of departure from the EU. During the 2019 General Election campaign, the Conservative Party generated controversy through such activities as promoting a counterfeit Labour manifesto online (Labour and the Liberal Democrats also engaged in questionable practices at this time). The Conservative Party for its part has objected to what it depicts as unfair treatment by public service broadcasters including the BBC. Before the pandemic, it seemed that an effort to subject the Corporation to political pressure might be a prominent part of the programme of the Conservative government.

Allegations about politicians distorting the truth and manipulating the media are far from new; and ultimately controlling the public narrative has always proved impossible for governments and parties in the past. However, without doubt, at the point of the onset of coronavirus, highly divisive disputes about the reliability of official information, bias in media coverage, neutrality, and the nature of truth itself were central to political debate. It is also fair to say that politicians – including some within the present government – had to some extent engineered such disagreements for their own purposes, or provoked them through their actions. At a time of emergency, the value of trusted sources of neutral information becomes apparent, as do the dangers of compromising them either through deception or exaggerated questioning of integrity.

### **Conclusion**

The preceding pages have discussed what the coronavirus emergency has revealed about pre-existing tendencies in the UK constitution, and the possible impact it might have. In concluding, it may be worth speculating further about possible future developments, again subject to recognition of the uncertainties at play. We do not know how long it will be until concerns about the pandemic can safely subside; and the economic consequences of coronavirus could significantly outlast the medical. Moreover, even when immediate pressures have subsided, the threat of a different outbreak may figure prominently. Emergency expedients could become normalised. Certainly, there will be no return to a world precisely as it was in early 2020. It is also possible that we are entering a period in which emergencies of global reach more generally – for instance, those connected to climate change – become more pronounced and regular, generating additional constitutional pressures.

Historical analogies might be useful in this instance. Emergencies have had lasting impact upon the functioning of UK politics. The two world wars provide a range of examples. The First World War prompted a reconfiguration of the party-political system, the introduction of votes for (some) women in parliamentary elections and their admission into Parliament; and – as mentioned above – changes in the way that Cabinet government and the office of Prime Minister functioned. The Second World War contributed to a lasting expansion in the socio-economic role of government and the erosion of local authorities. There were many other changes.

Both world wars also stimulated international movements to establish permanent bodies for achieving better coordination between states, to pursue goals such as security and prosperity. In recent years, in the UK as elsewhere, such systems of international rules-based governance have come under pressure of a ‘populist’ nationalist character. Perhaps coronavirus will undermine these arrangements further. But it might also create an imperative for more effective cooperation in areas such as health and the economy. It is possible that there will be a need for more restriction and regulation of international travel and trade, but that perversely it will require more cooperation to minimise the downsides. Autarky is not an option, but there may be a need for a greater focus on regional trade. If so, an organisation such as the EU may have an important role to play, whatever pressure it is under at present. Conceivably, events will force the UK back towards a closer relationship with it. An important component of advocacy of leaving the EU (whether well-conceived or otherwise) was the idea that it would be a means of enabling the UK to trade more extensively with faster growing economies elsewhere in the world. Whether these markets will be as dynamic or as open in future remains to be seen. Management of global debt may require a revisiting of ideas initially proposed by John Maynard Keynes for a genuine world bank able to issue a global reserve currency, but diluted in the actual Bretton Woods system. Such impetuses and initiatives, aside from the exact form

they take, are likely to have constitutional repercussions. They can involve the way in which the UK governs its internal affairs, and makes decisions about how to interact with the outside. This consideration of past disruption, though not identical to the present predicament, reminds us of the impact that shocks can have for constitutional development and why it is important to give close consideration to them.

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