

Anonymous 2 – Written Evidence (VUC0069)

Summary

The main vulnerabilities of our constitutional arrangements are as follows: it is not codified or derived from a single source; there is no universal process of dispute resolution for its enforcement; fundamental rights are not subject to complete entrenchment; and many constitutional norms are rooted in convention, which are exceptionally vulnerable to being ignored or circumvented. These difficult-to-enforce conventions and norms govern the most important aspects of our system – including the peaceful transition of power between politicians after an election, the ability of the legislature to oversee the executive, and the granting of assent to legislation. They also cover matters that might not be found in a ‘codified’ constitution, but are of constitutional importance, like respectful behaviour towards civil servants and the judiciary. A chief strength of the UK system is that the judiciary is known for being non-politicised. So too is the Sovereign, who is the head of public institutions, including the armed forces, the integrity of which is essential to the maintenance of the democratic system. Due to the exceptional nature of the UK’s constitutional system, many foreign safeguards – such as a stronger role for courts or codification – are difficult to implement, and therefore, less applicable. **However, we submit that one particular area where comparative lessons may be learned concerns the establishment of a constitutional dispute resolution process, taking a cue from the French Constitutional Council.**

Q4) How effective are the UK’s constitutional safeguards? Where do the vulnerabilities lie?

1. In *Miller 1*, the United Kingdom Supreme Court (UKSC) observed that, ‘unlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions.’¹
2. From the perspective of safeguards, the consequences of this characteristic are two-fold. First, because the UK lacks a single supremely important constitutional document, there is no universal process by which norms, constitutional principles and rules can be enforced at times of disruption. **Instead we rely on a patchwork of parliamentary scrutiny mechanisms and the judicial review process to allow us to assess the constitutionality of government action and ensure that public authorities act lawfully.** However, due to the uncoded nature of the constitution and the absence of a universal dispute resolution process, **there is no way of ensuring that political actors respect all underlying constitutional rules, which is a principal weakness.**

¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 [40]]]

3. Second, many integral aspects of the UK constitution depend on tacit understandings (including what are known as 'conventions'), that may lack clear official definition and hard legal status, as opposed to directly legally enforceable, more clearly defined rules. As these conventions are amorphous and largely political, adherence are difficult to enforce by Parliament or the courts.² While a convention may be taken into account in a judicial review proceeding, it is 'well established that the courts of law cannot enforce a political convention.'³
4. Matters governed at least in part by convention include: relations between the UK and devolved tiers of governance; the activities of ministers, including stipulations set out in documents such as the *Ministerial Code*; and the exercise of the Royal Prerogative. Pertaining to this latter collection of powers, there are crucial conventions involving the resignation, appointment, or retention of the Prime Minister following a General Election and their departure following a loss of confidence in the House of Commons, and the granting of Royal Assent, turning bills into Acts of Parliament. For these integral aspects to function in a way that maintains the integrity of the system, we rely on trusted politicians to behave and to want to adhere to constitutional norms, without a legally enforceable sanction-backed process (the 'good chaps theory').⁴ For instance, we would hope that a government would not introduce a bill that violated basic constitutional standards, or that MPs and Peers would not approve such content. These norms prevent the development of a circumstance in which Royal Assent was being sought for constitutionally dubious measures.
5. Since 2016, there have been an increasing number of occasions on which ministers have been criticised for acting in a constitutionally improper manner. These episodes include – in 2019 – an unlawful attempted prorogation which frustrated parliamentary scrutiny at the height of Brexit negotiations, and a then-Prime Minister (among others) violating lockdown regulations in 2020, and subsequently seeking to frustrate parliamentary inquiries regarding these transgressions.⁵
6. We emphasise that the increasing disregard for constitutional norms is not limited to one party. During recent Labour and Conservative administrations alike, ministers have been accused of bullying senior civil servants or unfairly dismissing them without reasonable grounds.⁶ As the

² Joint Committee on Conventions, *Conventions of the UK Parliament* (2005–06) HL 265-I

³ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [141]

⁴ Andrew Blick and Peter Hennessy, *Good Chaps No More? Safeguarding the Constitution in Stressful Times* ([Constitution Society](#) 2019)

⁵ *R (Miller and Cherry) v Prime Minister* [2019] UKSC 41, [2020] AC 373 [41]; House of Committee of Privileges, *Matter referred on 21 April 2022 (Conduct of Rt Hon Boris Johnson): Final Report* (5th report 2022–23) [HC 564](#)

⁶ There are four high-profile examples across the Labour and Conservative governments alike. Under the Johnson administration, the former Permanent Secretary to the Home Office, Sir Philip Rutnam, claimed that he had been bullied by former Home Secretary Priti Patel and that there had been a 'vicious and orchestrated campaign' against him. 'Cabinet Office to investigate Priti Patel bullying claim.' [BBC News](#) 2 March 2020; Dominic Raab was subject to eight formal complaints of bullying during both his tenure as Justice Secretary and as Foreign Secretary. 'Dominic Raab Bullying Report: Key Findings at a glance' [BBC News](#) 21 April 2023; Under the Starmer

Constitution Committee itself has observed, the impartiality and perceived impartiality of the civil service is a central tenet of our constitution.⁷

7. Senior members of political parties have publicly and repeatedly blamed the impartial civil service and independent judges for obstructing policy delivery.⁸ These claims undermine the long-standing principle that ministers have constitutional duties to protect the impartiality of officials and independence of the judiciary, in addition to trust in the political system as a whole.
8. Observers have voiced concerns about governments departing from established constitutional practice that is designed to ensure a system of robust parliamentary scrutiny; these include claims about the overuse and abuse of delegated legislation⁹ and announcing new policies to the press prior to parliamentary debates.¹⁰
9. **Whatever view one takes of each episode, collectively, they suggest that over the last decade, there has been a gradual erosion of respect for the constitution by politicians of all colours – so much so that they no longer feel bound to respect the civil service, judges or willingly submit themselves to parliamentary scrutiny. While there has never been a period of perfect adherence, many areas have recently been subject to a deterioration in standards.** We submit that the fact that we arrived at this stage confirms the ineffective nature of existing safeguards. **While valuable, neither Parliament nor the courts alone can adequately enforce the norms that our system depends on.**
10. In short, the main vulnerabilities of our constitution are that it is not codified or derived from a single source; there is no universal process of dispute resolution for its enforcement; and many constitutional norms are rooted in convention, exceptionally vulnerable to being circumvented or ignored. These difficult-to-enforce conventions and norms govern the most important aspects of our system – including the peaceful transition of power between politicians after an election; the ability of the legislature to oversee the executive; and the granting of assent to legislation. They also cover matters that might not be found in a 'codified' UK constitution,

administration, the Cabinet Secretary Sir Chris Wormald resigned and received a record pay-out of £860,000. 'Top Civil Servant Sacked by Starmer Received Record £860,000 Payout' [The Guardian](#) 14 September 2026; The former Prime Minister, Sir Keir Starmer also fired Sir Olly Robbins, the former Permanent Secretary to the Foreign Office, over Lord Mandelson's vetting, despite asking to fast-track this process. The Government is presently facing a judicial review of this decision.

'Former top official Robbins takes legal action over sacking' [BBC News](#) 13 July 2026

⁷ House of Lords Select Committee on the Constitution, *Permanent Secretaries: Their Appointment and Removal* (2022–23) HL 258

⁸ Keir Starmer, 'PM Speech on Plan for Change' ([Pinewood Studios](#)) 5 December 2024; Conservative Party Conference: Robert Jenrick Tells Courts to Get Out of the Way in Attack on Judicial Review' *Law Society Gazette* (London, 5 October 2025)

⁹ Secondary Legislation Scrutiny Committee, *Government by Diktat: A Call to Return Power to Parliament* (20th report 2021–22) [HL 105](#) [15]

¹⁰ Dexter Govan, 'The Speaker's War: Announcements in the House of Commons' [Constitution Society](#) 11 September 2025; House of Commons Public Administration and Constitutional Affairs Committee, *Ministerial Statements and the Ministerial Code* (4th report 2024–26) [HC 1036](#)

but are of constitutional importance, like respectful behaviour towards civil servants and the judiciary.

Q5) Who are the key guardians of the integrity of the UK's constitution? What formal or informal powers do they have?

11. Various political and constitutional actors may act as constitutional guardians, including the Cabinet, senior civil servants, backbench MPs, Peers, the independent judiciary, and the Sovereign. While all have either political or legal responsibilities to uphold the integrity of the constitution, their capacities to do so vary depending on the circumstances.
12. Ours is a system of cabinet government, meaning that although the Prime Minister chairs the Cabinet, the Cabinet remains 'the ultimate arbiter of all government policy.'¹¹ Bagehot states, 'Cabinet, in a word, is a board of control chosen by the legislature, out of persons whom it knows and trusts, to rule the nation.'¹² He added that the government, collectively, must have 'a tone of mind sufficiently stable to bear the necessary excitement of conspicuous revolutions.'¹³ The Cabinet is formally responsible for policy delivery and bound by the principle of collective responsibility.
13. The Cabinet is the first line of defence against unconstitutional or improper policy decisions. The Ministerial Code states, 'Ministers are expected to maintain high standards of behaviour and to behave in a way that upholds the highest standards of propriety.'¹⁴ This code is to be read against ministers' overarching duties to comply with the law and protect the integrity of public life.¹⁵ Ministers are expected to submit themselves to accountability platforms in good faith and to provide accurate and truthful information to Parliament and the public.¹⁶
14. These constitutional duties are formally incumbent upon all ministers. If a Prime Minister acts in a constitutionally improper manner, it is incumbent upon Cabinet ministers to object, albeit within the context of a confidential Cabinet discussion. Ultimately, Cabinet members determined to do so can collectively exert pronounced pressure upon or even depose a premier. The mechanism for undertaking the latter tends to be leadership rules of whichever party is in power, which is not transparent and is easily changed.
15. Cabinet members and senior party leadership exert considerable influence over a Prime Minister. Four of the last five former Prime Ministers left office due to pressure from within their own parties, including senior ministers.¹⁷ **We believe that this shows that senior figures within Cabinet and the governing party do play an influential role in governance and should, therefore, be given additional duties to**

¹¹ *The Cabinet Manual* (1st edn [October 2011](#)) 4 [\[13\]](#)

¹² Walter Bagehot, *The English Constitution* (Oxford University Press 2009) 12

¹³ *ibid* 27

¹⁴ HM Government, [Ministerial Code](#), [1.1] 6

¹⁵ *ibid* [1.6] 7

¹⁶ *ibid*

¹⁷ Former Prime Ministers Theresa May, Boris Johnson, Elizabeth Truss and Keir Starmer

uphold constitutional principles amongst themselves. However, such mechanisms rest upon the good intentions and determination of those who occupy the relevant positions. If they are either supportive of or unwilling to oppose improper courses of action being contemplated or pursued by a Prime Minister, then this safeguard ceases to exist.

16. Senior civil servants are the second line of defence in case of executive overreach. Those who may undertake some form of constitutional guardianship include the Permanent Secretaries, in addition to the 'golden triangle' who manage the relations between the Government and the Palace, namely, the Cabinet Secretary, the Principal Private Secretary to the Prime Minister and the Private Secretary to the Sovereign.

17. The primary role of civil servants is to support the Government in policy delivery. In doing so, they must act with integrity, honesty, objectivity and impartiality, pursuant to the Civil Service Code.¹⁸ Civil servants must 'comply with the law and uphold the administration of justice', and they 'must not deceive or knowingly mislead ministers, Parliament or others.'¹⁹ This means that if a minister acts in a manner that is clearly in violation of these principles, or of the constitution, junior civil servants should voice concerns to their principals and the Permanent Secretary should warn the minister. The minister, in turn, has 'a duty to give fair consideration and due weight' to a civil servant's informed and impartial advice.²⁰

18. The constitutional guardianship powers of senior civil servants are largely 'soft'; they do not have formal authority to halt unconstitutional behaviour. But there are steps that can be taken in some circumstances. Beginning with a common example, if a minister chooses to spend money in a manner that may not meet Treasury criteria of regularity, propriety, value for money, and feasibility, the Permanent Secretary asks for a written ministerial direction from the Secretary of State to ensure direct accountability to Parliament.²¹ This step ensures that the disputed public spending decision is scrutinised by the Comptroller and Auditor General, in addition to the House of Commons Public Accounts Committee.

19. **While the Cabinet Secretary advises the Prime Minister on matters involving compliance with the Ministerial Code, 'it is not the role of the Cabinet Secretary or other officials to enforce the code.'**²² The arbiter remains the Prime Minister, who decides its enforcement and selects the Independent Adviser. The Prime Minister 'is ultimate judge of the standards of behaviour ... and the consequences of a breach of those standards.'²³

20. **The process presupposes that the Prime Minister will act in good faith and be willing to take disciplinary steps that may be harmful**

¹⁸ The Civil Service, The [Civil Service Code](#)

¹⁹ *ibid*

²⁰ [Ministerial Code](#), [1.9] 9

²¹ Gavin Freeguard, 'A Sense of Direction: When Permanent Secretaries Object to Ministerial Decisions' [Institute for Government](#), 6 July 2015

²² [Ministerial Code](#), [2.3] 10

²³ *ibid*

to his own administration's credibility.—This difficulty was demonstrated by two episodes that occurred during the Johnson administration. In November 2020, Sir Alex Allan, the Government's independent adviser on ministerial standards, resigned after the Prime Minister had rejected his finding that Priti Patel had met the definition of bullying.²⁴ Then, in June 2022, Lord Geidt resigned from the same position, due to the 'Government's intention to consider measures which risk a deliberate and purposeful breach of the Ministerial Code.'²⁵

21. While the High Court has deemed the Ministerial Code to be justiciable, there have not been any successful claims.²⁶ It is unlikely that the courts will intervene, as they have acknowledged that a dispute about the interpretation of the Ministerial Code is not easy to separate from political issues which may not be justiciable.²⁷ They have recognised that a court may, as a matter of discretion, decline to entertain claims regarding the Ministerial Code where the facts are unknown or inappropriate.²⁸ **Although the Ministerial Code requires ministers and civil servants to act as guardians (assuming they are minded to do so), its enforcement is flawed in that it requires the Prime Minister to take actions that are principled but contradict his own political interests.**
22. A distinct set of circumstances may require the 'golden triangle' of three senior officials to act as informal guardians of constitutional integrity. If a Prime Minister chooses to act in a manner which politicises the position of the Sovereign, they would be expected to provide a uniform warning against this. One might envisage this occurring if the Prime Minister or senior ministers intend to abuse the exercise of Prerogative powers in a manner that would undermine the rule of law or core principles. An attempt to politicise the leadership of the armed forces, or deploy those forces for purposes of internal repression falls within this category.
23. Historically, the Private Secretary to the Sovereign has been influential in setting the boundaries of constitutional behaviour. The 'Lascelles Principles', which governed the conditions on which a Sovereign can refuse a PM's request for dissolution, were based on the view of Sir Alan Lascelles in an anonymous letter to *The Times*. Although it is difficult to conceive that any modern Private Secretary would be as influential, it is plausible that the golden triangle acting together with some political support from senior Cabinet members could, behind the scenes, prevent the Prime Minister from acting in a constitutionally improper manner. But it remains difficult to envision a case where senior civil servants could intervene without some support from ministers as they lack the political authority and formal powers to do so.

²⁴ Cabinet Office, 'Statement from Sir Alex Allan' [20 November 2020](#)

²⁵ Lord Geidt to Rt Hon Boris Johnson MP, [15 June 2022](#)

²⁶ *R (FDA) v Prime Minister and Minister for the Civil Service* [2021] EWHC 3279 (Admin) [39]-[40], [\[42\]](#)

²⁷ *ibid* [42]

²⁸ *ibid* [43]

24. The threat to constitutional integrity would be considerably more acute if the Prime Minister, with support from Cabinet, acted in a manner that stymies parliamentary scrutiny, by dissolving or proroguing Parliament for an exceptionally long period of time at a time of political importance. Given that the power of dissolution has been made subject to an ouster clause restricting judicial intervention, it is difficult to see how constitutional integrity would be protected.²⁹
25. The government derives its political-constitutional authority from commanding the confidence of a majority within the House of Commons (and it must resign if it loses that confidence).³⁰ This position puts the executive in a position of strength with regard to the legislature, since it has the broad support of a majority within the dominant chamber. However, a government is likely to be wary of division and discontent within its own Commons cohort (potentially even if actual parliamentary defeat on an individual measure or confidence motion is not a realistic proposition). Backbenchers from within the ruling party therefore wield significant influence. For instance, pressure from rebellious Conservative backbenchers forced the Government to commit to putting the second and third Covid restrictions to a vote in November 2020 and January 2021.³¹ **Backbenchers do have the political clout and influence to ensure that the government acts constitutionally, even if they lack formal powers. But they must want to use their influence and not be dissuaded by the promise of future political patronage.**
26. The House of Lords is regarded as a primary guardian because, unlike MPs, Peers are not subject to a high degree of party influence, no party now has a majority in the Lords, and the chamber has developed a distinguished reputation for expert scrutiny.³² Many constitutionally significant legislative amendments have been tabled by Peers.³³ But pursuant to the Salisbury-Addison convention, Peers cannot block government legislation implementing manifesto commitments, or pass wrecking amendments. The role of the House of Lords is limited because it lacks the democratic legitimacy to oppose a bill that is supported by a Commons majority, no matter how constitutionally offensive this bill may be.
27. The Lords may delay a public bill for up to approximately thirteen months under the Parliament Acts, though it has no veto powers over unconstitutional bills – other than those extending the length of a Parliament.³⁴ Its powers of delay have not been fully deployed since the

²⁹ Dissolution and Calling of Parliament Act 2022, ss [2-3](#)

³⁰ *The Cabinet Manual* [2] [2](#)

³¹ Hansard, HC debs 4 November 2020, vol 683, col 380; HC Deb 6 January 2021, vol 686, Steve Baker and Mark Harper, 'We need to know how many lives lockdown is destroying' [Daily Mail](#) 19 December 2020; 'Covid Passes become Law' [BBC 14 December 2021](#)

³² Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford University Press 2013) 292-293

³³ UCL [Constitution Unit](#), 'Government Defeats in the House of Lords' E.g., UK Internal Market Act 2020, Part 5, removal of clauses 42 and 44 permitting breaches of international law. Hansard HL Debs vol 807, [9 November 2020](#); Dawn Oliver, 'Constitutional Guardians: The House of Lords' (The [Constitution Society](#) 2016)

³⁴ Parliament Act 1911, [s 2](#); Parliament Act 1949, [s1](#)

Hunting Bill 2004, which was ultimately passed without the approval of the Lords.³⁵ Only seven bills have been passed under the Parliament Acts, and it should not be assumed that Peers will oppose constitutionally improper legislation to this point.³⁶ Peers have not used their delaying powers to oppose bills overturning UKSC judgments and watering down human rights protections, despite objecting on principled grounds.³⁷

28. Three committees within the House of Lords play a crucial role in upholding constitutional standards. In addition to the Constitution Committee, these are the Delegated Powers and Regulatory Reform Committee (DPRRC) and the Secondary Legislation Scrutiny Committee (SLSC). Their roles reflect the fact that the delegated legislation system is a critical concern from the perspective of constitutional guardianship.

29. While the use of delegated legislation is necessary to the proper functioning of any government, its overuse and inadequate parliamentary scrutiny have been criticised since the Donoughmore Report of 1932.³⁸ Delegated legislation may be used in a manner that bears little resemblance to the purposes envisioned by Parliament.³⁹ The parliamentary scrutiny process does not provide parliamentarians with a meaningful opportunity to voice dissent, or participate in policy scrutiny.⁴⁰ In November 2021, the DPRRC and SLSC raised the alarm, criticising decades of overusing delegated legislation and the resulting democratic deficit. They argued that these trends had led to a seismic shift of legislative power away from Parliament, towards the executive and called for a total 're-set'. Government reliance on delegated legislation remains a convenient way to side-line Parliament from policymaking.

30. The DPRRC primarily considers whether 'the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of delegated power to an inappropriate level of parliamentary scrutiny.'⁴¹ In doing so, it regularly warns against the overzealous use of Henry VIII powers and 'skeleton bills' which contain such 'significant delegations that the real operation [of the Act] would be entirely by the regulations.'⁴² The SLSC reviews the merits of all instruments subject to parliamentary proceedings. The SLSC may report instruments for: being

³⁵ Hansard HC Debs vol 424, [15 September 2004](#)

³⁶ Government of Ireland Act 1914; Welsh Church Act 1914; the Parliament Act 1949; War Crimes Act 1991; European Parliamentary Elections Act 1999; Sexual Offences (Amendment) Act 2000; and the Hunting Act 2004

³⁷ Safety of Rwanda Act 2024, ss 2-3, Dissolution and Calling of Parliament Act 2022, [s3](#)

³⁸ Earl of Donoughmore, *Report of the Committee on Ministers' Powers* (1932) Cmd 4060

³⁹ Consider the Health Protection (Restriction) Regulations (SI 2020/350), which imposed the most drastic restrictions on everyday life since the post-war era, including a national lockdown and a prohibition on gatherings. It is highly unlikely that Parliament envisioned such measures when it enacted the underpinning delegated powers, namely section 45C of the Public Health (Control of Disease) Act 1984 through [section 129](#) of the Health and Social Care Act 2008. However, the regulations were deemed entirely lawful in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin), though as some commentators suggested, the regulations lacked an adequate basis. Tom Hickman, 'Responding to the Covid-19 Crisis' [Blackstone Chambers](#), 30 November 2020

⁴⁰ Hansard Society, 'Delegated Legislation: The Problems with the Process' November [2021](#)

⁴¹ UK Parliament, 'Delegated Powers and Regulatory Reform Committee – Role' ([online](#))

⁴² DPRRC, *1st Report*, (1992–93 HL 57) [15]

politically or legally important; giving rise to policy issues that may be of interest; imperfectly achieving objectives; being made pursuant to an inadequate consultation; and the provision of inadequate explanatory materials.⁴³

31. Despite the significance of these committees in guarding against the abuse of delegated legislation, they lack censure powers, which means that the Government need not comply with their recommendations and longstanding conventions. This has directly contributed to the decline in government compliance with committee recommendations. In 2015, there was an assumption that most DPRRC proposals would be accepted, but the committee itself estimated that this dropped from a majority to approximately 30% in 2017–19 and to the region of 40% during the 2021–22 session.⁴⁴
32. Delegated legislation may be rejected by Peers, but this has only occurred on rare occasions and seldom in relation to constitutional matters. Since 1960, the House of Lords Library has recorded five fatal defeats out of over 180,000 Statutory Instruments.⁴⁵ The extremely rare nature of legislative defeats shows that Peers are conscious of their unelected role and will often defer to MPs. Lords defeats on delegated legislation may be motivated by principle, including ethical objections to severe financial cuts to low income working families, restrictions on legal aid and the social impact of expanded gambling. But none of the five defeats have concerned matters of constitutional importance. The exceptionally rare nature of defeats may be explained by the fact that if Peers block SIs, there is a high risk of backlash; when they last did so, the Cameron administration threatened to curtail their role in the delegated legislation process altogether.⁴⁶
33. As head of state, the Sovereign undertakes constitutional duties which have developed over a thousand years. These include making public appointments, bestowing honours, granting Royal Assent to legislation, appointing the Prime Minister and exercising numerous other prerogative powers. The consensus amongst constitutional commentators today is that most of these powers are exercised upon the advice of ministers, or pursuant to conventions.
34. Separately to these formal powers, the Sovereign is regarded as having 'the right to be consulted, the right to encourage, the right to warn.'⁴⁷

⁴³ SLSC, *Accessing the scrutiny work of the Committee* (45th report 2017-19) [HL 312](#)

⁴⁴ DPRRC, *1st Report* (2022-23) HL 8 [\[12\]](#)

⁴⁵ *Erskine May* [\[31.15\]](#) [\[31.27\]](#); Draft Southern Rhodesia (UN Sanctions) Order 1968; Greater London Authority Election Rules 2000; Draft Greater London Authority (Election Expenses) Order 2000; Draft Gambling (Geographical Distribution of Casino Premises Licences) Order 2007; Draft Legal Aid, Sentencing and Punishment of Offenders (Amendment) Order 2012

⁴⁶ When Peers last declined to consider the Tax Credits Regulations in 2015, this triggered a severe political backlash; the Cameron Government established a review to consider curtailing the House's role scrutinising delegated legislation altogether. Tax Credits (Income Thresholds and Determination of Rates) (Amendment) [Regulations](#) 2015; see *Strathclyde Review: Secondary Legislation and the Primary of the House of Commons*, Cm 9177 (December 2015)

Although the Sovereign must give way to the will of government, he or she may voice concerns privately regarding the constitutional propriety of actions in his or her weekly audience with the PM.

35. It is conceivable that a future Prime Minister could advise the Sovereign to act in a manner that would not be constitutionally appropriate. During Brexit, there were suggestions that the Government could advise the Queen to refuse to grant Royal Assent to the backbench-sponsored bill, the Cooper-Letwin bill, which legislated against a no-deal.⁴⁸ Professor Mark Elliott argued that such a proposition would be 'deeply problematic' because it would give the Government 'an unqualified veto over legislation', thus undermining the fundamental principle of parliamentary sovereignty.⁴⁹ We agree that the Sovereign has a constitutional duty – albeit not a legal one – to grant Royal Assent to legislation which has been approved by Parliament and that this duty arises independently of the convention to follow ministerial advice. We would hope that no government would be foolish enough to furnish the Sovereign with advice undercutting the clearly stated will of Parliament, thus placing the head of state in a position of extreme constitutional difficulty.
36. A scenario which pits Parliament against the government is a remote possibility; the **more likely scenario would be where the Queen or King is meant to provide Royal Assent to a bill which imposes draconian restrictions upon people's rights or undercuts the independence of the judiciary or the civil service. While the Sovereign could express reservations privately, he or she would be under immense pressure to follow the advice provided by the government. The Sovereign may only act as a guardian in a highly constrained set of circumstances either where there is some ambiguity or where departure from one principle can be justified by a more significant one.**
37. The courts have become increasingly important as the guardians of last resort. Amongst other matters, the courts have recently: ensured that Parliament was consulted on the government's decision to withdraw from the EU; overturned an unlawful prorogation during the crucial period of Brexit negotiations; and prevented the Government from implementing the Rwanda scheme as it would amount to a breach of the UK's obligations under international law.⁵⁰
38. The courts cannot quash a provision in an Act of Parliament due to the principle of parliamentary sovereignty. Pursuant to the Human Rights Act 1998, the courts may declare provisions within an act incompatible if they cannot be read in a manner that is compatible with the rights enshrined by the European Convention on Human Rights.⁵¹ But a declaration of

⁴⁷ Bagehot, *The English Constitution* 64

⁴⁸ Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' [Public Law for Everyone](#), 21 January 2019

⁴⁹ *ibid*

⁵⁰ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller and Cherry) v Prime Minister* [2019] UKSC 41; *R (AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 WLR 4433

incompatibility is not tantamount to a strike-down power; it does not legally invalidate or quash the provision in dispute; it remains up to Parliament, or the Minister to remove the incompatibility.⁵²

39. The Human Rights Act 1998, like a select few constitutional acts, is immune from implied repeal, but it can be overturned or amended by a subsequent Act expressly stating this purpose. However, **a determined Parliament can legislate for any purpose, constitutional or otherwise, doing so expressly if need be.** Thus, despite the significance of the Human Rights Act 1998, it does not grant the same level of rights protections as constitutional documents in other jurisdictions. The rights contained within it could be easily abolished by explicit legislation.
40. Despite the limited judicial control over primary legislation, delegated legislation alongside all other executive actions may be challenged on the broad and overlapping grounds of illegality, irrationality and procedural impropriety.⁵³ **While the courts regularly ensure that the decisions of public authorities are taken in a lawful manner and do not undermine core principles, the threshold for intervention on substantive grounds remains high, which means that matters only reach court after constitutional norms have been breached.** Moreover, the courts can only adjudicate on the questions that are brought before them; unlike the political actors discussed above, they cannot actively intervene in the workings of Government, nor can they question or impeach proceedings in Parliament.⁵⁴ **While valuable, judicial review remains a measure of last resort which is highly inaccessible to the general population. We emphasise that judicial decisions can be, and often are, reversed by any government that enjoys the support of a working majority in Parliament.**⁵⁵

Who guards the guardians?

41. Although we do not have a clear system of ensuring guardianship for the guardians, the Lord Chancellor and the Law Officers come close to fulfilling this role as they are subject to legal duties to uphold the rule of law and defend the independence of the judiciary.⁵⁶ But they lack formal powers to act, short of expressing their concerns to the Government and resigning.
42. One particular recent Lord Chancellor was seen as having failed to defend the position of judges amidst attacks by the press and politicians, showing

⁵¹ Human Rights Act 1998, s4

⁵² *ibid.*, [s10](#)

⁵³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 410; *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531

⁵⁴ *Erskine May*, [13.10]

⁵⁵ Richard Rawlings and Carol Harlow, 'Striking Back and 'Clamping Down': An Alternative Perspective on Judicial Review' in J Bell at al, *Public Law Adjudication in Common Law Systems* (Hart 2016) 301

⁵⁶ Constitutional Reform Act 2005, ss 3(1)(5)(6); 17

that the extent to which a political Lord Chancellor can be relied upon to guard the guardians is questionable.⁵⁷ By contrast, Law Officers have played a more significant role in upholding principles.

43. The Ministerial Code states that Law Officers 'must be consulted in good time before the Government is committed to critical decisions involving legal considerations.'⁵⁸ Although their advice is given in private, numerous recent Law Officers resigned in protest at purported breaches of constitutional standards. Namely:

- In September 2020, Sir Jonathan Jones resigned as Treasury Solicitor in opposition to provisions within the Internal Market Bill enabling the breach of international law.⁵⁹
- In September 2020, Lord Keen, the Advocate General for Scotland, resigned over the government's intention to breach international law. Keen was responsible for marshalling the Internal Market Bill through the Lords, but he could not find any 'respectable argument' to defend its departure from the UK's obligations under international law.⁶⁰
- In July 2022, Alex Chalk resigned as Solicitor General in protest at the Johnson administration's approach in constitutional areas, stating that 'public confidence in the ability of Number 10 to uphold the standards of candour expected of a British Government has irretrievably broken down.'⁶¹

44. The frequency with which Law Officers have resigned over matters of integrity supports our earlier point that there has been an erosion of respect for constitutional norms. **These resignations did not cut through with the media or the public; we submit that this shows that the implied threat of resignation by senior officials is not a meaningful constraint on government action.**

45. Although it is a welcome development for individual ministers and civil servants to object or resign on principle, exerting pressure is not an effective substitute for actively compelling the government to act in a constitutional manner. **Backbenchers and Peers are the most promising guardians should the government choose to introduce unconstitutional legislation or policy, as they have some ability to block or delay government legislation. Nevertheless, a majority in the Commons is likely to support the government of the day, with which they presumably share political affiliation, while the Lords are subject to political and legal limitations.**

⁵⁷ Patrick O'Brien, "'[Enemies of the People](#)': Judges, the Media and the Mythic Lord Chancellor" [2017] Public Law 135,

⁵⁸ 'Ministerial Code', [[5.11](#)]

⁵⁹ Raphael Hogarth, 'Jonathan Jones's Resignation Points to Wider Questions about Breaking International Law' [Institute for Government](#), 8 September 2020

⁶⁰ 'Richard Keen's letter to Boris Johnson resigning as Scotland's Advocate General' [The National](#) 16 September 2020

⁶¹ Alex Chalk QC MP to Rt Hon Boris Johnson [5 July 2022](#)

46. Although the Sovereign could privately caution the Prime Minister against such courses of action, his or her position is made tenuous by the absence of democratic legitimacy. While the courts can quash executive decisions and declare them to be unlawful, their intervention is reactive, requires the claim to be actively brought on justiciable grounds and can be easily reversed. **A government with a firm Commons majority may easily introduce legislative measures to restrict the scope of the courts and repeal human rights protections. Moreover, ministers and their political supporters could subject the judiciary to public pressure and denigration.**

Q6) How do the UK's constitutional safeguards compare to those in other jurisdictions?

Comparative Strengths

47. A chief strength of the UK system is that the judiciary is known for being non-politicised. So too is the Sovereign, who is the head of public institutions, including the armed forces, the integrity of which is essential to the maintenance of our democracy. Another strength is the flexibility of our constitutional system, which has been a means of adapting to changing circumstances but is also vulnerable to abuse by those with bad intentions.

Comparative Weaknesses

48. Our system remains extremely weak in comparative context in three respects. First, unlike the majority of modern democracies, our constitutional rules are not codified in any single text, which leaves fundamental issues open to dispute in a manner that would not occur if the rules were settled. The vast majority of modern democracies have a higher norm which establishes standards, principles and obligations. We do not claim that all problems could be avoided or resolved through such a text, but its absence remains a key weakness.
49. Second, UK political actors and courts can only step in in a select number of circumstances, only after harm has already been done to the constitution. The fact that we lack a clearer process for resolving constitutional and political disputes means that our system is more unstable in times of crisis and more vulnerable to such crises in the first place. By contrast, in Ireland, Canada and France, courts and politicians can enforce higher norms and principles through a widely accepted dispute resolution process which establishes stability and certainty.⁶²
50. Third, in the UK's system, constitutional principles and rights may be easily dispensed with by a government with a working Commons majority. As we have no higher law enshrining inviolable principles, there are no content-related restrictions on Acts of Parliament, which cannot be called into question by the courts. **To use a classic illustration, if any UK**

⁶² Constitution of Ireland 1937, arts 15.4.1, 26, 34.5.3;

Supreme Court Act, 1985, s 53

Constitution of Fifth Republic 1958, art 61; Cons const, décision n° 85-197 DC, 23 août 1985.

government, supported by a parliamentary majority, decided that all blue-eyed babies should be murdered, there would be no legal obstacles. This hypothetical might seem extreme, but it underscores the fact that in our system, fundamental rights and principles are uniquely vulnerable to erosion because they are not actively protected by any higher law. By contrast, in Ireland, Canada and France, primary legislation can be struck down if it violates protected rights.⁶³

A New Constitutional Council

51. Due to the exceptional nature of the UK's constitutional system, many foreign safeguards – such as a stronger role for courts or codification – are difficult to implement within the current framework, and accordingly, less applicable. However, we submit that one particular area where comparative lessons may be learned concerns the establishment of a constitutional dispute resolution process, modelled on the French system.
52. In France, the Constitutional Council (*Conseil constitutionnel*) is entrusted with the supervision of elections, adjudicating on complaints regarding referendums, and opining on the constitutionality of bills before they are signed off by the President of the Republic.⁶⁴
53. The French Constitutional Council is composed of nine statespeople who serve non-renewable nine-year terms, in addition to any former Presidents of the Republic who may choose to sit as *ex-officio* members.⁶⁵ Three members are appointed by the serving President of the Republic, three are appointed by the President of the National Assembly, and the remaining three are chosen by the President of the Senate.⁶⁶ The appointment of members is subject to parliamentary safeguards; the Constitutional Law Committees of both Houses of Parliament must issue an opinion beforehand, and the appointment of a certain candidate may be blocked by a 3/5 majority vote.⁶⁷
54. The Constitutional Council primarily opines on bills referred to it either by the President of the Republic, the Prime Minister, the leaders of both Houses, or a group of sixty parliamentarians. Although this process occurs before bills are signed, decisions are binding.⁶⁸ In 2008, a separate process was introduced for ordinary citizens to, as a matter of priority, challenge primary legislation for being contrary to the rights and freedoms enshrined by the Constitution (*question prioritaire de constitutionnalité* or 'QPC').⁶⁹

⁶³ Constitution of Ireland 1937, arts 15.4 and 34.3.2; Constitution Act 1982, [s52\(1\)](#); Constitution of Fifth Republic 1958, arts 61, 62

⁶⁴ Constitution of Fifth Republic 1958, arts 58-63; Bills here refers to both *projets de loi* proposed by the government and *propositions de loi* emanating from within Parliament, rather than being introduced by government.

⁶⁵ The Constitutional Council, '[The Institution](#)'

⁶⁶ Constitution of Fifth Republic 1958 [art 56](#)

⁶⁷ Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République, JORF n° 0171 du 24 juillet 2008, 11890, [art 26](#)

⁶⁸ Constitution of Fifth Republic 1958 arts 61 and 62; The referral procedure has been expanded over time.

⁶⁹ Loi constitutionnelle n° 2008-724 du 23 juillet 2008, [art 29](#); République Française, 'Qu'est-ce qu'une question prioritaire de constitutionnalité (QPC) ?

55. **We believe that this model may provide a useful blueprint for the UK because it could enable constitutional disputes to be resolved by seasoned statespeople who will likely have a greater degree of perceived political legitimacy to intervene than Peers, the Sovereign or courts acting on their own.**

56. To consider the form a UK version might take, the nine members of the proposed Council could consist of: the Speakers of both Houses; the President of the Supreme Court; three former Prime Ministers, drawn from different parties; and three other distinguished parliamentarians. To ensure a non-partisan atmosphere, the latter three parliamentarians would be from different parties and subject to a pre-appointment process in Parliament.

57. The proposed Council could be tasked with adjudicating on disputes relating to purported egregious breaches of constitutional standards by government following a referral by a group of senior parliamentarians. The Council could also intervene if the position of the Sovereign or the courts is politicised. **Should the Constitution Committee be interested in our proposal, we would be happy to provide a two-page note fleshing out this proposal.**

58. We submit that the Constitution Committee should, as part of its future work, consider this proposal and other means by which mechanisms might be adapted to the UK. We propose that the Committee give further attention to:

- Consideration of what constitutes constitutional abuse, and what appropriate responses might be by different institutions;
- Safeguarding the integrity and independence of public bodies and those who provide leadership roles within them;
- Protecting against abuse of the Royal Prerogative; and
- Upholding good practices within government.

28 September 2026