

Public Administration and Constitutional Affairs Committee

Oral evidence: Parliament and the Constitution: Mechanisms allowing Parliament to direct the Executive, HC 1907

Tuesday 29 January 2019

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Members present: Sir Bernard Jenkin (Chair); Mr Marcus Fysh; Kelvin Hopkins; Dr Rupa Huq; Mr David Jones.

Questions 1-67

Witnesses

I: Rt Hon The Lord Judge, former Lord Chief Justice of England and Wales, Sir Stephen Laws QC, former First Parliamentary Counsel, Sir Malcolm Jack, former Clerk of the House of Commons, and Professor Alison Young, Professor of Public Law, University of Cambridge.

Written evidence from witnesses:

– [Sir Malcolm Jack](#)

Examination of witnesses

Witnesses: Lord Judge, Sir Stephen Laws, Sir Malcolm Jack and Professor Alison Young.

Q1 Chair: I welcome our four witnesses to this special evidence session of the Public Administration and Constitutional Affairs Committee to look at some of the wider consequences of events that are taking place in the House of Commons later today, and which have been happening over recent weeks and months, concerning the role of the House of Commons and the role of Parliament in their relationship with the Executive. Could each of you identify yourselves for the record, please?

Sir Stephen Laws: My name is Sir Stephen Laws. I was the First Parliamentary Counsel from 2006 to 2012, after a career drafting legislation, and I am now a senior research fellow with Policy Exchange.



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Lord Judge: I am Igor Judge. I was formerly the Lord Chief Justice. I am a member of the Constitution Committee of the House of Lords. May I underline the fact that I am here in a personal capacity and am not speaking for anybody else?

Sir Malcolm Jack: I am Malcolm Jack. I was Clerk of the House of Commons from 2006 to 2011 and I am president of the Constitution Society, but I am also speaking for myself.

Professor Young: I am Alison Young. I am the Sir David Williams Professor of Public Law at the University of Cambridge. Prior to that, I was a professor of public law at the University of Oxford.

Q2 **Chair:** Thank you for being with us. May I start by asking a very general question to set the scene? Looking at the United Kingdom constitution, will you each briefly outline the respective responsibilities and functions of Parliament and the Government? Who would like to start?

Sir Stephen Laws: I can start by saying that I think, in a way, there is a false premise in the question, because the UK constitution, which is based, so far as the Executive and Parliament are concerned, on the confidence principle, is not one that provides for separate functions and powers of each, but one that provides for them both to be able to exercise power and that incentivises collaboration and co-operation between the two. What it does is to disperse influence between the two. Parliament is sovereign, so it is able to choose its own functions, but in choosing its functions, it needs to choose to carry out the ones that it is best able to do. So I think it is a question of where influences are exercised, and what appears to be the most efficient way to do that is for the Government to initiate action and to co-ordinate the management of affairs and for Parliament to scrutinise what is going on in that process and to hold the Government to account.

Lord Judge: We have to be careful not to confuse Parliament and the Government. Parliament is sovereign. It makes laws. That is the law-making body. The Executive is not Parliament, and the Executive is bound by the laws made by Parliament, just like everybody else. The problem we face is that the Executive has become over-mighty and there is insufficient control of the Executive by the House of Commons.

Sir Malcolm Jack: Yes, I think I would agree with that last remark, which reminds me of Dunning's famous motion in the 18th century: "The power of the Crown has increased, is increasing and ought to be diminished." We don't have separation of powers in our constitutional arrangements, because of course the Executive is in Parliament and it is, as we have just heard, bound by the laws that Parliament makes. I have nothing further to add, really.

Professor Young: The only thing I would like to add is that we are often told that the idea that the Executive and Parliament are fused is in some sense the efficient secret. It's an efficiency; it makes it work effectively, because you have the idea that the Government can bring in its Bills, it



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has the backing of the majority party and so it is able to get its Bills through Parliament.

While I can see that and understand that, you also have to recognise that it is the duty of Parliament to hold the Executive to account for its actions, and that can involve holding the Executive to account not just for its ministerial actions, but with regard to legislation. There are also mechanisms—as I am sure you are all very well aware—for private Members to be able to initiate legislation, and there is an ability for Back-Bench pressure to suggest and provoke amendments. To see it as just the role of the Government to initiate its plan without effective scrutiny is, in some senses, reinforcing the concerns that we have of potential Executive dominance in Parliament.

Sir Stephen Laws: Can I come back on that? I disagree with this idea that the role of Parliament is as a legislature and the Executive has a different role, and that the Executive has become over-mighty. If current events have proven anything, it is how influential Parliament is over events.

The constitution normally works in an invisible way, in which the No. 1 rule is that Governments do not make proposals that they do not think they are going to get Parliament to agree to. The reason this has all come into the open is because the Government has been required by a referendum to put forward policies for which there appears to be no consensus in favour in both Houses, either expressly or in people's hearts. That is why the conflict—if that is how you describe it—has come into the open, but normally it is not in the open. Parliament has enormous influence over Government, as Professor Meg Russell's research has shown, which is completely invisible because Governments are restraining themselves all the time.

For that reason, I do not accept that the Executive is over-powerful, and I do not accept that Parliament's only role is in relation to legislation. It is very influential in relation to legislation, but it has as much influence over executive functions as it does over legislative functions. Legislation is just one tool that is used by Government for implementing policy. A much more important tool, over which Parliament also has some control, is raising and spending money. Parliament also has control over what the Government does generally, because it questions Ministers, and the work of the Select Committees—particularly in relation to our withdrawal from the European Union—has been influential and beneficial.

Lord Judge: I think we have to isolate the Brexit issue, if we possibly can, on today of all days. Brexit is a very particular problem. It is a particular problem because it is happening to a Parliament that is utterly divided. Far be it from me to say how everybody thinks about it, but it is pretty obvious that it is divided, and it is happening in the context of a minority Government. Long after Brexit is over, five or 10 years from now, whatever decision is made by Parliament, the much more important question will be, "Has the Executive acquired yet more power over the way



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in which Parliament runs itself?" It is an extraordinary thing to say today, but in the long term, that is probably the more important question.

- Q3 **Chair:** But, Sir Malcolm, it would seem that the reverse is happening in the House of Commons. The Executive is not acquiring more power; the Executive is losing its influence over the legislative timetable.

Sir Malcolm Jack: Yes, I think that is the case. One qualification we need to make is that, of course, it is not only a minority Government; the crux of the matter is that it is a minority Government that cannot discipline its own party on the Brexit issue in the House of Commons. That is the crucial thing, and for that reason we have seen a shift to parliamentary power—if you want to put it that way—over the Brexit issue.

Professor Young: You can perceive that as a shift to parliamentary power, and you can see the moves, but you also have to recognise with regard to Brexit that you are not just in a situation with a minority Government, or in a situation where you have an issue that does not necessarily tie in fully with party political lines, which is how we are used to managing things. You also have the issue of a ticking clock in the background, of which we are all very aware. In that scenario, you begin to understand that if you do not want the particular default outcome against a ticking clock, there will be pressure to think of other mechanisms, and for Parliament to discuss how we avoid an outcome that it does not want in those particular circumstances.

- Q4 **Chair:** Does the conventional relationship, or what we have grown used to in the relationship between Parliament and Government, reflect some constitutional principle or just what we have become used to?

Sir Stephen Laws: I would say there is a principle that gives the Government control over the co-ordination of what is done. A system where each decision is treated separately and is resolved by a majority in Parliament diminishes democratic accountability, because if the Government is co-ordinating different strands of policy, different bits of legislation and different spending programmes, it is accountable to the public for the whole outcome of its programme.

That is why I think it needs the initiative to do that, so that when MPs go to the electorate, they can say either, "I supported all the activities that resulted in where we are," or, "I opposed them." That is the basis on which, in practice, the public judge the activities of parliamentarians. There may be side issues about whether they supported this or that particular moral issue, but essentially, elected politicians are judged on their contribution to a co-ordinated programme.

If you diminish responsibility for the co-ordination of the programme, which essentially depends on money, but also on the legislation you put together, you diminish accountability for it. If the Government can say, "Well, we would have done this and that, but some MPs stopped us," or, "The House of Lords stopped us," or, "The courts stopped us," you are depriving them of responsibility for what they do, which means that they are no longer efficiently accountable to the public.



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Sir Malcolm Jack: But they may reach better decisions as a result.

Professor Young: In some senses, to try to suggest that we can separate out between, "This is just practice," and, "Here are background constitutional principles," is to misunderstand how the two interrelate. There are background constitutional principles, there are understandings of wanting to have representative democracy, there are different understandings of what that might mean in practice, and there is also a desire to ensure that we have things such as deliberative democracy to ensure that deliberation can help us to achieve better outcomes in certain circumstances. We then put them against a backdrop of our own particular political structures, and how those principles play out will depend very much on the type of Parliament we are faced with.

How we might deal with a coalition Parliament, for example, would be very different from how we might deal with a minority Parliament or a Parliament composed of a strong governmental majority. It is not necessarily the case that this is the only way in which Parliament works. It tends to be the case that practice and background principles intermingle, and different principles will have different values in different circumstances.

Chair: That is the theory.

Professor Young: Exactly. Whether that works in practice is a rather different matter.

Q5 **Chair:** It seems to me that the relationship between Parliament and the Executive has historically been unlike the kind of relationship that has led to the shutdown and stand-off in the United States, and yet, for whatever reason or collection of reasons, there seems to be a stand-off between Parliament and the Executive. Indeed, there seems to be a stand-off inside the Government between different factions of the Government. Does that enhance accountability or diffuse it? Is that good for democracy or bad for it?

Sir Stephen Laws: You mentioned the stand-off in the United States. I sometimes describe the difference between the written constitution system and ours by saying that the written constitution draws clear lines and people can go up to them within the lines that have been drawn. Our constitution has lines which are hidden in shadow.

The system normally works because people do not enter the shadows, partly because one of the functions of Parliament, for example, is to confer legitimacy, and the further you get into the shadows, the more your legitimacy disappears—I do not want to extend the light analogy too much. People also don't enter the shadows because there is always uncertainty about what is hidden in the shadows and you might trip yourself up.

On the whole, the British constitution works by people collaborating with each other because the alternative is worse. What is most concerning about the current situation is that people have been exploring the shadows

to find out where the lines are, and the result is a reduction in legitimacy and collaboration.

Sir Malcolm Jack: I think a broader thought lies behind this, which is that constitutional change comes about because of political crises. In a sense, that is how I see the Brexit situation. This is nothing new.

In terms of an unwritten constitution—though we obviously have statutes and so on that are constitutional—that has happened all through our history, such as the Parliament Acts, the Irish problems in the 1880s and the Reform Bills in the 19th century. The Bill of Rights, on which Parliament bases its privilege, was the result of a political row, if you want to put it that way.

I'm much more—I wouldn't say relaxed, but I see the possibility of a change which, as the professor said, may or may not continue, depending on the political composition of a future House of Commons, in this long context.

- Q6 **Mr Fysh:** In that context, I would like to ask a little more of Sir Malcolm and everyone on the panel. When it comes to international negotiations, how have the responsibilities and functions of Parliament and the Government traditionally been separated? Could you say a little about how those particular moments at which changes were made solved any particular problems?

Sir Malcolm Jack: Stephen might be better to answer on the international treaties.

Chair: We will come to Sir Stephen in a minute.

Sir Malcolm Jack: On the treaties themselves, we have always had the principle that the Government is in charge in that matter. The House, as in Maastricht, cannot enter into the details of treaties. I was thinking of more general changes in the references I was making, such as the relationship between the two Houses after the Parliament Act 1911, and other changes of that sort, of a wider nature. Perhaps one of my colleagues might be better equipped on the subject of international treaties.

Professor Young: You're all looking at me, so I will try my best. Sir Malcolm is absolutely right that under the distribution of powers, the main role of the Executive is to enter into treaty negotiations and the main element of Parliament is to scrutinise that afterwards. We often see that as justified because we are in a dualist system and international law does not in and of itself have an impact within domestic law until it has been incorporated, and a lot of that incorporation is done through legislation. Although there may be suggestions that there could be some ways in which unincorporated treaties may have an impact in domestic laws, they are still very much at dicta level and not necessarily pushed fully and understood further than that.

In a very traditional way, you enter into a treaty, it is working in international law, and you need one Executive voice in order to put the



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viewpoint across, because obviously your negotiation position is stronger if you are speaking with one voice. However, it is not necessarily the case that that matches the current situation we are in.

We normally see that with regard to entering into treaties, but we are not in a situation where we are entering into a treaty; we are in a situation where we are discussing removing ourselves from a treaty. That has led, under some other constitutional arrangements, to thinking about the need for democratic involvement at that stage, because you are modifying law, which is why we have been through the European Union (Withdrawal) Act and had parliamentary input on those particular elements.

You also have to think about it in these terms. Normally when you are thinking about entering into treaties, there are some instances where you have to be expeditious and act quickly, and some where you have got a lot more time to be able to negotiate the treaty. Again, we are not in a situation where there is a large amount of time in which to discuss and negotiate a particular treaty, given the way article 50 is structured. All of those points might start to call into question the traditional way in which we understand the relationship between the Executive and Parliament.

In similar circumstances, I could mention, for example, the way that we have conventions developing with regard to the deployment of troops abroad, in which you have an element that is international but where there is still a form of democratic discussion with regard to that international-type action. I do not think it is as clear cut as just the Executive does one function and Parliament does the other.

Lord Judge: I will ask to defer on this, because in the Constitution Committee we are discussing and will produce a paper on the way in which we should be handling treaty obligations and the creation of treaties.

However, I would underline that treaty-making is understood to be a prerogative power—i.e. a power of the Executive. But treaties do not cover, as I once thought, just major things such as, “Shall we have peace?” at the end of 1945, or Versailles in 1919. There are hundreds of different treaties, some of them of no interest whatever to most people, such as, “Do we have a fishing arrangement with some island in the middle of the Pacific ocean?” That’s also a treaty.

So we have to examine treaties by remembering that they cover a huge ambit from ultimate national importance—peace, war, or obeying a treaty obligation and going to war—to things that are of importance but that in relative terms are minor.

Beyond that, I think that we have always traditionally worked on the Government—the Executive—making these decisions and then asking Parliament to ratify. Whether there should be a pre-treaty organisation, so that we actually discuss what we are thinking of doing, find out what the public think about it, find out what MPs think about it, and so on, is a separate point. Do you mind if I don’t go any further than that, Chair?



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Sir Malcolm Jack: Can I just make one quick comment on that? Those remarks highlighted the difficulty in the Maastricht episode, because Members of the House were very keen to try and put down amendments that actually altered the conditions of the treaty, and they were not in order.

Sir Stephen Laws: I don't think I have very much that is useful to add. Montesquieu has a lot to answer for, because of his doctrine of the separation of powers between Parliament and the Executive, which I have already said I don't think exists. Montesquieu defined executive powers almost exclusively by reference to international relations and war-making, so if anything is for the Executive, I suppose one can say that they are.

The formal position was always that there was the Ponsonby convention, which was codified in the Constitutional Reform and Governance Act 2010, which, as Lord Judge says, puts Parliament's role at the point of ratification. The practical problem is the one that Professor Young referred to, which is that you have always got a problem if you are facing in two directions. That's the problem we have at the moment and we have had it on other occasions, when it is not certain that a treaty you are negotiating will be acceptable at home. To what extent do you prepare the ground in advance and expose your hand to the other side?

It is a dilemma that is not unfamiliar to some of us who negotiated departmental budgets with the Treasury, and found that the Department thinks that you are the toady or creature of the Treasury and the Treasury thinks you are the advocate of the Department's interest. So, it can happen, but it doesn't make life any easier and it should be avoided.

So how should all this work? Well, the way that I think it works normally is that the Government knows what its supporters think and it negotiates treaties accordingly. That is what is different about this. The solution is to make sure that some sort of private consensus on what is going to be possible is arrived at, not out of sight of the people you are negotiating with.

Q7 **Chair:** Isn't the point you're all missing that this particular withdrawal agreement is a new treaty that has very profound domestic and expenditure effects, particularly in our domestic law? I mean, if we have a withdrawal agreement implementation Bill, it will be repealing the repeal of sections 2 and 3 of the European Communities Act 1972, and therefore, whereas the European Union (Withdrawal) Act 2018 was a fairly simple affair, this has a much more profound effect, in terms of continuing a lot of the application of European Community law? So should we be regarding this as a treaty, or is it a piece of domestic legislation that is being discussed as a treaty?

Lord Judge: I personally think it is a piece of domestic legislation about whether, under what circumstances and subject to what provision the provisions of the European Communities Act 1972 should be repealed. In that sense, it is perfectly obviously a piece of legislation. That is the narrow point. The wider point is all the other considerations, to which you



have drawn attention and which everybody is aware of—at least, we are all aware of some of them; whether we are all aware of all of them is another question.

- Q8 **Mr Fysh:** To come back to your point about it being essentially an exit document, is it not also the case that it can potentially have huge ramifications for the future negotiation of international treaties? In that context, you talked earlier about the Executive being responsible for the programme and about representative democracy having had a role in creating that programme through manifestos. How do we see this point in time potentially influencing the future relationship between the Executive and Parliament in that context? Is it not very dangerous?

Professor Young: I think you have to separate out where you think this danger is coming from. Let's start off with why we are in a situation at the moment where we originally had the motion with regard to the withdrawal agreement and the framework for a future relationship and we are now having the neutral motions that will be taking place later today. That is because of a piece of legislation—section 13 of the European Union (Withdrawal) Act. You have a precedent in legislation setting out this particular set of inter-relationships between Parliament and the Executive, with regard to this particular international agreement and within section 13 of the European Union (Withdrawal) Act.

Once we have got through hurdle two of agreeing the withdrawal agreement, if that is the direction in which Parliament then moves, you will still be in a situation where you have to enact legislation to implement the withdrawal agreement. That is the stage at which Parliament would normally be enacting legislation to ratify the withdrawal agreement, in order to bring its terms into force, and normally there would be a longer timetable than there would currently be, in order to scrutinise that. But still, that is coming through the normal process of ratification, through domestic law, to implement the consequences of the withdrawal agreement.

Where does that go with regard to setting future precedents? This has come from legislation, which has then triggered various discussions of business motions as to how to deal with these particular requirements. Going forward, you would always be thinking about the extent to which the precedents and practice we set today are to do with a particular set of circumstances, the European Union (Withdrawal) Act and how we are interpreting background principles. I do not think that, because we have moved in one particular direction, that will necessarily be set in stone, but it will obviously raise questions going forward, and you will think about relevant similarities and differences for other treaty arrangements.

Sir Malcolm Jack: I would just add that this is against the background of intense division on the issue in the country. It is not only in Parliament. There is a deep division in the country, so we are in a very different kind of situation.

- Q9 **Dr Huq:** It is very interesting to hear different and somewhat divergent



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views from the four of you. We have also had Dame Margaret Beckett before the Committee. She had a coherent view within herself. She was Leader of the Commons at a time when there were big majority Governments, so it was a different situation. Having been here since 2015, I have noticed—certainly after the second election, when the Government lost their majority—that the Government seem to be more and more in control of the timetable. We had a period where there were no Opposition days—they were not being granted. When they did come back, Conservative MPs were whipped to vote against Labour motions. We have seen how the Government have been forced to publish legal and financial advice, as well as the pulled vote last year. All that stuff does add up to a bigger picture. Dame Margaret's words were that, in the end, the Government "must get its business". Why must it?

Lord Judge: With great respect, I think that really should be examined. When it is, it will be revealed to be rubbish. The Government must not get its business. If you carry that to its logical conclusion, you have a dictatorship; the Government gets its business and Parliament enacts whatever the Government tells it to. The Government does not have to get its business; it is entitled to put its business before the House, and for the House to decide it. I do not think that the Government must get its business; I think that it must get its business considered.

Dr Huq: That is very encouraging for tonight.

Sir Malcolm Jack: I completely agree with Lord Judge on that.

Sir Stephen Laws: The phrase that the Government "must get its business" is one I have heard in relation to the House of Lords, because the Lords must pay deference to the democratic Chamber. In the House of Lords, they think that the Government must get its business.

As Lord Judge said, Parliament's most important business is what the Government is up to. Putting that before the House is rather more important. The idea that Parliament and Government have different things to consider is wrong. The Government has responsibility for conducting affairs, for co-ordinating and so on. That is most relevant to what Parliament is there for, which is to scrutinise, call people to account and legitimise what the Government is doing.

There is an issue about whether the House of Commons, having given its confidence to the Government, can really allow itself to behave in a way that is totally inconsistent with that. If the House of Commons thinks that the Government is not entitled to any of its business, money or legislative programme, it needs to withdraw its confidence. That is the way the system is organised. To say, "We will give you confidence, but we will not let you have any of the incidence of that," seems to me constitutionally incoherent.

- Q10 **Dr Huq:** We have heard already that MPs are not in agreement with no deal. What effect can the votes of expression have tonight? Is it completely meaningless, in the end?



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Sir Stephen Laws: In the end, it is an expression of an opinion that the House of Commons has very limited ways of enforcing. However, the way to enforce it is to say that, if the Government does not accept the opinion, it will withdraw its confidence. If the House of Commons is not prepared to do that, there seems, in some ways, little point in expressing the opinion. Of course, the Government will want to respect what the House says, but in a situation in which it has to choose between options for which no one is in favour, it cannot be forced to comply with the House's order.

Sir Malcolm Jack: I think there is a distinction with the amendment that seeks legislation—the Yvette Cooper amendment. That is a rather important difference.

Dr Huq: There are some versions with more teeth.

Lord Judge: In the long run, there is a political question to be decided in the House, as well as a legal question. If the result of everything that is going on is that there is no majority to repeal the European Communities Act 1972, there is no majority and it stays in force.

Sir Stephen Laws: Except it has been repealed.

Dr Huq: Some of us rebelled.

- Q11 **Kelvin Hopkins:** Textbooks describe the UK's system of parliamentary Government as Government through Parliament, not Government by Parliament. What do you think that means in practice?

Sir Stephen Laws: I have described what I think is the relationship, and I am not sure that your description captures what I described, so I am not sure if I agree with your description. I think that we have Government by collaboration between Parliament and the Executive. That collaboration is what is required by the confidence principle.

- Q12 **Kelvin Hopkins:** These are quotes from worthy constitutionalists in books. How does having a minority Government affect this?

Sir Malcolm Jack: I think we need to clarify this a bit. This is not only a minority Government but one that cannot rely on its party. That is the point. We can have minority Governments in our system, and we have had—there can be coalitions—but, on this issue anyway, the governing party does not have control of its minority. That is really the decisive thing.

- Q13 **Kelvin Hopkins:** Britain has had a two-party system, because, to win power, you have to choose between potential governing parties. Within those parties, however, are effectively coalitions in themselves. If one goes to countries with proportional representation, such as Denmark or Holland, you will find all sorts of fractions that you can see within the British political party system, but they are bound together in big political parties, so it makes it complicated.

Sir Malcolm Jack: But in this case, the discipline has broken down. Of course, there have always been coalitions within parties, but on major



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matters, the Whips have ensured that the party view is adhered to—with certain exceptions; there have always been rebellions. On the whole that has been done through the whipping system, but that is not working.

Sir Stephen Laws: But a minority Government presupposes that the House of Commons has given its confidence to somebody to hold the reins of executive Government. As long as they behave consistently with that and grant them the money and powers they need to carry on the Government, a minority Government will have less scope for doing what it wants to do, but it does need to be given the power to carry on business. If it is not, that amounts to the withdrawal of confidence, and the remedy for the House of Commons is to vote the Government out.

- Q14 **Mr Jones:** As we have already noted, you have arrived on a momentous day. This evening, potentially, the House of Commons could wrest control of the policy-making process of Brexit from the Government, depending on which amendments are successful. Are you aware of any recent historical precedents of Parliament seizing control in that manner from the Government on issues such as this or on any other issues?

Sir Stephen Laws: No.

Sir Malcolm Jack: No.

Professor Young: Yes.

Lord Judge: Not since the Act of Settlement of 1688, when the King was told that he no longer had a dispensing power, and various other things. That is the last time I can think of.

- Q15 **Mr Jones:** So in modern times, we are in uncharted territory at the moment. If there is a determined majority in the Commons for a specific policy, are there any established mechanisms that would allow the Commons to ensure that that policy is implemented?

Sir Stephen Laws: When the Government bring forward the legislation to give effect to it, Parliament can change the legislation to make sure that Parliament gets what it wants. The difficulty we are in is that the legislation to give effect to Government policy has already been passed without Parliament having amended it to do what it now wants to do. Frankly, I think it is a pretty bad example for rule makers to pass an Act and then, six months later, to start to try to find procedural devices to frustrate it. Yes, there is a way, but we have passed that moment. The moment was when the withdrawal Bill was going through Parliament.

Professor Young: I am not sure I agree with that, in the sense that I do not understand quite how it is frustrating the European Union (Withdrawal) Act, which is the provision under which we are holding these motions. We know that it was originally set down as a neutral motion, and we know that we have had a business order in the House of Commons, which has led to that being defined as meaning that it will be a motion to which amendments can be put.

I am not sure that we are necessarily in a situation in which we are contradicting or frustrating a particular piece of legislation. I think we are in a situation where we are looking at internal parliamentary rules to work out which rules and procedures apply in quite a novel circumstance. Obviously, the assumption or hope was that we would not be in a position where we were using those elements of motions, but we are, and now we are thinking of the procedural mechanisms by which to do that.

It is a novel situation, but when you have business motions in the House of Commons, you have a similar, though obviously not the same, democratic backing as a piece of legislation. It does not have the same legal force, but you still have an expression of democratic will for proceeding in a particular manner, and in some senses, this is the best we can do in the circumstances.

- Q16 **Mr Jones:** But in procedural terms, are we not in this position only because of a departure from established procedure by the Speaker, or at least what appeared to many commentators to be a departure?

Professor Young: This is a long and complicated issue. If you'd like, I can draw up the business motion and we can have a long discussion about different definitions of what was meant by an "allotted day" in paragraphs 1 and 2 and paragraph 9, and the fact that it had to be a Minister who proposed an amendment to the business motion.

The original element of the neutral motion, allowing you to have a discussion that would allow amendments, was in the first business order on 4 December. The amendment was allowed then to say that Standing Order No. 24B would not be allowed—that was part of the business motion that was agreed then. The situation with regard to the way in which this may have been modified, which may potentially have not been in line with the business motion, came afterwards. It was a different amendment that was to do with the three days, as opposed to the 21 sitting days set out in legislation.

Sir Malcolm Jack: I should also say that there has been a significant change in the way the term "forthwith" is understood, because in practice, "forthwith" has always meant "without amendment". The Question is not proposed; it is just put, because usually there are two stages to a Question. Now, we are in a situation where the term "forthwith" has been reinterpreted, if you like, by the Speaker's decision to select the amendment, and also the House's endorsement of that decision by voting for the amendment.

- Q17 **Mr Jones:** But was it actually a breach of precedent? The Speaker himself said it was a breach of precedent.

Sir Malcolm Jack: It was certainly a change of practice.

Mr Jones: In fact, the point he made was that if you do not change these things, things will never get changed.

Sir Malcolm Jack: Yes, exactly.



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Sir Stephen Laws: I am not sure that it is a change of practice to change what is properly understood by one word. It seems to me that if you have always understood a word in a particular way and you use it on a subsequent occasion, you are entitled to assume that people will give it the meaning it has always been given. However, my point is wider than that. The issues that are arising now are not different from those that were live during the passage of the European Union (Withdrawal) Bill. The question of whether there should be more than two options available to Parliament at this stage was debated; the question of whether the motion that followed on from a rejection of the withdrawal agreement should be amendable was debated, and Parliament reached conclusions on statutory provisions that answered those questions.

Now, I have to be careful, because I do not want to be assumed to be thinking that anything is the right solution here, or advocating any way out of the EU or not out of the EU. You could make a very strong case for saying that legislation should not be setting down the procedure in the House of Commons, and if it does not, then no question arises about whether other procedures are inconsistent with what has been laid down. However, if you do lay down procedures in legislation, then you should only change those procedures by legislation. That is not what is being done. Ways are being found to give different meanings to words that Parliament—the House of Commons and the House of Lords—agreed only six months ago, and to give them a different effect to what, like it or not, Parliament agreed six months ago.

Sir Malcolm Jack: One of the amendments is seeking to change things by legislation.

- Q18 **Mr Jones:** The Government are arguably in danger of getting stuck—not being able to get their business through—and traditionally the remedy for that was a general election. How has that position changed as a consequence of the Fixed-term Parliaments Act?

Sir Stephen Laws: I personally do not think it has changed at all. Back in 2010 and 2011, Sir Malcolm and I had long discussions about what the Fixed-term Parliaments Act should or should not say. Of course, the Bill as introduced had an entirely different definition of a confidence motion from the one it had when it passed into law. The original definition, I think, depended on the Speaker certifying that it was a vote of confidence. Obviously, that was what we drafted to start with; I thought that was preferable.

But does that really make any difference? I have read the Committee's report on confidence motions and, as you say, a Government can always put down a motion requiring a two-thirds majority, and there are very few circumstances in which that motion will not be passed, because if the Government put it down and the Opposition can't vote against it, that is normally going to give you a two-thirds majority. The only circumstances in which that won't happen are the circumstances in which it was intended that that would not happen: when there is a minority party that can change the Government by switching sides.



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But the notion that the Prime Minister could designate a particular issue as a vote of confidence and that would persuade people to vote for it in a way that does not happen now just seems to me to be wrong. It always depended on whether people believed that the Prime Minister would really do it, and a Prime Minister could now say, "If you don't agree to this, I'm going to give up and put down a motion for a general election requiring a two-thirds vote." So I am not sure that anything has really changed.

Lord Judge: May I make a point that is divergent? Doesn't this underline the crucial importance of Parliament actually scrutinising legislation before it enacts it? Everything that has been said I entirely agree with, but what is the lesson? We are in a muddle because we did not know, when we were enacting the legislation, that this would be the consequence. There is an overall problem—nothing to do with Brexit—with the way in which Parliament, and the House of Commons in particular, does not have sufficient time to examine the legislation it is enacting.

Some extraordinary things come through. For instance, the Ivory Bill was a beautiful piece of legislation. We all want to save elephants—of course we do; they are wonderful creatures—and so we have enacted it. However, tucked away in clause 17(7) of the original Bill that came from the Commons was a power granted to a Minister for enforcement, and it enabled the Minister to have, in effect, his own little private army of enforcers, who had all the powers that police officers would have—getting warrants and searching—and more. If I were in Mr Putin's Russia and were one of his Ministers, I would have thought, "That's just what I'd like—my own force."

That provision did not go through because everybody in the House of Commons thought, "Hooray! Let's have a dictatorship"; it was because the House of Commons did not have time to reflect on what clause 17(7) actually meant. There is an overall problem about the way the structures of our constitution are not working—not in the context of Brexit, but generally—because you do not have time to scrutinise.

I could go on about that, but you've heard enough from me. *[Interruption.]* Well, may I just add this? We should have a postage stamp published this year, 2019, for the 40th anniversary of the last time the House of Commons refused the effect of a piece of secondary legislation. It is 40 years since that happened—we give stamps out for 25 years.

Sir Stephen Laws: I am afraid I have to reject the notion that because the Government do not get defeated on things, that shows that Parliament has no influence. What it actually proves—

Lord Judge: I am not saying that.

Sir Stephen Laws: Well, that is the argument in relation to statutory instruments: Parliament has no influence over what goes in them, because it has only very rarely defeated them. I don't think that is true. It is particularly not true now, when the Select Committees look very carefully into issues arising in secondary legislation. There were cases, about which



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I have written, on tribunal fees. There are cases on legal aid. All those things are very closely looked at by the Select Committee. The Justice Committee looked deeply into both issues. So Parliament does have an influence on the formulation of Government policy, because of this overriding inhibition on Government. Things get through, but one of the reasons why drafters do not find themselves drafting exorbitant powers of entry in Bills is that Government generally know that if they draft an exorbitant power of entry in a Bill, it will run into trouble—if not in the House of Commons, then at least, as has been proved, in the House of Lords. Parliament at that stage is influencing what goes into legislation because Government do not want to have arguments about things that they really do not want to have arguments about.

Lord Judge: I don't want to respond because we are going miles away from the subject, but I am sorry I got on to a little hobbyhorse of my own.

- Q19 **Chair:** No, I just want to bring us back to the Fixed-term Parliaments Act. There is a very strong sense among some of us that the whole business of confidence has been separated from the day-to-day decision making of the Government. The Government can be in a state of paralysis and division, but the confidence issue is somehow settled by a single kind of motion that is laid down in statute, where everybody reverts to their party tribe and everything is all right, but actually, in the immortal phrase, "Nothing has changed." What influence has the Fixed-term Parliaments Act had over that situation? Where would we be if we did not have the Fixed-term Parliaments Act?

Professor Young: The influence of the Act is that it sets out a very particular type of motion. It is exactly what you said; in some sense it is divorcing aspects of confidence as being separate from issues. Seeing, on the one hand, a large defeat followed by a vote of confidence is a clear example of that divorce between the policy issue and the motion.

That is not say that you can't, as your report has clearly made out, have aspects of confidence discussions going on that are separate from what is going on. The difficulty is that, under the Act, the only way you can trigger an early general election is through the different mechanisms within the Act itself. That is what is causing the issue of separating it out.

It has had, in some senses, unintended consequences, which brings us back to the point Lord Judge was making. It is not necessarily the case that there is no influence of Parliament, or that there isn't adequate parliamentary scrutiny. In our constitution we sometimes resolve practical issues without necessarily having a full awareness of what the consequences might be in the long term.

This was a piece of legislation to solve a practical issue of a coalition Government, but it went on, even though it was suggested in the House of Lords that it should be for only one Parliament. It went on longer and now we are seeing the consequences of that in a novel situation.

- Q20 **Chair:** Fundamentally, we were told, when the Fixed-term Parliaments Bill



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was going through, that it was taking a power away from the Executive.

Professor Young: Exactly, but the political reality is different.

Chair: It prevented the Prime Minister from arbitrarily asking for a Dissolution and it was going to increase accountability. What is the evidence that we have a more accountable system of Government as a result of that?

Professor Young: You are absolutely right to raise that point. You have legality and political reality, and we saw that with the snap general election. You could say that that is a large two-thirds element you are going to have to have, so surely that is more control to Parliament than the Government, because you are going to have a lot of votes.

But essentially you are saying, if you are not willing to go to a general election at this time, in some way you must believe you are not going to win it. So it is going to be very difficult for you in those scenarios not to vote in favour of a snap general election. Sometimes we will enact legislation, but you also have to be aware of the political reality of how those legislative provisions will be used.

Sir Malcolm Jack: A cynical response might be that that is exactly what Government intended by introducing the Bill.

Q21 **Chair:** Yes, I nicknamed it the incumbency Bill because it strengthens the incumbency of the Government in office.

Sir Stephen Laws: I agree. It is true that it appears that the House of Commons wants to have it both ways, which is to give confidence to the Government and then not to give it the incidence. For the reasons I have given, I don't think technically that is the result of the Fixed-term Parliaments Act but, like all legislation, that Act was intended to have an influence on the way people thought about Parliament. It was intended to set five years as the default so that we did not have, among other things, the previous practice of three years of Government and two years of preparing for an election that nobody knew when it was going to happen. It did have a psychological effect. Maybe that psychological effect, which to some extent was intended, is the reason the two things are becoming separated. But I don't think it is the terms of the Act that do it.

Q22 **Mr Jones:** Would it not also, arguably, have improved the Prime Minister's prospects of winning the meaningful vote if she had been able to declare it a confidence issue, which of course she can't do as a consequence of the Act?

Sir Stephen Laws: As I said, she could say she would put down a motion for the two-thirds majority—

Q23 **Mr Jones:** But given that they would be separate motions, wouldn't that have made it more difficult—as, in fact, has been proven—to dislodge the Government?



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Lord Judge: As a matter of reality, whatever may happen in the votes this evening, and indeed over the next few months, the Government could still continue, although hobbled, for another couple of years, because in a confidence vote isolated from the reality of events that are going on, which the Government should be running and controlling, who is going to vote for a general election? Well, you are not, are you?

- Q24 **Mr Fysh:** Coming back to the idea of Governments being responsible for the programme, where are the people in all of what we have just been discussing? Why should they not feel completely short-changed by our democratic system if it is producing this perverse result where you can have a zombie Government?

Lord Judge: If I may say so, I think that this is a really critical moment in our legal constitutional history and in our political history. I think that the public are deeply disillusioned, and not just about Brexit but with the entire process by which it is governed. I don't have a solution for you, but I am sure that you should be taking into account the degree of public disillusionment. It is everybody. I don't come from London; I'm not a south-east drifter. I live in the midlands. And all sorts of people talk to me about it and they are fed up. And it is not just about Brexit; they are fed up with the way in which they think the country is being run. Yet, actually, we live in a wonderful country—we do.

- Q25 **Mr Fysh:** But is a part of that that it effectively, through the effects of this statute and the procedure and so on, gives MPs a totally different status to that of the people they are supposedly there to represent?

Sir Stephen Laws: It stops the Government being accountable to the public, as I have described. I think you are right; people should be disillusioned, because when the next election comes there will be members of all parties who will be able to go to their electorates and say, "Well, I didn't have anything to do with it."

- Q26 **Mr Jones:** What precedents are there in legislation for instructing Ministers that they must carry out tasks that are unspecified in the legislation, such as international negotiations?

Sir Stephen Laws: I suppose I am the precedent person, so I will go first. There have been periods when Governments have passed legislation that was aspirational rather than specific. There was a period in 2008 to 2009 when that happened. We had legislation to secure financial stability, we have child poverty legislation, and we have climate change legislation. That legislation is usually passed by setting the Government an aspirational target and requiring it to report to Parliament if it doesn't meet it.

I have always taken the line that that is not an ideal way to use legislation and it has diminishing returns the more areas of policy you give priority to. But it seems to me that it is a legitimate use of Parliament's power—not a wise use, but a legitimate use—and there is an established way of doing it. Those are the examples—climate change, child poverty and financial stability—that I would bring forward.



- Q27 Mr Jones:** Of course, there is already a scrutiny reserve, in terms of EU legislation, which prevents Ministers from taking certain actions without reference back to Commons and Lords Committees. But beyond the scrutiny reserve, to what extent has the House—either House, I suppose—ever previously sought to direct Ministers to carry out their ministerial responsibilities other than through legislation?

Professor Young: I guess it depends on what element you are looking at. As well as the aspirational examples that Sir Stephen was referring to, you can point to other legislative requirements that in some way, shape or form put on Ministers obligations that are quite broadly phrased. In fact, we get quite a lot of that.

I decided to have a quick look. My example is the Sanctions and Anti-Money Laundering Act 2018, which was recently enacted. That is part of the situation regarding what will happen to our international law obligations, some of which have been fulfilled through our EU membership. If we leave the EU, there will be situations in which we will need powers to fulfil those obligations separately. In addition to giving a power to fulfil the UN obligations, the Act also gives the ability to go beyond that and impose sanctions beyond our obligations in international law. There are various duties on Ministers with regard to exercising those particular requirements.

Happily, I have the section in front of me. It states that “the appropriate Minister making the regulations...must at the required time lay before Parliament a report which explains in respect of each discretionary purpose” why he wants to carry out the changes, for example, and his reasons for pursuing them. There are examples in international law of imposing duties on Ministers—in this instance to report—that have been recently enacted.

Sir Stephen Laws: We need to mention the obligation on the Lord Chancellor to uphold the rule of law. That reminds me that there was something in the 1215 version of Magna Carta that people should not be appointed to office unless they understood the law, which was omitted from the 1216 version.

Professor Young: No comment.

- Q28 Chair:** The European Union (Withdrawal) (No. 3) Bill, if enacted, would require the Prime Minister to give effect to the terms of whatever motion is passed under the Act. How would this be enforced?

Lord Judge: I think it could only be enforced politically by the House of Commons. Please do not think for one moment that anybody should be able to seek a judicial review. Not only would it be ludicrous for the judiciary to be involved in deciding a political question, but they would have a way out if anybody took that step, by saying that there is an alternative remedy—to go back to the House of Commons. That is the only way it could possibly be enforced, in my view. It would be up to the House.



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Sir Stephen Laws: But it wouldn't be the only obligation imposed on a Minister that people did not expect to ever need to be enforced. The basis on which the Government is run is that the Government will comply with the law—rule makers should stick to the rules that they make. On the whole, if the Government has a legal obligation, it will do its utmost to comply with it.

Lord Judge: Once enacted, it is a completely different situation.

- Q29 **Chair:** Let us assume that it is enacted, and therefore that these obligations fall on the Minister, and that a motion is passed expressing what the Minister should do, which is enforceable in law. Lord Judge, are you saying that this kind of statute is not really statute?

Lord Judge: Can we just follow it through? If it goes to the Supreme Court and the Minister is in default, an order is made that the Minister should do something. Do we lock him or her up when they do not? What does the Government do about its own Minister? The only solution would be to craft a clause that prevented judicial review, which would be very difficult. These are political questions, not judicial questions. It is perfectly true that it may be the law and that there has to be a remedy, but the remedy has to be provided within the House of Commons.

- Q30 **Chair:** So to what extent is this a proper piece of legislation, in constitutional terms?

Professor Young: I am not necessarily sure that it is proper or improper. We have other examples of legislation that are not necessarily meant to be legally enforced by the courts. We often refer to section 1 of the Scotland Act 2016, which inserted various provisions into the Scotland Act 1998 to assert the permanence of the Scottish Parliament and the Scottish Government. It states: "The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements. The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government."

That is a political assertion with important political ramifications, even though we would not necessarily see it as subject to legal enforcement. You could say exactly the same with regard to section 2, which inserted the Sewel convention provisions. Again, that is recognising the Sewel convention. You will know that in the recent Miller decision that was seen as recognising it as a convention, not necessarily something that would be legally enforced. I do not think that it is constitutionally inappropriate; it is recognising that different pieces of legislation have different impacts.

- Q31 **Chair:** Would it be tidier if Parliament kept these kinds of provisions declaratory, invocative and aspirational, and if we kept these out of legislation? I have to say that I am somewhat exasperated by Acts of Parliament that say, for example, "The Government should make sure that it gets best value from its expenditure." Nobody knows what best value means.



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Sir Stephen Laws: It would be much better, because the dilemma for the drafter is always, “How do I make this into a proper legal obligation by giving it legal consequences and, at the same time, because this would involve something that would be questionable in relation to article 9 of the Bill of Rights, make sure that this does not get into the courts?”

I am afraid I cannot remember what it was called, but there was an Act in 2009 that required the Government to balance the books, or to reduce the deficit or whatever it was. Was it the financial stability Act? I cannot remember what it was called. One of the purposes of that provision was to ensure that whether the Government did or not could not be litigated in the courts. In order to promote that effect, a provision was inserted saying that the Government had to report to Parliament, so you create the appearance of a legal consequence so as to exclude the one that you really want to exclude, which is somebody litigating whether or not the Government was treating the deficit properly. That is not a desirable way to proceed, but you cannot say that it is forbidden because Parliament is sovereign.

Q32 **Chair:** Why did the parliamentary draftsmen let this through?

Sir Stephen Laws: The Government decides on composing legislation. I have to say that there are examples under other Governments too.

Lord Judge: Before you criticise parliamentary counsel, perhaps you could remember the absurd introduction in the Scotland Act of the word “normally”—what the Government here will do “normally” in the context of things that are Scottish. The Government defended that with great power. It never saw the problem. We should not have legislation that provides for policy assertions, or something that might go down well if we can use it on “Newsnight” one night.

Sir Malcolm Jack: The only thing I will add to the discussion, because I agree with what has been said, is that there is a political pressure sometimes to say something that is not legally binding but is important.

Sir Stephen Laws: Once someone has said it once, the argument against it becomes weaker and weaker.

Sir Malcolm Jack: I agree.

Professor Young: That, in a sense, is its point—to reinforce the importance of the expression through legislation. Even if it cannot be legally enforced, there is still the element of it now being in a piece of legislation, which has more importance than if it was just in a business motion.

Sir Malcolm Jack: To add to Stephen’s point, Ministers will take these things seriously if they are there.

Q33 **Mr Fysh:** Before we move on to the next questioner, I just want to understand something. That exchange was incredibly interesting, but I do not quite understand whether you think, on balance, that the piece of



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statute that is proposed to effectively take some of the decision making around the previous statute out of the Executive's hands is sufficient truly to do that, because, for example, it has a financial consequence. I think we will come on to some questions on the finances in a bit more detail later, but in the broadest terms, if it is not a proper statute, how can it possibly undo the effect of what was a proper statute that definitely does have legal effects that are definitely enforceable in courts of law?

Professor Young: I think it is a misunderstanding to say that if this were to be enacted in some way this would not be a proper statute. That is a separate issue from discussing whether this is something that the courts would be in a position to legally enforce, because of issues of parliamentary privilege and not wishing to intervene with Parliament's determination of its own internal proceedings. I am not necessarily sure that that makes it an ineffective piece of legislation.

Sir Stephen Laws: I agree. It would be a valid piece of legislation doing whatever it did, including delegating power to the House of Commons to decide whether to trigger it.

- Q34 **Mr Fysh:** In that context, what are the arguments for or against legislatures seeking to manage executive functions, such as treaty negotiations, directly?

Sir Malcolm Jack: The disadvantage is gridlock, which we have already mentioned, as in the US system—but of course, the President has veto powers. Gridlock is the disadvantage.

Lord Judge: Another disadvantage—at least, this is how I see it; obviously others may take a different view—is that in the course of the negotiations about Brexit, every week somebody has come out and stood on a platform and told us all what is going on, and the EU has come out and stood on a platform and told us all what is going on. There must have been occasions when it would have been much wiser for negotiations to take place in private, in confidence, while difficult issues were thrashed out and while a bit of give and take was introduced to the discussions. As it is, there has had to be an arrangement by which there has been posing at the front for the people back home, or for the people all over Europe, instead of just quietly getting on with it. I do not think that has been a very happy feature of the EU negotiations.

- Q35 **Mr Fysh:** Are there examples that you can cite of other legislatures doing that in a more effective way, in terms of separating the executive role, the idea of secrecy around the negotiations, and the mandate at the beginning or approval at the end by the legislature? Who do you think does that best?

Lord Judge: I have no idea who does it better, but I am pretty sure—speaking on the basis of prejudice rather than evidence—that there are plenty of countries where the idea of an open negotiation would simply not be allowed to happen. Whether that would be constitutionally permissible or simply practical politics, I do not know.



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Professor Young: When you look at other examples, you tend to find that there is more scrutiny to do with international treaties when you have entered into negotiations and you have a treaty that you have signed but not necessarily ratified. There will be more detailed parliamentary scrutiny of those treaties at that stage.

You find that in Australia, which has a joint committee that does that. The other advantage of that process is that they publicise the treaties, which allows public interest groups and NGOs to be aware of the treaties that are currently under negotiation. That means that you can raise it with your MP and bring it as an issue of political salience, and you are able to ask questions and have things scrutinised in committees. That enables you to have democratic input and democratic accountability without undermining the ability to go away and negotiate on the international stage.

That is what we are trying to trade off. We need to go away and have the ability to negotiate on the international stage, but we also need to have democratic accountability for treaties that could have an impact, not just directly in law but on policy direction in future.

Sir Malcolm Jack: Of course, once again, we are in a very particular situation with the EU withdrawal and its effects.

Sir Stephen Laws: It is not really a constitutional problem; it is a leadership problem. It is obvious to everyone that you are likely to get a better result from a negotiation if it is conducted in private, but if you have the dilemma of how, when you have negotiated in private, you are going to sell that when you get back home, you need to be more transparent about what you are doing as part of the leadership of the opinion that will accede to it. That is the dilemma; I do not know what the answer is.

- Q36 **Mr Fysh:** Can you think of any examples of other treaty negotiations that have been threatened to be undermined so significantly by the legislature right at the crucial moment—the situation we are in today?

Sir Stephen Laws: I am not a historian—Sir Malcolm is more of a historian than I am. There may have been issues around the Congress of Vienna after 1815, where not so much Parliament, but opinion back home determined what was to be debated. It was perhaps similar at Versailles—opinion back home had an influence on what those negotiating the treaty felt they had to agree.

Lord Judge: But whether that was formally or simply because they recognised the sense of grievance that huge sections of the populations of France and Great Britain felt about what had happened is another matter. I do not think there was a negotiation in which people came on to a stand every week and said, “This is what we are going to do,” or went on Twitter.

Sir Malcolm Jack: That was quite a long time ago.

- Q37 **Mr Fysh:** Was that opinion back home expressed through representatives or the people themselves? One could argue that in this situation, it is



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very clear that people want to get on with things and do not want extensions. It is very clear that the legislature is taking a directly opposite view. How was it back in 1815? Was there divergence?

Dr Huq: We need a people's vote to establish it. You don't know what people think. They haven't been asked since one day in 2016.

Mr Fysh: On article 50 extension, you think that is a subject for a people's vote.

Dr Huq: We don't know. We need to test it.

Chair: I am not having this debate here, among ourselves.

Mr Fysh: Coming back to the question, was that feeling something that was expressed by the popular representatives?

Lord Judge: I can't answer that.

Sir Malcolm Jack: With Versailles, there was certainly a lot of newspaper discussion of it, but no doubt that was confined to the chattering classes.

Chair: We are now moving on to the role of the Speaker.

Q38 **Dr Huq:** Lord Judge, you mentioned that new platforms have been ever opening up. The Speaker has become a household name in all this. There have been accusations that he has rewritten the rulebook. When is advice from Clerks advisory? Some people may say, "When is a referendum advisory?"

Anyway, my question is, what do you think the role of the Speaker of the House of Commons should be in maintaining balance between the Commons and the rights of minorities within it? I speak as an Opposition MP. The other day, in the last question on Theresa May's statement, I listed some of the overriding of the legislature that seems to have gone on. I worry that "strong and stable" is becoming "scared of scrutiny". She said, "I've spent 24 hours at this Dispatch Box since October answering these questions," but that does not feel like scrutiny when the same stuff is parroted back and the minority Member does not have a right of reply. What do you think about the Speaker's role and what it should be?

Lord Judge: Well, the Speaker is a neutral servant of the House with great power. How he or she—we have had a female Speaker—exercises it is ultimately for the House to decide. That is how I see the constitutional position, but Sir Malcolm may—

Sir Malcolm Jack: I entirely agree. In coming to his decisions, the Speaker assesses the feeling and mood of the House.

Sir Stephen Laws: I have been involved in lots of discussions over the years in which I have been representing the view of the Government and he has been representing the view of the House as communicated to the Speaker. What I learned is that the Speaker is usually looking to reflect the opinion of the House as a whole, recognising that there are lots of different opinions within the House. Having given confidence to the



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Government, a large and relevant part of what the House thinks is also what the Government thinks, because that is part of it. I never expected to get a particularly easy ride, because the Government can speak for itself and the Speaker very often speaks for the rest, but that is not his only obligation.

The Speaker's role, it seems to me, is to be an honest broker between different sides. In Denmark, if there is a need for a coalition, it is the Speaker's role to act as the convener of the talks that result in the Government. I think it would be a good example if the Speaker were able to behave in a way that enabled him to perform that role. It is difficult at the moment to imagine him performing it, but that would epitomise the sort of behaviour I would expect from a Speaker.

Q39 Dr Huq: And this current one is more assertive than the last one. I was not there for the last one, but—

Sir Stephen Laws: Well, in different ways. All the Speakers I have experienced were prepared to assert themselves when they needed to, as I'm sure Sir Malcolm will confirm.

Sir Malcolm Jack: They assert themselves in different ways.

Q40 Dr Huq: I think we all voted the same way on that biggest defeat in parliamentary democracy. It does feel a bit like we have guns held to our heads in this blackmail Brexit; it doesn't feel like good decision making if we are given these options. Do you think that present conventions are sufficiently robust to manage a time in which the Government does not have a majority? It is a minority Government that seems sometimes to act like a medieval monarchy.

Sir Stephen Laws: Good heavens. Well, if the Government were able to get its way like a medieval monarchy, we would not be in this situation. What this situation is demonstrating beyond all else is that Parliament has influence—and to some extent a controlling influence, with or without new Bills—over what the Government does. I have said that Parliament in some ways missed its opportunity when the European Union (Withdrawal) Bill was going through, if it wanted to influence the way things proceed, but I find it difficult to blame anybody in this situation for trying to reduce down to two the multiple options that are available.

If you are going to reach a solution, in the end you are going to have to choose between the best option and, hopefully, the next best option. Possibly, there are idealists who are trying to reduce it to a choice between the best option and the next best, and there are cynics who are trying to reduce it to a choice between the best option and the one that will be least attractive to anybody, but there is no other way to get to a solution than gradually eliminating the options that are available.

Sir Malcolm Jack: We also have to come back to this business about the parties. The fact is that there is no agreement within the two major parties on the Brexit issue, and therefore whatever Government were in power—



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even a Government with a majority—there would be considerable difficulties.

Lord Judge: I think the solution is in the hands of the House, and each individual Member of the House. Speaking again for myself, of all the political questions that have arisen in my adult life, this Brexit issue is pre-eminently one for a free vote. This is a conscience issue, and each Member of the House has a conscience, making up his or her mind about what is best for the country, taking everything into account—which of course includes the result of the referendum, and what they themselves said to their constituents during the referendum campaign and the general election, squaring whatever they said with their conscience.

A free vote would be the best way of knowing what the democratically elected House of Commons actually wanted, rather than the idea that somebody is being dragooned here and somebody there. It has the great advantage that, at the end of it, everybody in the constituency knows that he or she voted this way or that way, and they can decide whether they are going to return them or not.

Sir Stephen Laws: I find it difficult to accept that the problem we have at the moment is that people are doing what the Whips tell them to do.

Lord Judge: No, I'm not suggesting that.

- Q41 **Chair:** I have to tell you that most MPs tend to think they exercise their conscience in every vote, and the idea that we switch off our conscience just because there is a Government Whip has been demonstrated not to be the case in this Parliament. I think that is rather what Stephen is saying.

Lord Judge: But, if I may say so, if it were a free vote there would be no issue. A free vote, understood on all sides, would be clear.

- Q42 **Chair:** Can I come back to the role of the Speaker? It seems to me that historically, the role of the Speaker has been to interpret the rules of the House in a manner that prevents the majority from overriding the minority. In this Parliament, the Government are not in the majority, and the leavers are the minority. The remainers are the majority, and it seems that the Speaker is becoming a creature of the majority at the expense of the minority. To what extent is that a departure from the practice of what the Speaker is meant to do?

Professor Young: I think the difficulty is that all the processes and procedures within Parliament basically rest on certain assumptions. When we match those assumptions, they work well. When you have a strong Government and an aspect of the Speaker's role is to make sure that it does not override the wishes of other groups or minorities in the House, it can work very well. As we keep pointing out, however, we are not in that situation; we have a minority Government and an issue that cuts across party politics and on which we do not have the luxury of time. All of those put a pretty considerable amount of pressure on the way in which the Speaker acts.



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That does not necessarily mean that we need to completely modify the role of the Speaker, but it does make us take a step back and ask to what extent these are novel situations and to what extent they will last into the future. To the extent that scenarios that undermine the assumptions on which our current structures work might go beyond Brexit, I think the House needs to take a step back and think about its procedures and how to modify them to match the new assumptions.

Sir Malcolm Jack: It will also change if there is a Government with a disciplined majority.

Sir Stephen Laws: To get back to my analogy about the shadows and so on, I think it is the responsibility of the Speaker to ensure that whatever decisions the House reaches, those decisions have the legitimacy that will make them easier to accept for people who do not agree with them. That is why I think it is very important that he should be ensuring that there can be no question about the process by which decisions have been arrived at. If they are arrived at by a respectable and acceptable process, they will ultimately be accepted by the people who do not agree with them.

- Q43 **Chair:** But if the majority wants something in the House of Commons, how much is that the ultimate arbiter of the legitimacy of the decisions the Speaker takes?

Sir Stephen Laws: He has a very wide discretion on some matters, but there are some matters on which one would think he did not have discretion. His decisions would be open to question on grounds of legitimacy if they strayed beyond those things, as I think one can make a case that the decision on “forthwith” did. I have suggested that if he were ever minded to allow the majority in the House to override the Government’s initiative on finance, it would also put the whole process into question.

In minority situations, it is always process that becomes the main object of debate in the end—partly because when people are trying to build a coalition in a minority situation, it is much easier to get people on board by saying, “You may think you have to agree with what is being done, but you cannot possibly like how it is being done.” That argument is always used in minority situations to move people from one side to the other.

- Q44 **Chair:** Sir Malcolm, can you imagine yourself or any of your predecessors advising the Speaker in favour of his interpretation of the word “forthwith”?

Sir Malcolm Jack: I think they would all have pointed out that it was a departure from the understood practices of the House in relation to that question, and I think they would have discussed with the Speaker the implications of not holding to that convention.

- Q45 **Chair:** And what are the implications?

Sir Malcolm Jack: The implications are that the business of the House—the Government business—can be changed at any moment.



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Sir Stephen Laws: It is worth noting that nearly all the Standing Orders of the House that were introduced to deal with systematic obstruction by Irish republicans led by Parnell contain the word "forthwith". That is the basis on which systematic obstruction of the business of the House was stopped: by a whole load of Standing Orders, all of which use the word "forthwith".

- Q46 **Mr Jones:** Doesn't it destroy predictability? Isn't it impossible for a parliamentarian to guess what the Speaker might decide on any particular proposal that he or she wants to put forward?

Sir Stephen Laws: The rules of the House are not law, but predictability is the essence of the rule of law.

- Q47 **Mr Jones:** Would you say that that has been damaged by the decision over "forthwith"?

Lord Judge: I doubt it. I think one gets slightly carried away. In your House it is an intense debate, with people having huge consciences on both sides. I do not think that that particular decision is going to cause John Citizen to think that the rule of law is endangered.

Sir Stephen Laws: I agree. But if it is the beginning of a trend, it might be.

Lord Judge: But then there are other questions that arise.

Sir Malcolm Jack: There are also good and bad precedents, of course.

Chair: I hope I was not asking about a bad one.

- Q48 **Kelvin Hopkins:** This question is specifically to Sir Stephen. You touched on finance just now. You have argued that the Government have a "constitutional veto" over legislation in relation to expenditure. Can you explain the rationale for the Government having this veto?

Sir Stephen Laws: Yes. The veto is in Standing Order No. 48. I think it comes back to what I was saying before. There are things that the Government needs to be accountable for. It needs to be accountable for the whole business of Government. A Government is not a series of separate decisions that can be isolated each from the other. It is a series of decisions that have to hang together. The main thing that makes them hang together is money. As I think I said before, legislation is a tool of Government, but the principal tool of Government is the use of public money and raising public money. The Government needs to be accountable to the electorate for the way it raises money and how much it spends. You should not have taxation without representation. You should not have taxation without accountability either.

If the Government does not have ultimate control of the budget, nobody is responsible for the overall budget situation of the Government to the electorate. That is the constitutional rationale. It is the thing that preserves the integrity of the Government's programme. If you don't have it, where do you go? I think, from a practical point of view, you end up in



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a nightmare of pork barrel politics, which you do see in some other systems, where everybody is arguing for their own bit of money and the Government just has to find a way to fund it, so it has control over neither expenditure nor taxation. I do not think that is a desirable constitutional system. I am not saying it is impossible, but I think it is an undesirable one.

- Q49 **Mr Jones:** Sir Stephen, you wrote a paper for Policy Exchange where you discuss the issue of Standing Orders Nos. 48 and 49. You asked, "would not the Speaker's 'creative' approach to the rules of the House allow the disapplication of SOs 48 and 49 without Crown recommendation?" You answered yourself, "In theory, I suppose it could; but it would be more than surprising and potentially horrific if it did so in practice." Is there any reason why this veto, as you have described it, is provided for in the Standing Orders, rather than in primary legislation?

Sir Stephen Laws: It is the business of the House of Commons. The House of Commons has financial privilege. I think it would be surprising if some rule about the conduct of proceedings in the House of Commons were in legislation. I know it is in section 13 of the withdrawal Act, but perhaps that was an ill-advised precedent. I think Standing Orders are where you would expect to find the relationship between the House of Commons and the Government. I have argued elsewhere that the House of Commons does not need the assistance of the courts to enforce its will on the Government. Putting stuff in legislation always runs the risk that—article 9 of the Bill of Rights or not—someone will find some way to get it into court. You would always seek to impose this sort of rule, as it inevitably was historically, through the rules of the House.

- Q50 **Mr Jones:** But isn't that answer dependent on there being a Speaker who adopts a less, as you put it, creative approach to the Standing Orders of the House?

Sir Stephen Laws: It depends on the relative value you give to ensuring that the rules of the House can only be enforced by the Speaker and allowing the courts to involve themselves in them. I think that's your answer—it's a careful answer.

Mr Jones: I won't push it further.

- Q51 **Mr Fysh:** Much of our constitutional system, which you are describing, does rely on these honour systems about what individuals think of precedent and what their judgment is, rather than on reference to any particular set of texts, so it is an interesting situation where individuals begin to depart from historical norms for how things happen. It is hard to think of a situation in the current Parliament, for example, where a Minister might resign if the Government could not get its business. That does not seem to be done anymore. Is that something that it is possible to address in any way other than Standing Orders or the law itself? What are the other ways we could think about trying to—

Sir Malcolm Jack: By having a written constitution.

Q52 **Mr Fysh:** Would that be the law though? Does it have to be the law?

Sir Malcolm Jack: Oh yes—a written constitution, certainly.

Lord Judge: There are arguments in favour of a written constitution and there are arguments against.

Chair: We're not going into them here.

Lord Judge: And I'm not, but the point I want to make is that if you are looking at any individual problem that you are facing—the discussion we have had in the last three minutes suggests there is an individual issue—please don't tackle it as a single issue; you have to see the structure as a whole. The problems that you identify are different bits of the structure and are not answered separately from the rest of the structure.

Q53 **Mr Fysh:** To come back to the specifics of the financial veto, Sir Stephen, you have suggested that if Parliament were to pass legislation over this veto of the Government's, the Government could advise the Queen not to grant Royal Assent to the legislation.

Sir Stephen Laws: That is certainly not what I said. My point was only this. If legislation is forced through the House of Commons in a way that creates a question about its legitimacy, there is a risk. It is not that I think the monarch could or couldn't refuse Royal Assent in those circumstances. I am not going to express a view on that. There are academic views on both sides. My point is that there would undoubtedly, in my view, be people who would argue that she should, and the fact that that argument would be allowed to happen, because the Bill had passed in a way that had questionable legitimacy, is something that must be avoided at all costs, because all politicians—including, for this purpose, the Speaker—should avoid a situation in which that argument is available.

Q54 **Mr Fysh:** I have a lot of sympathy with that. Would the Queen, in such a circumstance, be obliged to follow the advice her Prime Minister gave her?

Sir Malcolm Jack: No, I don't think she would—not necessarily.

Sir Stephen Laws: As I have said, some say she wouldn't; other academics say that she would have to follow the advice. That is precisely why we don't want to get into a situation where the question needs to be answered.

Sir Malcolm Jack: May I come in on this? There are some precedents—admittedly, 19th-century precedents—where the House of Commons has petitioned the Crown on matters of prerogative directly; there was a case involving Gladstone and Disraeli. Admittedly, this was not on matters of huge significance—bishops and the prerogative of the Queen—but the Queen was petitioned on a Humble Address from the Opposition. So there are precedents. There is a precedent from the House of Lords as well. I think it involved Irish peers. A similar Humble Petition was presented to the Crown. In the case of the Gladstone and Disraeli one, the Queen



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acceded to the Opposition's Humble Address, presumably having been advised by the Government not to.

Q55 **Mr Fysh:** Would it be for the Speaker to decide on whether—

Sir Malcolm Jack: No, it has nothing to do with the Speaker. It would be for the Queen and the Prime Minister advising her.

Q56 **Mr Fysh:** Could you clarify whether the full Cabinet has to approve the laying of a motion for a money resolution?

Sir Stephen Laws: The convention is that a money resolution is initialled by a Treasury Minister, when you get it. This is all what happens in normal circumstances. Who knows? In normal circumstances, if a Bill requires a money resolution, the drafter will alert the Department whose Bill it is that it needs it and inform the Treasury. The draft of a resolution will be approved by the Minister in charge of the Bill, because it is his Bill, and it will then be sent to the Treasury to be initialled, usually by the Financial Secretary. There was a time when we had to send the initialled version to the Clerks in the House, but I think that nowadays they do not always insist on seeing the initialling.

Sir Malcolm Jack: This arises, of course, in the context of private Members' Bills as well. They would have to be examined to see whether there were money implications.

Q57 **Mr Fysh:** Would the First Lord of the Treasury have the call on whether or not that happened in the final analysis?

Sir Stephen Laws: There was a curious example where the Treasury Minister in question was the First Lord of the Treasury. Everybody accepted that he was the First Lord of the Treasury and therefore could initial the money resolution under the Government practice of getting it done by a Treasury Minister, but usually it is the Financial Secretary.

Q58 **Mr Fysh:** So there is no precedent of the need for the full Cabinet to approve such a thing.

Sir Stephen Laws: No. It is certainly not recorded anywhere.

Q59 **Chair:** Can we get back to the question? Does the whole panel agree that the requirement for a money resolution constitutes a constitutional veto over Parliament's right to legislate in respect of Bills requiring a money resolution? Do you all share that view?

Sir Malcolm Jack: No, I don't. I think that that would be the conventional understanding, but, as I say, there are precedents where the House has petitioned the Crown directly, on a matter of prerogative.

Q60 **Chair:** I am at a loss as to how a sovereign House, a sovereign Parliament, can be vetoed by anybody.

Sir Stephen Laws: Sir Malcolm might not have answered the question about money resolutions. He was answering a question about Royal Assent.



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Sir Malcolm Jack: Yes, that's right.

Q61 **Chair:** I was asking about money resolutions.

Sir Malcolm Jack: Ah, money resolutions. Well, could the same thing happen? Could the House petition the Crown directly?

Q62 **Chair:** If it is merely a matter of procedure and the procedure is waived—you say this will be horrendous, Sir Stephen—but if the procedure is waived and an Act of Parliament is put through both Houses and presented to the sovereign and given Royal Assent, which court will look at this and say, "Oh, there wasn't a money resolution"?

Lord Judge: I haven't read Sir Stephen's paper. I regret that I haven't. I was told about it, but I haven't. It would strike me as rather a strange situation. The idea that a court would be able to interfere and decide what should happen is way out of the constitutional boundaries.

Q63 **Chair:** It would seem to be a breach of article 9.

Sir Malcolm Jack: Yes, it would be.

Sir Stephen Laws: The issue only arises if it is perhaps overridden contrary to advice. That then questions the legitimacy of the way the Act is passed. There are different views on whether or not some of the Bills before the House would require it.

Q64 **Chair:** But in the end that is a matter for Parliament.

Lord Judge: Parliament can ratify its own decisions.

Sir Stephen Laws: But it is established—Sir Malcolm will confirm this—by precedent and previous rulings that a motion to disapply Standing Order No. 48 requires the Queen's recommendation.

Sir Malcolm Jack: That is correct.

Q65 **Chair:** What does that mean?

Sir Stephen Laws: It means that the House could not agree to a motion to dispense with the need for a money resolution without the Crown having given its approval to that motion.

Q66 **Chair:** Who would enforce that?

Sir Stephen Laws: It is the job of the Speaker or the Chairman of Ways and Means to enforce it.

Q67 **Chair:** Finally, we have talked extensively about what is going on in Parliament today. However, what are the long-term constitutional considerations that the House should bear in mind when making these decisions? How do we prevent unintended consequences arising from what may be decided for whatever expedience today? You may each have a closing statement.

Sir Stephen Laws: I have already explained that I think the greatest cause for concern at the moment is the willingness of people on all sides



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to stray into the shadowy area of what is and is not allowed. If people want to reach decisions that will be accepted by a broader class of people than those in favour of them, they need to keep all their decisions within the area of unquestionable legitimacy.

Sir Malcolm Jack: I do not believe that you can predict unintended consequences. That is the whole logic of their being unintentional. Nevertheless, Committees like this must look closely at the possible implications. For example, I do not want to go into this again, but the “forthwith” question has all sorts of ramifications for all kinds of questions put “forthwith”, such as on statutory instruments, which may then lead to conflict with the courts. These sorts of issues certainly need to be looked at. However, the exact consequences are very difficult to predict.

Lord Judge: I said earlier that this is a Brexit issue. This decision will have to be made. We will get to the decision and there will not be time to pause and think what lies ahead. However, I hope that at the end of it, 10 years from now, we will have greater parliamentary control over the Executive. I think that that could happen.

Professor Young: I agree that it is not possible to have a full understanding of the possible unintended consequences, by definition. However, this situation gives us the opportunity to take a step back and reflect more deeply on the constitution more generally. We have a tendency with the UK constitution to move from situation to situation, resolving them pragmatically and then moving on. We sometimes do not necessarily have the time to take a step back and think more deeply about the nature of our constitution, the values we want it to promote and how we can guarantee that.

Now is obviously not the time to do that, but this situation has shown that it is time—once we have gone through these particular issues—to take a step back and think more deeply about how the constitution should work. Remember that it is about reflecting deep constitutional values, not only providing solutions to particular practical problems.

Chair: Thank you very much. We have been very privileged to have four such distinguished witnesses, who at such short notice have given us such an informed and thoughtful commentary on the present situation. We are very grateful to you indeed.