HOUSE OF LORDS Library Briefing

Constitution, Democracy and Rights Commission

The Conservative Party's manifesto for the December 2019 general election included a commitment to set up a constitution, democracy, and rights commission. The manifesto argued that following the UK's withdrawal from the EU it would be necessary to look at the "broader aspects" of the UK's constitution. It said a Conservative Government would set up a constitution, democracy, and rights commission to examine the following issues:

- the relationship between the government, parliament, and the courts;
- the functioning of the royal prerogative;
- the role of the House of Lords; and
- access to justice for ordinary people.

Other areas would include examining judicial review and amending the Human Rights Act 1998 to balance the rights of individuals, national security, and effective government.

There are currently limited details available on the remit, form, and composition of the commission. The Government has said that it wants to ensure a range of expertise is represented on the commission and that it takes evidence from third parties and civic society to inform any recommendations.

Several commentators and academics have welcomed the general principle of reviewing the UK's constitutional arrangements. However, some have expressed concern about the context of the commission, particularly coming after the Supreme Court found against the Government on constitutional issues.

This Lords Library Briefing sets out what is presently known about the commission; an overview of the areas it is proposed to cover; political responses to it; and recent commentary from academics and organisations concerned with government and the constitution.

Table of Contents

Charley Coleman
26 March 2020

Table of Contents

---

1. What is a constitution, democracy, and rights commission?

The Conservative Party's manifesto for the December 2019 general election included a commitment to set up a constitution, democracy, and rights commission. The manifesto argued that following the UK's withdrawal from the EU it would be necessary to look at the "broader aspects" of the UK's constitution.[1] This included:

- the relationship between the government, parliament, and the courts;
- the functioning of the royal prerogative;
- the role of the House of Lords; and
- access to justice for ordinary people.[2]

The manifesto also cited a need for the UK's security services to run effectively and as such a Conservative Government would make amendments to legislation, including the Human Rights Act 1998, to "balance" human rights and national security:

> The ability of our security services to defend us against terrorism and organised crime is critical. We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.[3]

In government, the Conservative Party would also examine the process of judicial review:

> We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays.[4]

The manifesto said that the Conservatives would set up a constitution, democracy, and rights commission within their first year of government. The commission would examine these issues "in depth" and generate proposals on them. The manifesto said the purpose of such proposals would be to "restore trust in our institutions and in how our democracy operates".[5]

---

[1] Conservative Party, *Conservative Party Manifesto 2019*, November 2019, p 48.
[2] ibid.
[3] ibid.
[4] ibid.
[5] ibid.

1.1 Timing and composition

The Government's background briefing notes on the December 2019 Queen's speech said that careful consideration was needed on the composition and focus of the commission.[6]

In answer to a written parliamentary question on 7 January 2020, the Government stated that it was considering the composition of the commission but that "the precise scope of the commission's remit and programme has not yet been decided".[7] This was reiterated by Robert Buckland, Lord Chancellor and Secretary of State for Justice, who stated on 29 January 2020 that decisions were yet to be taken on the form, remit or composition of such a body:

> Discussions with Cabinet colleagues are at an early stage, but I can say that we want a commission or similar body to examine the issues and make recommendations that restore people's trust in our democracy and the institutions that underpin it. No decisions have been made yet on the appointment of such a body, its scope or composition.[8]

Mr Buckland said he was in discussion with ministerial colleagues about "the range of expertise and individuals that we need, and the diversity of that panel, so that we make sure that the commission, or the committee, is in the best possible place to gather evidence and come up with measured, sensible reforms".[9] He said that he would update the House of Commons "in due course".[10]

In February 2020, the *Financial Times* reported that Michael Gove, Minister for the Cabinet Office, would oversee the constitutional review, alongside Robert Buckland, the Justice Secretary, and Suella Braverman, the Attorney General.[11] The commission would be formally led by an independent individual. According to the *Financial Times*, Lord Sumption is "tipped by officials to head up the review".

1.2 Possible form

In his comments in the Commons on 29 January 2020, Robert Buckland said

---

[6] Prime Minister's Office, *The Queen's Speech 2019*, 19 December 2019, p 126.
[7] House of Lords, 'Written Question: Constitution, Democracy and Rights Commission', 7 January 2020, HL36. This answer was referenced in response to a further question on the subject on 12 February 2020: House of Lords, 'Written Question: Constitution, Democracy and Rights Commission', 12 February 2020, HL896.
[8] HC *Hansard*, 14 January 2020, col 875–6.
[9] ibid, col 877.
[10] ibid, col 876.
[11] Sebastian Payne, Laura Hughes and George Parker, 'Michael Gove to oversee UK constitutional review', *Financial Times (£)*, 14 February 2020.

that the Government wanted a commission "or similar body" to examine these issues.[12]

The idea of a body to consider the UK's constitutional arrangements has been discussed before. In 2012–13 the House of Commons Political and Constitutional Reform Committee published a report entitled *Do We Need a Constitutional Convention for the UK?*.[13] The committee defined a convention as a "representative body collected together to discuss constitutional change".[14] It drew a distinction between this and a commission:

> For the purposes of the inquiry, a commission is defined as a group of people appointed by the Government to investigate a matter of public concern and to make recommendations on any actions to be taken. Commissions have regularly been used to research and probe issues of constitutional importance. Indeed, in recent years there have been a number of commissions: the Calman Commission, which looked at further powers for Scotland; the Holtham, Richard, and Silk Commissions, which looked at devolved powers for Wales; the McKay Commission, which looked into solutions to the West Lothian Question; and the Commission on a British Bill of Rights, which looked at whether the UK should have its own Bill of Rights.[15]

Writing in the context of the Scottish independence referendum result, Dr Robert Hazell, professor of British politics and the constitution at UCL and then director of the UCL Constitution Unit, argued that "there is no single model for a constitutional convention".[16] This point has been illustrated by Dr Alan Renwick, then Associate Professor of Comparative Politics at the University of Reading, now deputy director of UCL's Constitution Unit. In part two of his paper, *After the Referendum: Options for a Constitutional Convention*, Dr Renwick considered six types of composition, and a seventh category of mixed arrangements, used during processes of constitutional review or reform, and explored them in further detail through examples from the UK and other countries. He found seven categories of constitutional deliberative body:

- Expert commission
- Negotiation among leaders
- Indirectly elected assembly
- Civil society convention
- Directly elected constituent assembly

---

[12] HC *Hansard*, 14 January 2020, col 875.
[13] House of Commons Political and Constitutional Reform Committee, *Do We Need a Constitutional Convention for the UK?*, 28 March 2013, HC 371 of session 2012–13.
[14] ibid, p 9.
[15] ibid, p 5.
[16] Robert Hazell, 'You want a constitutional convention? This is what to think through first', UCL Constitution Unit Blog, 8 October 2014.

- Citizens' assembly
- Mixed assembly[17]

These are discussed in further detail in the following Lords Library Briefing:

- House of Lords Library, *Constitutional Issues and the Case for a UK-wide Constitutional Convention*, 6 December 2018

2. What issues might the commission examine?

This section of the briefing supplies an overview of recent developments in the areas outlined in the Conservative party's 2019 general election manifesto. The aim of this is to provide information on what the commission could look at. The information in this section is illustrative of these topics because the Government has not yet published further information on the remit of the commission or its terms of reference.

Other related issues

The Conservative manifesto also stated that the Government would repeal the Fixed-term Parliaments Act 2011 and implement other policies, such as photographic ID requirements at polling stations.[18] These were included alongside the commission as policies under the heading of constitution and democracy, but were not specifically referenced in the paragraph on the commission.

On 4 July 2019, the Government appointed Lord Dunlop (Conservative) to produce an independent report into the UK Government's Union capability.[19] The review's terms of reference stated that the objective was to "consider whether UK government structures are configured in such a way as to strengthen the working of the Union, and to recommend changes where appropriate".[20] In answer to a written question on 3 March 2020, the Government said that Lord Dunlop reported to the prime minister in the autumn of 2019 and that the Government was "carefully considering [his] recommendations".[21]

The Conservative Party manifesto presented the Dunlop review and other issues relating to devolution, and strengthening the Union, separately from

---

[17] Alan Renwick, *After the Referendum: Options for a Constitutional Convention*, April 2014, pp 8–9.
[18] Conservative Party, *Conservative Party Manifesto 2019*, November 2019, p 48.
[19] Government website, 'The Dunlop Review into UK Government Union capability', accessed 17 March 2020.
[20] Cabinet Office, 'Review of UK Government Union capability: terms of reference', 4 July 2019
[21] House of Lords, 'Written Question: UK Government Union Capability Independent Review', 3 March 2020, HL1969.

the constitution, democracy, and rights commission. This briefing considers only the issues directly linked to the commission in the Conservative party manifesto.

2.1 Relationship between the executive, legislature, and the judiciary

The Conservative party's 2019 general election manifesto included "the relationship between the Government, Parliament and the courts" as one of the issues for the commission to consider.[22]

Many of the subjects that the commission could examine relate in some way to the relationship between the executive, the legislature, and the judiciary. As such, the information presented in sections 2.2 to 2.6 of this briefing is relevant to this subject. For example, the functioning of the royal prerogative and the issue of judicial review both relate to recent cases before the Supreme Court.[23] This section focuses on recent comments made by the Government in relation to judicial appointments.

Recent Government comments relating to the commission and the judiciary

In an oral question on the commission in the House of Commons, Robert Buckland, Lord Chancellor and Secretary of State for Justice, was asked whether judicial appointments might be looked at by the commission, following the Supreme Court case on prorogation. Mr Buckland responded by arguing that nobody "on any side of this House" wished to see "political influence being brought to bear on the appointment of judges".[24] He said that he would not want to see a "US-style system" introduced to the UK.

The Government has also recently said that judicial independence is "fundamental" to the rule of law and that judges must be free to make decisions without interference from parliament or the executive:

> Judges must be free to make their judicial decisions without being subject to interference by Parliament or the executive. Judicial independence is fundamental to the rule of law and the effective operation of our democracy. To protect the rule of law, the main form of accountability is through right of appeal to a higher court. The Judicial Conduct Investigations Office support the Lord Chief Justice and the Lord Chancellor in their responsibility for considering and determining complaints about the personal conduct of all judges in England and Wales.

---

[22] Conservative Party, *Conservative Party Manifesto 2019*, November 2019, p 48.
[23] For further information see section 2.2 of this Lords Library Briefing.
[24] HC *Hansard*, 14 January 2020, col 876.

> [The Government] are fully confident in the competence of our judiciary. Judges are selected following a transparent, rigorous, independent, merit-based process which is key to maintaining the quality, integrity and independence of our world class judiciary. The Lord Chief Justice and Senior President of Tribunals require judges to attend induction training before sitting and thereafter attend continuation training. There are a range of appraisal schemes across the courts and tribunals judiciary.[25]

Further reading

- House of Lords Library, *Constitutional Issues and the Case for a UK-wide Constitutional Convention*, 6 December 2018

Briefing published ahead of a debate in the House of Lords on the case for a constitutional convention.[26] It sets out the views of political parties on the idea of a constitutional convention; a discussion of possible structures of a convention; and issues to be considered.

- House of Commons Library, *Procedure for Appointing Judges, 4 October 2019*

House of Commons Library briefing published to support a Westminster Hall debate in the House of Commons on the procedure for appointing judges.[27] The briefing provides an overview of the appointment of judges.

- Courts and Tribunals Judiciary, 'The justice system and the constitution', accessed 17 March 2020

Article by the Courts and Tribunals Judiciary on the justice system and constitution.

2.2 Royal prerogative

The UK is a constitutional monarchy, in which the sovereign reigns but does not rule.[28] Parliament and government make and carry out policy, while the sovereign carries out certain constitutional, ceremonial and representative functions.[29] Some of the constitutional functions of the monarch are exercised through what are known as prerogative powers. Anne Twomey,

[25] House of Commons, 'Written Question: Judges: Accountability', 17 March 2020, 28696.
[26] HL *Hansard*, 13 December 2018, cols 1406–52.
[27] HC *Hansard*, 8 October 2019, cols 499–515WH.
[28] Vernon Bogdanor, *The Monarchy and the Constitution*, 1995, p 1.
[29] ibid, pp 61–2.

professor of constitutional law, provides the following definition of prerogative powers:

> Prerogative powers are the discretionary powers of the crown that have been inherited from medieval times and have not been abrogated by legislation. They are ordinarily executive powers which may be exercised by the sovereign or his or her representatives without the need for legislative authorisation.[30]

Prerogative powers in the UK include the power to: [31]

- appoint a prime minister;
- summon or prorogue Parliament;
- give or refuse royal assent to bills;
- legislate by prerogative orders in council or by letters patent;
- exercise the prerogative of mercy, eg to pardon convicted offenders;
- make treaties;
- wage war by any means and to make peace;
- recognise states;
- issue passports and to provide consular services;
- confer honours, decorations, and peerages; and
- make certain appointments, including royal commissions.

This list is not exhaustive; there is no definitive list of the prerogative powers.[32] Prerogative powers derive from powers exercised historically by the monarch; therefore, new ones cannot be created. While these powers formally belong to the sovereign, the monarch does not exercise many personally but either on the advice of ministers or by ministers themselves.[33]

The limits of prerogative powers are defined and recognised by common law and they have the same status as common law.[34] As a result, prerogative powers can be abolished, restricted, or replaced by legislation. For example, the Fixed-term Parliaments Act 2011 removed the monarch's power to dissolve Parliament. However, as prerogative powers derive from the historical power of the monarch, new prerogative powers cannot be created in legislation.

---

[30] Anne Twomey, *The Veiled Sceptre*, 2018, pp 4–5.
[31] ibid, p 5.
[32] House of Commons Political and Constitutional Reform Committee, *Role and Powers of the Prime Minister*, 24 June 2014, HC 351 of session 2014–15, p 7.
[33] Vernon Bogdanor, *The Monarchy and the Constitution*, 1995, p 66.
[34] Anne Twomey, *The Veiled Sceptre*, 2018, p 7.

Prerogative powers cover a wide range of areas but have recently been examined in relation to the UK's withdrawal from the EU. Two high profile Supreme Court cases have involved the operation of prerogative powers:

- **Triggering of Article 50**. In 2016 a number of claimants, led by Gina Miller, brought claims for judicial review against the Government following its decision to trigger Article 50 of the Treaty on European Union. The claimants argued that "owing to the well-established rule that prerogative powers may not extend to acts which result in a change to UK domestic law, and withdrawal from the EU Treaties would change domestic law, the Government cannot serve a notice [under Article 50] unless first authorised to do so by an Act of Parliament".[35]

  On 3 November 2016, the High Court of England and Wales handed down a judgment in which it held that the Secretary of State did not have power under the Crown's prerogative to give notice pursuant to Article 50.[36] The Court accepted the claimants' arguments that the Crown could not change domestic law and nullify rights under the law unless Parliament had conferred upon the Crown authority to do so by an Act of Parliament, and that the European Communities Act 1972 (ECA) did not give the Crown the necessary authority.[37] The Government's appeal against the High Court ruling was heard by the Supreme Court in December 2016, and the Supreme Court judgment was handed down on 24 January 2017. By a majority of eight to three, the Supreme Court dismissed the appeal and held that an Act of Parliament was needed to authorise ministers to give notice of the UK's decision to withdraw from the European Union.[38]

- **Prorogation of Parliament**. In September 2019, the Supreme Court ruled that the advice the Prime Minister, Boris Johnson, gave to the Queen to prorogue Parliament was unlawful because it had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account, and no reason was given to justify this.[39] Originally two separate cases for judicial review were brought to the High Court of England

[35] Supreme Court, *Press Summary—R (On the Application of Miller and Another)(Respondents) v Secretary of State for Exiting the European Union (Appellant)*, 24 January 2017.
[36] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), para 111.
[37] ibid, paras 95–6.
[38] Supreme Court, *Press Summary—R (On the Application of Miller and Another)(Respondents) v Secretary of State for Exiting the European Union (Appellant)*, 24 January 2017. Lord Reed, Lord Carnwath and Lord Hughes dissented from the majority.
[39] R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) and Cherry and Others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019] UKSC 41, paras 55–61.

and Wales and to the Court of Session in Scotland. The High Court determined that it was beyond the scope of judicial review, but the Court of Session determined that it was justiciable.[40]

Both Supreme Court cases related to prerogative powers, but both also had their origins in judicial reviews. This briefing covers the issue of judicial review separately in section 2.6 of this briefing.

Recent Government comments on the commission

In an oral question in the House of Commons, Martyn Day (SNP MP for Linlithgow and East Falkirk) asked about the commission examining prerogative powers.[41] He stated the Supreme Court ruling on the Government's attempt to prorogue Parliament in September 2019 came about because the use of prerogative powers could be challenged in court.

Mr Day asked whether the Government believed that the use of prerogative powers should still be challengeable in court. Robert Buckland, Lord Chancellor and Secretary of State for Justice, responded that given the "stresses and strains" on the constitution it would be wrong of the Government not to take stock and "look at the general constitutional position through the lens of the public".[42] Mr Buckland argued that "it is all about" public confidence and "the confidence the public have in this place being the ultimate arbiter of our democracy, which is key".[43] However, he said that the Government wanted to examine the issues in a measured way and that he wanted the commission to develop evidence-based solutions.

Further Reading

- House of Lords Library, *Prerogative Powers of the Crown*, 13 December 2019

This briefing supplies an overview of what prerogative powers are; the role of ministerial advice in their execution; and the nature of reserve prerogative powers.

- House of Commons Library, *The Royal Prerogative*, 17 August 2017

This briefing provides a discussion of prerogative powers. This includes the

[40] House of Commons Library, 'Decision of the Supreme Court on the prorogation of parliament', 24 September 2019.
[41] HC *Hansard*, 14 January 2020, col 876.
[42] ibid.
[43] ibid.

types of prerogative power; a history of them; recent changes to the royal prerogative; and a discussion on reforming prerogative powers.

- House of Commons Library, 'Decision of the Supreme Court on the prorogation of parliament', 24 September 2019.

This briefing supplies an overview of the Supreme Court's judgment on the Government's advice to the Queen to prorogue parliament in September 2019.

- House of Commons Library, 'Brexit and Miller: what next for Parliament?', 24 January 2017

This briefing provides an overview of the Supreme Court's judgment on whether an Act of Parliament was needed to authorise ministers to give notice of the UK's decision to withdraw from the European Union.

2.3 Role of the House of Lords

The Conservative party's 2019 general election manifesto included "the role of the House of Lords" as one of the issues the commission could consider.[44]

Reform of the House of Lords has been a regular subject of debate and the House has undergone a series of changes since the 19th century. In this time several Acts of Parliament have had a noteworthy effect on the role, powers, and membership of the House of Lords. These include:

- **Appellate Jurisdiction Act 1876**. This allowed for life Peers to sit in the House of Lords. The Act also allowed a maximum of four judges to be granted life peerages and to sit in the House as Lords of Appeal in Ordinary.
- **Parliament Acts 1911 and 1949**. The 1911 Act removed from the House of Lords the power to veto a bill, except one which would extend the lifetime of a parliament. Following the Act, the Lords could only delay legislation for a maximum of three parliamentary sessions, when at least two years had passed between the first Commons second reading and the Commons third reading in the third session. The 1949 Act amended the 1911 Act, reducing the time periods specified in the execution of the procedure from three sessions to two, and two years to one, respectively.
- **Life Peerages Act 1958**. This allowed the creation of peerages for life. The Act also made it explicit that women were eligible to receive a life peerage.

[44] Conservative Party, *Conservative Party Manifesto 2019*, November 2019, p 48.

- **Peerage Act 1963**. This allowed female hereditary Peers to take seats. It also enabled hereditary Peers to renounce their titles and thereby stand in the House of Commons, and entitled all Scottish peers to sit in the House of Lords.
- **House of Lords Act 1999**. This removed from the House of Lords all but 90 (plus the holders of the offices of Earl Marshall and Lord Great Chamberlain) of the hereditary Peers. Subsequently, under the Standing Orders of the House, any vacancy resulting from the death of one of the 90 hereditary Peers would be filled through a by-election.
- **House of Lords Reform Act 2014**. This allowed Members of the Lords to permanently retire or resign on a statutory basis. It also provided that Members who do not attend the House for a whole session of more than six months, and are not on leave of absence, cease to be Members. Additionally, Members convicted of a serious offence, and sentenced or ordered to be imprisoned indefinitely, or for more than one year, cease to be Members under the Act.
- **House of Lords (Expulsion and Suspension) Act 2015**. This provides for the House of Lords to expel Members on grounds other than low attendance or conviction of a serious offence. It also enables the House to suspend a Member for a period a time specified in the suspension resolution.

There have also been several significant reform proposals and reviews into the role of the House and its composition. These have included:

- Bryce Commission 1918
- Parliament (No 2) Bill 1968–69
- Wakeham Commission 2000
- House of Lords Reform Bill 2012–13
- Strathclyde Review 2015

The House of Lords Library's Briefing *History of the House of Lords: A Short Introduction* provides an overview of these proposals.[45]

Strathclyde review

Recently the role of the House of Lords has been examined as it relates to the role of the House of Commons, particularly as regards secondary legislation. On 26 October 2015, the Government was defeated in the House of Lords after Members voted to support two amendments to the approval motion of the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. These amendments would have

[45] House of Lords Library, *History of the House of Lords: A Short Introduction*, 27 April 2017.

delayed consideration of the regulations until specific conditions had been met. The Government later withdrew the regulations.

Following these defeats, the Government announced a rapid review to examine "how to protect the ability of elected governments to secure their business".[46] *The Strathclyde Review: Secondary Legislation and the Primacy of the House of Commons*, was published on 17 December 2015.[47] This set out three proposals but it recommended that one of these be adopted. This was the third option, to create a procedure whereby the Lords could "invite the Commons to think again when a disagreement exists [over secondary legislation] and insist on its primacy". The procedure would be set out in statute.[48]

In November 2016, the Government stated that it would not introduce new primary legislation to implement proposals outlined in the Strathclyde Review.[49] The Leader of the House of Lords, Baroness Evans of Bowes Park, told Members of the Lords that, while the Government agreed with the conclusion of the review that the will of the House of Commons should prevail on secondary legislation, it did not believe that primary legislation would be necessary at that time.[50] In the absence of a formal mechanism by which the House of Commons might assert its primacy on secondary legislation, Baroness Evans said that the Government was reliant on the House of Lords to self-regulate in this matter. She added that the Government might reconsider its position on introducing new legislation if it believed in the future that this self-regulation had broken down.

Brexit and the Salisbury convention

More recently, the relationship between the House of Lords and the House of Commons has been highlighted by the passage of various pieces of Brexit legislation. This has been noted particularly within the context of a minority government and in relation to the operation of the Salisbury convention. The Salisbury convention is commonly understood to mean the House of Lords gives a second reading to government bills that seek to implement manifesto commitments, does not subject them to wrecking amendments and returns them to the Commons in reasonable time. It is also sometimes called the Salisbury-Addison convention.

Following the 2017 general election, some academics argued that the issue of whether the Salisbury convention applied to a minority government had

---

[46] Nigel Morris and Charlie Cooper, 'Tax credits: David Cameron announces urgent review of House of Lords' powers', *Independent*, 27 October 2015.
[47] Cabinet Office, *The Strathclyde Review: Secondary Legislation and the Primacy of the House of Commons*, December 2015, Cm 9177.
[48] ibid.
[49] HL *Hansard*, 17 November 2016, cols 1538–48 and cols 395–6. The Government's response to the Strathclyde Review was published in December 2016, Cm 9363.
[50] HL *Hansard*, 17 November 2016, col 1539.

particular relevance to the Government's plans to legislate for Brexit. In the view of Steve Peers, professor of EU, human rights and trade law at the University of Essex, writing in June 2017, it was "arguable whether this convention applies when there is a minority government".[51] He contended this was particularly so in reference to Brexit, because the Government had failed to win a majority for its key policy:

> […] the Prime Minister explicitly requested votes for a bigger Commons majority to combat the hypothetical prospect of the Lords voting against her Brexit agenda. In effect, she asked voters: "Give me a big majority so the Lords don't meddle with my Brexit plans". And the voters answered: "No". In the circumstances, if the Lords block any government Brexit bills, they would not be frustrating the popular vote—but rather giving effect to it.

Albert Weale, emeritus professor of political theory and public policy at University College London, argued that with a minority government in office, the House of Lords need not feel "inhibited in voting against elements of the Great Repeal Bill" where it had "serious concern" about the way the Government wanted to use delegated powers.[52]

Some supporters of Brexit claimed that the House of Lords breached the Salisbury Convention during the 2017–19 parliament by passing 'wrecking amendments' to the Government's Brexit legislation.

The Government was defeated in 15 votes in the House of Lords during the passage of the European Union (Withdrawal) Act 2018.[53] This Act was previously also referred to informally as the 'Great Repeal Bill'. The Act contains measures to prepare the UK's statute book for Brexit, such as repealing the European Communities Act 1972 on exit day and ensuring EU-derived laws would continue to function after Brexit.

Sir Bill Cash (Conservative MP for Stone) described several of the Lords' amendments to the bill as "disreputable wrecking amendments" passed "in defiance of the Salisbury Convention".[54]

Similarly, Sir John Redwood (Conservative MP for Wokingham) said it was "difficult to interpret" some of the amendments made to the bill in the Lords

---

[51] Steve Peers, 'The gamble that failed: The Brexit election and what happens next', EU Law Analysis Blog, 13 June 2017.
[52] Albert Weale, 'Why democrats should welcome a hung parliament', Constitution Unit Blog, 12 June 2017. The 'Great Repeal Bill' is a reference to the bill that became the European Union (Withdrawal) Act 2018.
[53] See: House of Lords Library, *European Union (Withdrawal) Bill: Summary of Lords Amendments*, 18 May 2018.
[54] Sir Bill Cash, 'Failure to reverse the wrexiteers' changes to the EU Withdrawal Bill would undermine trust in democracy itself', Brexit Central, 18 May 2018.

as "not designed to prevent Brexit".[55] Without using the term specifically, he implied they were wrecking amendments supported by members of the Lords who "have made no secret of their opposition to the whole policy of Brexit". He argued that the Salisbury convention should apply to the European Union (Withdrawal) Bill because it was a central manifesto bill of both the Conservatives and the DUP. He also claimed the bill was in the Labour manifesto for the 2017 general election, "so an overwhelming majority of MPs were elected on the pledge to carry through the necessary legislation for our exit". Labour's 2017 manifesto said the party accepted the referendum result, but specifically said it would "drop the Conservatives' Great Repeal Bill".[56]

Likewise, Viscount Ridley (Conservative) also objected to some of the Lords' amendments to the bill. He argued that "in adding off-piste clauses", the Lords had "effectively torn up the Salisbury convention".[57]

Writing in response to this line of reasoning, Sir David Beamish, former Clerk of the Parliaments, did not agree that the House of Lords had broken the Salisbury convention.[58] He suggested that the non-government amendments agreed by the Lords "may all be regarded as an exercise of the House of Lords' time-honoured role of inviting the Commons to think again; putting forward amendments designed to improve the bill, but without any implied threat of blocking progress if the Commons does not accept them". In Sir David's view, if the Commons rejected the amendments but the Lords went on to insist on them, thereby delaying the enactment of the bill, it "might well be seen as a wrecking tactic". However, he thought it unlikely that such a tactic would command majority support in the Lords. He therefore felt it was "clear that talk of 'tearing up the Salisbury convention' is premature".

In the event, the Lords did not insist on any of the amendments that Sir Bill Cash had described as "wrecking amendments" that violated the Salisbury Convention:

- The Commons rejected two of the amendments outright, one on keeping the Charter of Fundamental Rights after Brexit, one on removing the date of exit day from the face of the bill.[59] The Lords did not insist further.

---

[55] Sir John Redwood, 'The role of the House of Lords', John Redwood's Diary (Blog), 16 May 2018.
[56] Labour Party, *Labour Party Manifesto 2017*, May 2017, pp 24–5.
[57] Matt Ridley, 'May must get tough with Lords to stop the Brexit meddling', *Times* (£), 16 May 2018.
[58] Sir David Beamish, 'What is the Salisbury Convention, and have the Lords broken it over Brexit?', Constitution Unit Blog, 12 June 2018.
[59] House of Commons Library, *European Union (Withdrawal) Bill 2017–19: Ping Pong*, 18 June 2018, pp 15 and 18.

- The Commons made further amendments to a Lords amendment on North-South cooperation and the prevention of new border arrangements in Northern Ireland.[60] The Commons amendments were agreed to by the Lords.
- The Commons disagreed with Lords amendments that would have prevented the Government from repealing the European Communities Act 1972 unless it outlined what steps it had taken towards negotiating the UK's continued participation in a customs union with the EU.[61] The Commons passed amendments in lieu requiring the Government to make a statement on its progress towards negotiating a customs arrangement with the EU. The Lords agreed to the amendments in lieu.
- The Commons disagreed with a Lords amendment to give Parliament a 'meaningful vote' on the Brexit deal.[62] The Commons passed an amendment in lieu. The Lords agreed to the Commons amendment in lieu but made some further amendments to it. In turn, the Commons agreed to this, but made yet further amendments to the clause. In a final round of parliamentary ping-pong, the Lords agreed.[63]

Speaking at the end of the proceedings on the bill, Baroness Hayter of Kentish Town, then Shadow Spokesperson for Exiting the European Union, implied the House of Lords had fulfilled its constitutional role. She said:

> […] with the catalogue of changes to the bill […] I hope even the Government will recognise the vital role played by your Lordships' House, and that our detractors, particularly in parts of the press, will realise that it is our role to ask the Government, and the Commons, to think again. We have done that, and to quite a large extent we have been heard.[64]

Baroness Evans of Bowes Park, Leader of the House of Lords, said she thought the Lords' scrutiny "has seen improvements made to this bill".[65] She said that while there were a number of issues on which the Government did not agree, she was "pleased that we have been able to find solutions and compromises to most of the concerns raised".

---

[60] House of Commons Library, *European Union (Withdrawal) Bill 2017–19: Ping Pong*, 18 June 2018, pp 17–18.
[61] ibid, p 13.
[62] ibid, pp 5–9.
[63] HL *Hansard*, 20 June 2018, cols 2082–92.
[64] ibid, col 2087.
[65] ibid, col 2092.

Further reading

- House of Lords Library, *History of the House of Lords: A Short Introduction*, 27 April 2017.

Briefing charts the principal developments affecting the House over the course of its history and highlights the main changes and legislation passed. Since the 19th century a number of Acts of Parliament have had a noteworthy effect on the role, powers, and membership of the House of Lords.

- House of Lords Library, *Salisbury Convention: A Decade of Developments*, 13 December 2019

Briefing providing background on the Salisbury Convention, including developments in the last ten years.

2.4 Access to justice

The Conservative party's 2019 general election manifesto included "access to justice for ordinary people" as one of the issues the constitution, democracy and rights commission could consider.[66] The manifesto also stated that the Conservative party would "establish a royal commission on the criminal justice process".[67]

The royal commission was discussed separately to the constitution, democracy and rights commission in the manifesto. However, the royal commission and the constitution, democracy and rights commission have been linked through the issue of access to justice. In February 2020, Home Secretary Priti Patel said the royal commission on the criminal justice process would address some of the issues around access to justice. [68]

This section discusses some of the recent government changes to access to justice. For a more in-depth discussion of access to justice see:

- House of Lords Library, *Access to Justice and Welfare Advisory Services*, 23 March 2020.

Legal aid changes

There have been several changes made since 2010 to both the courts estate and to areas of funding, specifically to the scheme for legal aid. The current

[66] Conservative Party, *Conservative Party Manifesto 2019*, November 2019, p 48.
[67] ibid, p 19.
[68] HC *Hansard*, 10 February 2020, col 573.

legal aid scheme is provided for by part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The Coalition Government introduced LASPO because it argued there was a need to make financial savings in this area in England and Wales. Speaking at LASPO's second reading in the House of Commons, Ken Clarke, the then Lord Chancellor and Secretary of State for Justice, said that he accepted that access to justice for "the protection of fundamental rights is vital for a democratic society".[69] He said that he would not compromise this but expressed concern that cases were ending up in court, through the support of legal aid, that would be better dealt with in other ways.[70] Ken Clarke also argued that the legal aid system had an "unignorable problem of affordability".[71] He expressed the view that the system would need reform anyway but due to the current financial crisis this was "imperative".[72]

Several organisations and bodies have expressed concerns about the reforms to civil legal aid LASPO introduced. For example, the Law Society has expressed concern that the reforms have had the "seriously damaging effect of limiting access to justice for ordinary and vulnerable people".[73]

Review of legal aid changes

In February 2019, the Government published a post-implementation review of part 1 of LASPO.[74] The report was large, running to 289 pages. In the foreword, David Gauke, then Lord Chancellor and Secretary of State for Justice, stated that legal aid had an important role in enabling access to justice.[75] He said that the Government had heard throughout the review that it was part of a larger picture and that there should be a focus on early intervention to prevent problems from escalating into issues that required a court visit. He concluded that the engagement should be continued, and the Government should collect further evidence:

> It is essential this engagement continues and that we collect more evidence, exploring with our partners and stakeholders innovative ways of supporting people to access the justice system and placing early intervention firmly at the heart of legal support.[76]

In February 2019, Theresa May's Government published its legal support action plan to deliver quicker and easier access to legal support services. The Government stated that it was "imperative" that support was given to the

[69] HC *Hansard*, 29 June 2011, col 986.
[70] ibid.
[71] ibid, 986.
[72] ibid.
[73] Law Society, 'Access to British justice increasingly only for the few: Law Society warns ministers', 28 September 2018.
[74] Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*, February 2019, CP 37.
[75] ibid, p 3.
[76] ibid, p 4.

most vulnerable in society to access justice.[77] It developed the plan following the evidence given to its post-implementation review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).[78]

Courts and tribunals reform programme

The Government has also been working on a courts and tribunals reform programme that is looking at both ways of working and how new technology can be applied to the courts service.[79] For example, in reference to civil, family and tribunal services, the Government has stated that:

> Users will be able to opt to resolve simple disputes online with the support of a mediation service, and if that is not appropriate, progress it under the case management of judges to resolve the dispute online, or at a hearing they can attend by video, or in person in a court or tribunal room. We will introduce the kind of digital working in civil and family courts, and in tribunals, that legal professionals and others have become used to in the criminal courts.[80]

In June 2019, the House of Commons debated court closures and access to justice.[81] Opening the debate, Bambos Charalambous (Labour MP for Enfield, Southgate) argued that the Government had implemented court closures and cuts in legal aid in a "piecemeal way".[82] He asserted that "the cumulative effect of cuts to legal aid and court closures [were] making it harder for the most disadvantaged to access justice as they should be able to".[83]

Responding for the Government, Paul Maynard, then Parliamentary Under Secretary of State for Justice, described access to justice as a "fundamental right".[84] He said that this was why the Government was investing in the courts:

> That is why the Government are investing £1 billion in the most ambitious programme of its kind in the world. It will create a system that works better for those who need it. It will be easier to run and it will provide better value for taxpayers. Access to justice matters because everyone should have a stake in our legal system.[85]

---

[77] Ministry of Justice, *Legal Support: The Way Ahead: An Action Plan to Deliver Better Support to People Experiencing Legal Problems*, February 2019, CP 40, p 3.
[78] Ministry of Justice, 'Legal support action plan', 7 February 2019.
[79] HM Courts and Tribunals Service, 'The HMCTS reform programme', updated 6 February 2019, accessed 17 March 2020.
[80] ibid.
[81] HC *Hansard*, 20 June 2019, cols 414–37.
[82] ibid, col 414.
[83] ibid.
[84] ibid, col 434.
[85] ibid, col 433–4.

Mr Maynard said that the Government's plans did not replace the need for traditional courts, and he said it would not exclude those who did not have access to a computer and the internet. However, "it will transform the way people use our courts and tribunals, opening up new ways to access justice".[86]

In February 2020, Home Secretary Priti Patel said that Boris Johnson's Government would continue to work on resolving the issues affecting access to justice.[87] Ms Patel explained that the work would take place through the cabinet committee on crime and justice, and through the work of the Home Office and the Ministry of Justice (MoJ). She also reiterated the pledge made in the Conservative Party's 2019 manifesto to "establish a royal commission on the criminal justice process". Ms Patel said the commission would address some of the concerns about access to justice.

The Government is also currently reviewing criminal legal aid schemes, with the Ministry of Justice having announced a review in December 2018.[88] The review is considering legal aid "throughout the life cycle of a criminal case". It is being overseen by cross-agency programme board and chaired by the Ministry of Justice's director of access to justice. The review is intending to report, with any recommendations, by the end of summer 2020.

Further reading

- HM Courts and Tribunals Service, 'The HMCTS reform programme', updated 6 February 2019, accessed 17 March 2020

Website providing an overview of the Government's court and tribunal reform programme.

- House of Commons Justice Committee, *Court and Tribunal Reforms*, 31 October 2019, HC 190 of session 2019; and Government Response, 16 March 2020

Report examining the Government's court and tribunal reform programme. The committee said that "serious concerns" existed about the programme's impact on access to justice. The committee made recommendations, including for example that the courts and tribunals service "develop guidance in consultation with stakeholders on recognising and addressing communication barriers that may affect vulnerable defendants in court".

[86] HC *Hansard*, 20 June 2019, cols 434.
[87] HC *Hansard*, 10 February 2020, col 573.
[88] Ministry of Justice, 'Criminal legal aid review', 19 September 2019, accessed 17 March 2020.

- House of Commons Library, *Court Closures and Access to Justice*, 18 June 2019

House of Commons Library briefing published to support a debate in the House of Commons on the issue of court closures and access to justice.[89] It provides an overview of recent reform of the courts estate.

- House of Commons Library, *Court Statistics for England and Wales*, 16 December 2019

Briefing outlining statistics on caseload; case outcomes; and court performance. It also covers court closures since 2010 and data on workforce strength, judicial diversity and expenditure on courts.

- House of Commons Library, 'Is the criminal justice system fit for purpose?', 15 January 2020

Briefing examining the current position of the courts system in England and Wales.

- House of Commons Library, *The Future of Legal Aid*, 31 October 2018

House of Commons Library briefing published to support a Westminster Hall debate in the House of Commons on the future of legal aid.[90] It sets out the background to legal aid reforms and the Government's commitment to conduct an evidence-based review of part 1 of LASPO.

2.5 Human Rights Act, administrative law and national security and the executive

The Conservative Party's manifesto cited a need for the UK's security services to run effectively and that a Conservative government would make amendments to legislation, including the Human Rights Act 1998, to "balance" human rights and national security:

> The ability of our security services to defend us against terrorism and organised crime is critical. We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.[91]

[89] HC *Hansard*, 20 June 2019, cols 414–37.
[90] HC *Hansard*, 1 November 2018, cols 418–58WH.
[91] Conservative Party, *Conservative Party Manifesto 2019*, November 2019, p 48.

The European Convention on Human Rights (ECHR) is an international treaty that only member states of the Council of Europe may sign.[92] The Council of Europe has 47 member states, including the UK.[93] The ECHR, which set up the European Court of Human Rights ('ECtHR'), lists rights member states have undertaken to respect.[94] Rights include the right to life, the right to a fair hearing, and the right to respect for private and family life. The Human Rights Act 1998 made provision in UK domestic law which meant UK nationals could rely on the ECHR rights before UK courts. An individual who believes that a UK court has not respected their ECHR rights may still bring a claim before the ECHR once they have tried an appeal in UK courts.[95]

Proposals to amend the Human Rights Act 1998, and also to introduce a British Bill of Rights, have been examined by several political parties, including under the last Labour government.[96] Including a green paper which looked at how power should be held accountable and how the rights and responsibilities of citizens could be upheld. This included several areas that the current Conservative government has proposed for the commission to cover, including the role of prerogative powers and issues around the Human Rights Act 1998. A subsequent paper was published, as well as consultation responses:

- HM Government, *The Governance of Britain*, July 2007, Cm 7170.
- Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework*, March 2009, Cm 7577.
- Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework: Summary of Responses*, March 2010, Cm 7860. An independent report, prepared by TNS-BMRB, was published alongside the summary of responses: Ministry of Justice, *People and Power: Shaping Democracy, Rights and Responsibilities*, 30 March 2010.

The Conservative Party has argued that the current law on human rights has created a culture of "risk aversion" amongst public authorities.[97] In March 2011, the Coalition Government established the Commission on a Bill of

[92] Council of Europe and European Court of Human Rights, *European Court of Human Rights: Questions and Answers*, May 2016, p 3.
[93] Council of Europe, 'Our member states', accessed 16 March 2020.
[94] Council of Europe and European Court of Human Rights, *European Convention on Human Rights*, accessed 16 march 2020.
[95] UK Supreme Court, 'The Supreme Court and Europe', accessed 16 March 2020.
[96] House of Commons Library, *Key Issues for the New Parliament 2010: From the Human Rights Act to a Bill of Rights?*, May 2010.
[97] House of Commons Library, *Key Issues for the New Parliament 2010: From the Human Rights Act to a Bill of Rights?*, May 2010.

Rights.[98] This reported to the Government on 18 December 2012.[99] The House of Lords debated the report on 20 June 2013.[100]

In 2015, the Conservative manifesto pledged to scrap the Human Rights Act 1998 and pare back the role of the ECHR in UK law.[101] In 2017, the Conservatives also signalled that they were seeking to change the human rights landscape once the UK had left the EU. The 2017 manifesto said:

> We will not repeal or replace the Human Rights Act while the process of Brexit is under way but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the [ECHR] for the duration of the next Parliament.[102]

Most recently, the Conservative party manifesto for the December 2019 general election contained further commitments to update the Human Rights Act 1998.[103] However, in answer to a written question on 2 March 2020, the Government said that whilst it was looking at updating the Human Rights Act 1998 it was not currently considering introducing a British Bill of Rights:

> We made a commitment in our manifesto to update the Human Rights Act 1998 and administrative law to ensure that there is a proper balance between the rights of individuals, our national security and effective government. We are now considering how best to do this, and have no current plans to introduce a British Bill of Rights.[104]

Recent Government commentary on the commission

In answer to an oral question in the House of Commons, Geoffrey Cox, the then Attorney General, stated that the Government was committed to the UK's "membership of, and subscription to" the ECHR.[105] However, he said that this should not mean the human rights structures in the UK are not looked at with a "critical eye". Mr Cox said that the Government would look at these structures.

---

[98] Ministry of Justice, 'Commission on a Bill of Rights', accessed 16 March 2020 [site archived by the National Archives on 6 February 2013].
[99] Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us: Volume 1* and *A UK Bill of Rights? The Choice Before Us: Volume 2: Annexes*, December 2012.
[100] HL *Hansard*, 20 June 2013, cols 431–64; and House of Lords Library, *Debate on 20 June: Report of the Commission on a Bill of Rights*, 17 June 2013.
[101] Conservative Party, *Conservative Party Manifesto 2015*, April 2015, p 58.
[102] Conservative Party, *Conservative Party Manifesto 2017*, May 2017, p 37.
[103] Conservative Party, *Conservative Party Manifesto 2019*, November 2019, p 48.
[104] House of Commons, 'Written Question: Bill of Rights', 2 March 2020, 18637.
[105] HC *Hansard*, 16 January 2020, cols 1142–3.

Further reading

- House of Lords Library, 'Why are human rights an issue for a UK-EU deal?', 6 March 2020

Briefing providing an overview of recent proposals on changes to the Human Rights Act 1998, regarding the negotiations between the UK and the EU on the future relationship.

- House of Commons Library, *Proscribed Terrorist Organisations*, 18 December 2019

Briefing looking at proscribed terrorist organisations. Section 5.3 examines the compatibility of proscription with human rights law.

- House of Commons Library, A British Bill of Rights?, 18 May 2016

Briefing setting out an overview of the Human Rights Act 1998; the European Convention on Human Rights and the work of the European Court of Human Rights. It also considers developments during the 2010–15 parliament on the issue and looks at the impact of the Human Rights Act 1998 and the ECHR on the sovereignty of the UK parliament.

2.6 Judicial Review

The Conservative party's 2019 general election manifesto said that:

> We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays.[106]

Judicial review is a type of court proceeding where a judge reviews the lawfulness of how a decision was made by a public body.[107] It does not consider the 'rights' and 'wrongs' of the decision. The Courts and Tribunals Judiciary cites the following examples of the kinds of decisions that may fall within the scope of judicial review:

- Decisions of local authorities in the exercise of their duties to provide various welfare benefits and special education for children in need of such education;

[106] Conservative Party, *Conservative Party Manifesto 2019*, November 2019, p 48.
[107] Courts and Tribunals Judiciary, 'Judicial Review', accessed 16 March 2020.

- Certain decisions of the immigration authorities and the Immigration and Asylum Chamber;
- Decisions of regulatory bodies;
- Decisions relating to prisoner's rights.[108]

The Coalition Government made a number of changes to judicial review, including introducing time limits in planning cases and increasing the discretion of judges to refuse to hear cases certified as "totally without merit".[109] Part 4 of the Criminal Justice and Courts Act 2015 introduced further changes, including a new 'materiality' threshold for applications.[110]

More recently the process of judicial review has been prominent in relation to the UK's withdrawal from the EU. Two high profile Supreme Court cases, on the triggering of Article 50 and the lawfulness of the Government's September 2019 attempt to prorogue Parliament, have had their origins in judicial review, and with the court finding against the Government in both cases.[111]

Recent Government comment on the commission

In an oral question in January 2020 on the UK's withdrawal from the EU and human rights, Nick Thomas-Symonds, Shadow Solicitor General, quoted the Prime Minister as saying that judicial review should not be "abused to conduct politics by another means or to create needless delays".[112] He expressed concern that the Prime Minister was "seeking some sort of vengeance because he did not like the Supreme Court's decision that his prorogation of Parliament was unlawful".[113] Mr Thomas-Symonds argued that the Government should never attack the judiciary or the courts system. He asked whether the Attorney General agreed with his assertion that weakening judicial review would mean that "it will be not the Prime Minister who loses out, but all our constituents whose rights to hold public authorities to account are watered down?".

Geoffrey Cox, the then Attorney General, said that there was "no question" of weakening judicial review.[114] He said the Government was asking whether the process could be made more efficient and streamlined and more focused on its purpose. Mr Cox described this as "holding the Government to

---

[108] Courts and Tribunals Judiciary, 'Judicial Review', accessed 16 March 2020.
[109] Bingham Centre for the Rule of Law, Justice, and the Public Law Project, *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015*, Part 4, October 2015, p 1.
[110] ibid, p 5.
[111] These are discussed further in section 2.2.
[112] HC *Hansard*, 15 January 2020, col 1019. This is the same phrase used in the Conservative party 2019 manifesto, see: Conservative Party, *Conservative Party Manifesto 2019*, November 2019, p 48.
[113] HC *Hansard*, 16 January 2020, col 1143.
[114] ibid.

account for their administrative decisions". He argued that some judicial review cases that were brought before the courts "should perhaps never have been started". Mr Cox asserted that often these were thrown out, but applications risked clogging up the courts system. The Government was "looking at this extremely carefully" but the then Attorney General said that he wanted Mr Thomas-Symonds to understand that there was "no question of backsliding upon the fundamental principle of the independence of the judiciary".[115]

Writing before she was appointed as the current Attorney General, Suella Braverman described the two recent Supreme Court cases on triggering Article 50 and on prorogation as "the latest examples of a chronic and steady encroachment by the judges".[116] She argued that powers "repatriated" from the EU would mean "precious little if our courts continue to act as political decision-maker, pronouncing on what the law *ought* to be and supplanting Parliament". However, she insisted that she was not "lambasting" the judiciary or questioning the "quality of our judges". She said what she was arguing was that "the delicate relationship between law and politics is off-balance". Suella Braverman stated that the courts should operate to "curb abuse of power by government" but the UK could not be said to be a representative democracy "if a small number of unelected, unaccountable judges continue to determine wider public policy, putting them at odds with elected decision-makers".

Further reading

- Institute for Government, 'Judicial review', 9 March 2020.

Explainer by the Institute for Government providing an overview of judicial review.

- Bingham Centre for the Rule of Law, Justice, and the Public Law Project, *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015*, Part 4, October 2015

A report by the Bingham Centre for the Rule of Law, Justice, and the Public Law Project examining changes to the operation of judicial review.

- House of Lords, 'Written Question: Judicial Review', 10 March 2020, HL1884

Written question setting out the number of judicial reviews that were conducted in the High Court (Administrative Court) of England and Wales

[115] HC *Hansard*, 16 January 2020, col 1144.
[116] Suella Braverman, 'Suella Braverman: people we elect must take back control from people we don't. Who include the judges', 27 January 2020.

each year between 1999– Q3 2019. These data include substantive hearings only, not applications for permission to apply for judicial review. The question also includes data on the number of judicial review disposals in the Upper Tribunal (Immigration and Asylum) Chamber from 2013 (when cases started to be heard there) and until Q3 2019. These data do include applications for permission to apply for judicial review, and not just the substantive hearings.

- Lord Neuberger, former President of the Supreme Court, 'Reflections on significant moments in the role of the judiciary', 16 March 2017.

Speech by Lord Neuberger, former President of the Supreme Court, setting out his thoughts on the role of the judiciary.

- Lord Sumption, Reith Lectures: 'Law's expanding empire', 'In praise of politics', 'Human rights and wrongs', 'Rights and the ideal constitution', and 'Shifting the foundations', June 2019

Links to audio recordings and transcripts of Lord Sumption's Reith Lectures from June 2019.

3. What have politicians and commentators said about the commission?

3.1 Political response

House of Lords Oral Question on the Constitution, Democracy and Rights Commission

Labour has expressed concern that issues of public confidence in politics are more fundamental than issues the commission might cover. Speaking in an oral question in the House of Lords, Baroness Smith of Basildon, Labour shadow spokesperson for the Cabinet Office and shadow leader of the House, argued that if people were serious about restoring trust in the "whole political system", it was important to understand and tackle issues that impact society "from homelessness to the climate emergency".[117] She also referenced Government briefings and suggested that restoring confidence was about behaviour and offering hope for the future:

> The Government's briefings have already provoked some interest, whether about political appointments to challenge the independence of the judiciary or about shallow comments about moving this House to York. While I understand that some Number 10 spokesmen delight in being populist, does the Minister consider that the path to restoring

[117] HL *Hansard*, 29 January 2020, col 1439.

> confidence is structural change of democratic institutions or will he accept that it is more fundamentally about behaviour and about offering hope for the future?[118]

She also argued that an increase in dissatisfaction with democracy was "startling but hardly surprising, given the toxic nature of debate" over the past few years.[119]

Lord Tyler, Liberal Democrat spokesperson on constitutional and political reform, quoted the Conservative manifesto's commitment to "protect the integrity of our democracy".[120] He also referenced the Electoral Campaigning Transparency All-Party Parliamentary Group's report *Defending Our Democracy in the Digital Age*.[121] He asked whether the Government recognised that there was what he described as a "dangerous" connection between digital campaigning and "potentially illegal funding".[122] He argued that these were seeking to influence elections and referendums.

Lord Lisvane (Crossbench), former Clerk of the House of Commons, sought assurances on the authority and independence of the commission and specifically that "the commission will not have its card marked by the Government".[123] Lord Howell of Guildford (Conservative) argued that the words that make up the proposed title of the commission "are very vague and the canvas enormous".[124] Lord Morgan (Labour) described the commission as a "shadowy" and "generalised" body, and asked whether it would look at upholding the rights of parliament and the judiciary and protecting the rule of law.[125]

Responding for the Government, Earl Howe, Deputy Leader of the House of Lords, said that a number of things were in train designed to achieve the ends cited by Baroness Smith. Referencing the UK shared prosperity fund, he said this was designed to "reach out to deprivation and inequality wherever it exists and bind the country together in the process".[126]

Lord Howe said the matters of electoral interference referred to by Lord Tyler were ones the Government was "determined to grip".[127] However, he

---

[118] HL *Hansard*, 29 January 2020, cols 1438–9.
[119] HL *Hansard*, 29 January 2020, col 1438.
[120] Conservative Party, *Conservative Party Manifesto 2019*, November 2019, p 48. This is included under the same general heading as the commission in the manifesto, "protect our democracy", but in relation to introducing voter ID and a commitment to "prevent any foreign interference in elections".
[121] Electoral Campaigning Transparency All-Party Parliamentary Group, *Defending Our Democracy in the Digital Age*, January 2020.
[122] HL *Hansard*, 29 January 2020, col 1438.
[123] HL *Hansard*, 29 January 2020, col 1437.
[124] ibid, col 1438.
[125] ibid, col 1437.
[126] ibid, col 1438.
[127] ibid, col 1438.

was unable to be "specific" on whether the commission would be looking at this issue.

Lord Howe also said that he recognised the concern that lay behind Lord Lisvane's question. He said the Government wanted to achieve recommendations that commanded public confidence. Lord Howe said the commission would have to engage widely and that it was important for the public and civil society to feel that they had been engaged with. On the issue of the breadth of the subjects at hand, he agreed that constitutional reform was a term that could encompass many subject areas. He said that one reason the Government was "taking a bit of time" deciding the commission's remit was to ensure that it was not drawn too widely or too narrowly. Lord Howe said that "if the remit is too wide, the task becomes too unwieldy and lengthy; too narrow, and it risks creating policy that is not properly joined up".[128] He said that the scope needed to be substantial but sensible. Lord Howe also said it was still too early to provide details about either the composition or the remit of the commission. He said he understood Lord Morgan's desire for more information on the commission.[129]

On 26 March 2020, the House of Lords was due to consider a motion moved by Lord Morgan that "that this House takes note of Her Majesty's Government's proposals for the establishment of a Constitution, Democracy and Rights Commission, its challenges and opportunities". This has been postponed and a new date is to be confirmed. In an article for *The House*, Lord Morgan argued that the commission should be welcomed but should be proceeded with "with caution".[130]

3.2 Wider commentary

The *Financial Times* has written that "several leading lawyers and constitutional experts" agreed that a review of the UK's constitutional arrangements would be reasonable, but that there was concern about criticism of the judiciary by politicians.[131] The newspaper quoted Philippe Sands QC, a professor of law and director of the Centre for International Courts and Tribunals at University College London, as saying that he did not object to a process of reflection on the relationship between the executive, the legislature and courts. However, he said there was a concern "in many quarters, that such independence is in the crosshairs, with knee-jerk proposals for US-style vetting of judges, in which legal and political considerations merge".

---

[128] HL *Hansard*, 29 January 2020, col 1438.
[129] ibid, cols 1437–8.
[130] Lord Morgan, 'A new commission to examine our constitution offers both dangers and opportunities', *The House*, 23 March 2020.
[131] Jane Croft and James Blitz, 'Lawyers fear Tories are planning 'revenge' against Supreme Court', *Financial Times (£)*, 11 December 2019.

Professor Meg Russell and Dr Alan Renwick, director and deputy director of UCL's Constitution Unit, have described the creation of the commission as "clearly an ambitious enterprise".[132] Referring to previous reform, such as the establishment of the Supreme Court, as "piecemeal", they said that "a review of these fundamentals is therefore refreshing". However, the questions involved, such as the proper balance of power between the executive, legislature, and judiciary, were "extremely big, complex and delicate". Meg Russell and Alan Renwick expressed concern that the commission's role is potentially more troubling given the recent context in which it is being proposed:

> The UK has recently witnessed an exceptionally turbulent period in constitutional terms, with the referendum vote for Brexit followed by a significant struggle over its implementation. Particularly during 2019, tensions ran very high between government and parliament, with the Supreme Court becoming involved via the prorogation case. That these tensions helped motivate the proposed Commission seems clear from other words in this section of the manifesto, which suggest that 'The failure of Parliament to deliver Brexit… has opened up a destabilising and potentially extremely damaging rift between politicians and people'. Leaving aside the question of which parliamentarians exactly were responsible for blocking Brexit, this statement highlights how concerns about the most recent period (including the Supreme Court's role) have driven some on the Conservative side to seek reform.[133]

The authors argued that whilst the recent period had been "undoubtably difficult" it was also "highly unusual". In their article, Meg Russell and Alan Renwick also explored questions of how the commission might function and command public support.

Writing for the Institute for Government, Dr Catherine Haddon argued that it was unclear in what way the Government wanted to look at the functioning of the royal prerogative. She said this could involve looking at the Queen as the source for executive powers or how ministers use them. Dr Haddon argued that the commission could be a way of consolidating executive power, but this could lead to calls for further checks and balances:

> [L]ooking at prerogative powers is also a way of looking at the executive powers of the government. So the proposed review could be code for returning the power to call an election to the hands of the prime minister—and perhaps even strengthening the role of the executive further. If any review becomes about consolidating the

[132] Meg Russell and Alan Renwick, 'The government's proposed Constitution, Democracy and Rights Commission: what, why and how?', UCL Constitution Unit Blog, 14 February 2020.
[133] ibid.

> power of ministers, there will be demands for reciprocal checks and balances in Parliament or the courts.[134]

She argued the commission risked "continuing to make the constitution a Brexit battle ground" and that trying to "avoid any repeat of the parliament just gone would be a mistake".

Michael Olatokun, research fellow in citizenship and the rule of law and head of public and youth engagement at the Bingham Centre for the Rule of Law, has argued that for the commission "to deliver" it needs to be able to empower citizens "from different walks of life to contribute to the conversation".[135] He also expressed concern that a traditional commission may not be capable of engaging "on the scale that is needed to meet the challenge".

[134] Meg Russell and Alan Renwick, 'The government's proposed Constitution, Democracy and Rights Commission: what, why and how?', UCL Constitution Unit Blog, 14 February 2020.
[135] Michael Olatokun, 'Consult beyond the usual suspects to renew the constitution', Bingham Centre for the Rule of Law, 10 February 2020.