REPORT

Constitutional Performance: An End of Parliament Review

A Summary Report from the United Kingdom Constitution Monitoring Group

THE CONSTITUTION SOCIETY

Editor: Professor Andrew Blick

Prof. Andrew Blick, Director of the Constitution Society, which supports this initiative, is Professor of Politics and Contemporary History and Head of Department of Political Economy, King's College London.

Researcher: Dr. Dexter Govan

Dr. Dexter Govan is Director of Research of the Constitution Society. He holds a doctorate in History from the University of Edinburgh.

United Kingdom Constitution Monitoring Group

The United Kingdom Constitution Monitoring Group (UKCMG) comprises experts and practitioners covering a range of areas of the UK constitution. Its principal purpose is to assess developments – actual and anticipated – in the UK constitution. To form a basis for its work, in the absence of a codified constitution for the UK, the UKCMG has identified a set of 20 general and desirable guiding principles that express what we believe to be the core values underpinning the proper operation of the UK system of governance. Edmund Burke once said that "to make us love our country, our country ought to be lovely". It is with such an observation in mind that we hope to encourage adherence to our principles.

In this report we review events and tendencies since the foundation of this Group in 2020. We assess them against our 20 principles, drawing attention to any areas of concern. This publication is intended to be read alongside the Group's five previous publications, parts of a twice-annual series to which we will return in July of 2024. The UKCMG is impartial and has no party affiliation.

Members of the group participate in a personal capacity, and not as representatives of any other organisations or institutions with which they are associated.

The members are:

Professor Linda Colley
Professor Mark Elliott
Professor Katy Hayward
Professor Michael Kenny
Professor Aileen McHarg
Sir Richard Mottram
Professor Petra Schleiter
Sir Paul Silk
Lord Thomas of Cwmgiedd

Constitutional Performance: An End of Parliament Review

Executive Summary

The United Kingdom Constitution Monitoring Group (UKCMG), established in 2020, is made up of members with practical experience and academic knowledge of the UK constitution. **Our formation was driven in part by concern about declining adherence to constitutional standards and principles in the UK. Those concerns have been more than amply justified.**

Our initial unease developed against a backdrop of international tendencies such as 'populism' and 'democratic backsliding'. Ideas, movements and politicians that challenged established norms, sometimes overtly, seemed to be in the ascendant, and to require close scrutiny. Often they made various aspects of constitutions their target, undermining institutions, compromising rights, and violating standards. These problems have afflicted a wide variety of states, including those previously regarded as less vulnerable to them, such as the US – and the UK.

With these patterns in mind, since 2021 we have produced five biannual reports on constitutional developments in the UK. We assess trends and occurrences against a set of **twenty criteria**, taken largely from official accounts of standards, rules and procedures produced by entities such as the UK government. Our focus has been on whether, when these principles are taken into account, unfolding events or initiatives should give us any cause for concern.

Unfortunately, we have consistently found much reason for apprehension, particularly involving the UK executive and its intersection with other parts of the political system. Some of the most critical and controversial matters in UK politics of the last four years (and indeed since 2016) have involved the constitution. This position is not healthy. **A system that is constantly in question cannot function properly.**

In this shorter paper, we provide an overview of some of the most serious areas of difficulty we have identified over our previous five reports, and – as it draws to a close – the 2019 Parliament as a whole. In doing so we present key constitutional challenges that will face the UK, and in particular whoever forms the next UK government, after the General Election that must take place no later than January 2025. In previous reports we have given extensive attention to territorial and devolved issues in their own right. Since it is a UK-wide political contest that has provided the motivation for this exercise, our focus in this publication is principally upon UK-level institutions and developments, as well as their relationship with other tiers.

It is easy for constitutional issues to become lost in an election campaign and its aftermath. But given how prominent they have been in recent years, we urge that they receive due attention, and that consideration be given to how problems that have arisen might best be addressed. The matters we highlight fall into five categories: general constitutional principles; standards; executive-Parliament relations; the territorial constitution; and the rule of law and rights. In each case, we provide a description of the subject, and offer brief conclusions and recommendations.

Constitutional Principles

Important qualities for an effective constitution include that **the rules and principles making it up should be clear, should be in some way enforceable, and should as far as possible command consensus. Changes to the constitution should be considered and inclusive.**

The present Parliament has seen doubts appear about some central elements of the system. **The relationship between the confidence of the House of Commons and the holder of the post of Prime Minister became ambiguous**, in particular when Liz Truss became premier in September 2022. She did so on a basis of a final vote by the mass membership of the Conservative Party while having a less convincing level of support among Conservative MPs.

Confusion emerged about the status of the doctrine of collective responsibility, with various high-level ministers making statements that challenged or undermined the existing policies of the government, for instance during the Conservative Party conference of October 2022; and by Suella Braverman during her second spell as Home Secretary, which ended with her removal from Cabinet in November 2023.

Another constitutional arrangement that has come under pressure is the relationship between ministers and top civil servants. Officials have the duty to give objective and impartial advice to ministers and, in return for speaking 'truth to power', are entitled to be treated by ministers with respect and consideration. There have instead been multiple abrupt departures of high-ranking civil servants. For example, Mark Sedwill was effectively forced out of his post as Cabinet Secretary under Boris Johnson in mid 2020; while Tom Scholar was removed as Permanent Secretary to the Treasury when Truss took office in 2022. The relative strength of the Cabinet Secretary/Head of the Civil Service, who has in practice acted as an upholder of constitutional principles within government, appears in parallel to have declined.

In the UK system, adherence to constitutional standards rests to a significant extent upon a willingness on the part of senior figures to abide by and promote rules that lack firm legal status. Some are found in non-statutory documents such as the UK *Ministerial Code*; others have an existence that is less formal still. **During the 2019 Parliament, we observed multiple instances of the problems that can develop if ministers (and perhaps officials also) lack a commitment to self-regulation. This tendency is a particular problem if the Prime Minister of the day fails to take standards seriously**, either for themselves or the ministerial colleagues whose good behaviour is supposed to be an interest of theirs.

The premiership of Boris Johnson illustrated this point well. His behaviour with regard to lockdown parties and his obstruction of subsequent attempts to investigate them; and his tendency to retain or even promote ministerial colleagues following questionable conduct on their part undermined the integrity of the system.

In the present Parliament, a number of measures of constitutional significance were embarked upon or actually implemented despite their extremely contentious nature. They included the *Elections Act 2022*, which controversially introduced voter ID to Great Britain and expanded ministerial powers relative to the Electoral Commission; and in 2023-2024 the *Safety of Rwanda (Asylum and Immigration) Bill*, which contains far-reaching measures for the disapplication of human rights protections. These measures caused unease on the government side as well as among the opposition and beyond Parliament; but were nonetheless taken forward.

Recommendation

The constitution is changing in ways that lack wide support, and are difficult to define with precision.

Principles and rules are difficult to enforce. A UK government might helpfully bring forward a new edition of the Cabinet Manual in draft , using this as a basis for a wider, inclusive discussion about the constitution, and possibly a formal approval mechanism of some kind.

This debate might engage with ways of establishing greater levels of consensus over appropriate ways of operating the system; whether changes to it are necessary; and how to enforce rules better. It might consider whether issues involving, for instance, collective Cabinet responsibility and the status of the Civil Service, are indicative of broader underlying problems within the UK executive. Discussion could consider, moreover, what type of processes might best be followed in relation to constitutional change.

Standards

Repeatedly, the conduct of UK-level ministers has fallen short of expected levels as set out in documents including the Nolan *Seven Principles of Public Life* and the *Ministerial Code*. Objectionable activities have included making misleading public statements; bullying behaviour; the questioning of the integrity of groups such as civil servants and legal professionals; and even criminality. For instance, Dominic Raab stepped down as Deputy Prime Minister in April 2023 after an investigation found he had behaved in ways that met a defined threshold for bullying. His resignation letter sought to cast doubt on the inquiry into his conduct; and the behaviour of officials.

Such transgressions have taken place from the top down. The departure of Johnson as Prime Minister in September 2022 followed repeated lapses on his part that eventually made his position untenable (he subsequently resigned from Parliament). Civil servants were also associated with concerning behaviour, for example as participants in lockdown parties at Downing Street.

There have been departures from standards intended to maintain financial transparency and integrity within the UK executive, for instance in relation to the award of pandemic contracts and in declarations of interest.

The UK executive has deployed its ability to confer patronage – for instance in the form of honours and public appointments – in questionable ways. Various appointments to the House of Lords have generated considerable controversy.

Standards enforcement mechanisms have not been sufficiently independent or robust. The processes leading to the appointment of the Chair of the BBC Board in early 2021, for example, failed to identify links to the then Prime Minister, Johnson, that later made the position of the Chair untenable. There have been frequent delays regarding enforcement mechanisms or in ensuring such mechanisms are engaged with, including a substantial delay in appointing the Independent Adviser on Ministers' Interests.

When found to have violated rules, ministers (or ex-ministers) have shown a reluctance fully to accept such conclusions, or to recognise the legitimacy of official enforcement processes, as when Nadhim Zahawi and Dominic Raab were forced out of office in 2023.

Recommendation

There are serious systemic and cultural weaknesses in mechanisms for the upholding of standards. Enhancements to the effectiveness of rules and of enforcement bodies are an urgent requirement.

Previous proposals by the Committee on Standards in Public Life, an outcome of its *Standards Matter 2* workstream,[1] which were not wholly implemented, should be applied in full. The recent Governance Project commission chaired by Dominic Grieve KC offers further valuable options.[2]

1 See: < https://www.gov.uk/government/collections/standards-matter-2 >, last accessed 25 February 2024.

2 For the Governance Project recommendations, see: < https://www.ukgovernanceproject.co.uk/wp-content/uploads/2024/02/Governance-Project-Final-Report-31.1.24.pdf >, 1 February 2024, last accessed 25 February 2024. For standards in particular see: pp.15-30.

Executive-Parliament Relations

There has been a sustained tendency towards ministers making misleading statements to Parliament, affronting this institution and making it harder for the legislature properly to perform its vital role in ensuring executive accountability. In 2023, the House of Commons Committee on Privileges found Johnson to have held the House in contempt with his answers to questions about lockdown parties. Both he and some of his allies, the Committee also concluded, had worked to undermine its inquiry.

As well as misleading Parliament, ministers have demeaned it further through a tendency to make important announcements via the media first, rather than in the House. In May 2023, the Speaker of the House of Commons severely reprimanded Kemi Badenoch, the Business and Trade Secretary, for such practices in relation to changes in policy regarding retained EU law. **The executive has also misused its ability to appoint members of the House of Lords**, to the detriment of the status of the second chamber, with various dubious selections made.

The extensive creation and use of delegated law-making powers has tipped the balance of power away from Parliament and towards UK ministers and other agencies to a worrying extent. Events such as Brexit and the pandemic intensified an already existing pattern of asking legislators to agree to primary legislation providing ministers or regulatory bodies with vaguely-defined, extensive, discretionary legislative authorities.

The executive has developed a practice of introducing bills that serve perceived party-political needs but do not meet basic standards of coherence and effectiveness, as with the recent *Safety of Rwanda (Asylum and Immigration) Bill* (legislation which also has further constitutional problems with it).

Recommendation

The way in which the UK executive handles its relations with Parliament requires major improvements. It is essential in areas such as delegated legislation to curb excesses and allow for more effective parliamentary accountability.

It will always be tempting for whoever forms the government at a given time to lessen obstacles to the pursuit of their programmes. There are also limits in the extent to which the UK Parliament, as it currently operates, can take on more responsibilities. Given such constraints, less legislation would clearly be preferable to unsatisfactory legislation.

The Territorial Constitution

Legislative devolution to Wales, Scotland and Northern Ireland, is an established component of the UK political system. The proper functioning of the UK constitution therefore requires the maintenance of an appropriate balance between the UK and territorial tiers, that recognises the importance of the different levels.

Some of the key aspects of this relationship rest on understandings and principles that, even if they are referred to in statute, are not subject to hard enforcement, and require shared conceptions and goodwill among all parties to make them operate satisfactorily. **During the present Parliament, partly prompted by Brexit but extending beyond it, there has been a pronounced deterioration in the quality of interaction between central and devolved tiers**. The Covid inquiry, for example, has produced evidence that during the pandemic there was a pronounced lack of trust between the executives of the different territories, undermining the possibility for cooperation and coordination.

The 'Sewel' convention according to which bills relating to devolved matters are passed by the UK Parliament only with the express approval of devolved legislatures, is no longer viable. Major legislation, such as the *United Kingdom Internal Market Act* 2020, has been passed notwithstanding overt opposition from one or more of the devolved legislatures. This Act also provides an example of **a tendency towards creating powers for UK ministers to issue secondary legislation that encroaches excessively in devolved areas**. **Mechanisms for ensuring effective intra-UK political dialogue have failed**, as over Scottish gender reform legislation in 2022-2023, which UK ministers vetoed.

Serious and immediate problems have manifested themselves in Northern Ireland. Again partly but not exclusively in connection with Brexit, for a prolonged period the devolved government ceased to function, owing to the refusal of the DUP to participate in it. This breakdown created uncertainties around the viability of governance arrangements pioneered in the Belfast/Good Friday Agreement. Efforts by the administration in London to achieve reestablishment of the devolved executive prioritised meeting the particular demands of the DUP above all other actors. Through this approach, **the UK government compromised its adherence to the 'rigorous impartiality' principle that is intrinsic to the peace process**.

For instance, the "Safeguarding the Union" white paper that it issued in January 2024 setting out the basis for the restoration of devolution stressed a commitment on the part of the UK government to the preservation of the Union, rather than maintaining that the status of Northern Ireland is a matter for its people to determine. Such stances reverse thirty years of good practice. We note also that the white paper sets out plans for the use of secondary legislation by UK ministers, augmenting constitutional problems with the arrangement: both the purpose to which policy is directed and the means by which it is to be pursued present difficulties.

Recommendation

We urge those involved in the operation of the UK territorial constitution, particularly the UK government, to give close attention to the procedures and mechanisms of cooperation. They should also approach the relevant relationships in a spirit that benefits all. The Sewel convention, which is no longer functioning properly, requires replacing with a system involving firmer legislative re-enforcement than exists at present.[3]

The restoration of the devolved executive in Northern Ireland was welcome. However, it should not have been at the cost of a loss of impartiality on the part of the UK government. It is vital to the peace process and the good governance of Northern Ireland that this requirement is adhered to. Principles should not be abandoned in pursuit of short-term objectives, in this as in other constitutional spheres.

3 See: The Independent Commission on the Constitutional Future of Wales, *Final Report*, January 2024, available at: < https://www.gov.wales/sites/default/files/publications/2024-01/independent-commission-on-the-constitutional-future-of-wales-final-report.pdf >, last accessed 25 February 2024, p.123.

The Rule of Law and Rights

The rule of law, entailing public authorities as much as those they govern being subject to consistent legal principles, is a crucial component of the UK constitution.

It requires the existence of an independent judiciary, respected by people in positions of power. Unfortunately, **members of the UK government and of the governing party, as well as allied sections of the media, have again displayed in recent years what seems to be a calculated hostility towards legal professionals**. Phrases such as 'lefty lawyers' are employed to depict a system that supposedly pursues ideological goals and seeks to frustrate democratic government. **This rhetorical approach carries with it (perhaps deliberately) the possibility of sapping the willingness of those who operate the legal system to uphold the law impartially, with negative implications for the rule of law.**

Alongside making public criticisms, **the UK government has pursued measures that would legally circumscribe the ability of the courts to review the actions of the executive; and dilute judicial human rights protections**. For instance, the *Safety of Rwanda (Asylum and Immigration) Bill*, which seeks to define Rwanda as a safe destination for refugees in defiance of objective reality and international law, attempts to prevent the full application of the *Human Rights Act 1998*. This exclusion would signal a desire by the UK to opt out of international law. It also carries the potential to bring the judiciary into conflict with Parliament. A court may find itself in a position where it regards the law as being constitutionally illegitimate. But were it to respond by declining to apply an Act of Parliament, it would be entering onto new and challenging constitutional territory.

Adherence to the rule of law should extend to the international arena. **The UK executive has pursued initiatives – for instance with respect to Northern Ireland and to refugees – that have called into question its compliance with international obligations**. The UN High Commissioner for Refugees, for example, has stated that the UK plan for transferring refugees to Rwanda would violate such obligations.

The UK government has introduced various measures which have compromised particular rights and freedoms in significant ways. It has passed laws (such as the *Police, Crime, Sentencing and Courts Act 2022*) and pursued policies that serve to restrict protest, with negative implications for freedom of expression, association and assembly. There have also been – through the *Strikes (Minimum Service Levels) Act 2023* – limitations on the ability to strike, calling further into question the right to freedom of association. Another area of worrying restrictions involves the right to vote. Voter ID rules introduced into Great Britain under the *Elections Act 2022* have had the effect of making it harder for people to take part in elections, seemingly impacting disproportionately on certain already excluded groups.

Recommendation

UK ministers must act in a less adversarial fashion towards the judiciary. They should fulfil their obligation, included in the *Constitutional Reform Act 2005*, to uphold the independence of the judiciary.

The cessation of initiatives that have the effect of compromising rights, or which call into question compliance with international obligations, is needed. However, simply ceasing to move further in certain directions is not sufficient. A UK government must proceed with undoing objectionable measures and policies, or at very least making them operate in more acceptable ways.

The course of policy we have observed during our work shows that successive holders of the office of Lord Chancellor have failed effectively to fulfil their obligation, inserted into their oath of office by the *Constitutional Reform Act 2005*, to respect the rule of law. In future they should make the performance of this vital task effectively a priority.

First published in Great Britain 2024
The Constitution Society
Top Floor, 61 Petty France
London SW1H 9EU
www.consoc.org.uk

ISBN: 978-1-913497-20-0

THE
CONSTITUTION
SOCIETY