

Alex Thomas, Programme Director at the Institute for Government – Written Evidence (EOS0006)

Follow up to Alex Thomas's evidence to Lords Constitution Committee inquiry on Executive oversight and responsibility for the UK constitution:

An example of an issue where there has been a difference between lawfulness and constitutionality, for example an issue that was lawful but unconstitutional:

- As discussed briefly during the evidence session, one example might be a prime minister not resigning after their party clearly lost an election. The constitution would require it, but it rests on convention rather than law. Anything other action that was constitutionally required but rested solely on convention would also presumably be relevant – which would include for example ministers not turning up when called to appear in front of select committees, or the government not providing a spokesperson at the despatch box.

An example of where the cabinet secretary, or another official, has stopped something happening because it was unconstitutional:

- The recent serialisation of Tim Shipman's Brexit book 'Out' is interesting here, and shows how hard it is for a senior official to stop something happening in the face of a determined prime minister or political adviser. Helen MacNamara is quoted as relying on the law, and its enforcement, to stop Boris Johnson from doing something that was both unconstitutional and unlawful. She reportedly says to the prime minister, when pressed on the government ignoring the Benn/Burt Act, that in those circumstances "the civil service can't work for you. If you want to do that, it's the law, none of us can work for you". And if the prime minister and Dominic Cummings ignored the law that "the police don't work for you in that situation, Dom, they work for me ... they work for us. It's not your building. These aren't your people. The police work for the Queen. We all work for the Queen." It was the law, not constitutional convention, that ultimately constrained the prime minister.
- Examples of an official stopping something based solely on constitutionality are hard to find, including reflecting on my experience in government, because cabinet secretaries and other senior officials will do everything possible to avoid getting to the point where they have to give advice that something is unconstitutional. And if they do give that advice it has no teeth. Even the prorogation of 2019, which had a good claim to be unconstitutional, and turned out to be unlawful, was not stopped by officials until the courts stepped in.

Justification for the claim that the Johnson government did not regard itself as governed by constitutional norms during 2020:

- I misspoke during the evidence session, and was referring to 2019 and the events of the prorogation and the early government response to the

Benn/Burt Act. But during 2020 the dismissal of permanent secretaries, previously explored by the committee, is some evidence that the government did not consider itself bound by norms that had constrained previous administrations.

Does the IfG see any value in putting some principles into legislation to guide executive decision making on constitutional issues?

- There is value in there being a generally shared understanding of what should be considered a constitutional issue, and how decisions should be made on matters that relate to those issues. If the Committee were to consider publishing and updating existing material to help assist that understanding that would no doubt be helpful. That could be accompanied by advice based on the Committee's expertise and evidence-gathering about the seriousness with which the executive should approach constitutional issues.
- But putting such a list and principles into legislation would need considerably more work and reflection. There will be consequences of legislating on how the executive should approach constitutional questions that would themselves raise fundamental constitutional questions. Until that has been fully considered I would be sceptical about legislating in this area.

Thoughts on how bringing together parliamentary representatives to supplement the council of the nations and regions would work and if it would be beneficial:

- It is not clear what the objective of this would be. It would blend legislative and executive representatives in what is currently an executive to executive forum. It also raises a question of membership – would there just be UK Parliament representatives or also representatives from the Scottish Parliament, Senedd and NI Assembly, if so, what level of political balance would be sought? And there is a question of mandates. Currently the forum represents nations and regions, while MPs represent constituencies.
- The terms of reference for the council say that "The Council is designed to facilitate partnership working between the UK Government, Devolved Governments, the Mayor of London, and Mayors of Combined Authorities and Mayors of Combined County Authorities. It will be a central driving forum that brings together governments and authorities with devolved responsibilities to determine actions for tackling some of the biggest and most cross-cutting challenges the country faces, on a structured and sustained basis." For parliamentary representatives to be involved there would need to be more clarity about what 'partnership' relations with an MP or peer would look like. You could make a case that with only partial coverage of the regions – almost 50% of England's population is not represented by a mayor at the table – parliamentary representation might help. But the other issues raised above would remain.

What constitutional challenges does the Council of Nations and Regions face in seeking to renew democracy in England?

- There will be many challenges – though I would highlight two practical considerations that might turn into constitutional questions. The first is the current partial coverage of mayors in England. The devolution map is of course incomplete, which means areas lacking a mayor will be underrepresented in the forum. Although coverage may change it is likely that predominantly rural areas will be under-represented. The second is if there is an expansion of mayors across England it will increase the number of seats at the table. This could affect the effectiveness of the forum and potentially dilute the impact of any given mayor.

Do any governance challenges arise from having multiple ministers (e.g. Angela Rayner, Pat McFadden and the Prime Minister) involved in oversight of the Council of the Nations and Regions?

- The Council's terms of reference say: "The Prime Minister will chair the Council, which will be hosted at different locations around the UK...Meetings of the Council of the Nations and Regions will work alongside existing and planned engagement between the Chancellor of the Duchy of Lancaster and the Devolved Governments, and engagement between the Deputy Prime Minister and the Mayor of London, the Mayors of Combined Authorities, and the Mayors of the Combined County Authorities." So, it looks like the Council will operate alongside pre-existing arrangements, and that there are three structures which are in operation. The very different responsibilities of metro mayors and the first ministers may help to preserve the unique character of each of these forums. However, there is a risk of overlap. The Council's scope is quite broad ("provide a forum to share best practice, to collaborate on shared issues, and agree how to work together to drive delivery on areas of mutual priority") which could lead to confusion as to which forum and minister is the best liaison point.

20 October 2024