

Walking the Dark Side: Evading Parliamentary Scrutiny

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Abstract

Parliamentary scrutiny assumes a dual willingness—a willingness of government to be scrutinised and a willingness of Parliament to scrutinise, alongside a singular capacity: the ability of Parliament to scrutinise. In the official Westminster view of scrutiny these principles and practicalities are aligned and serve to illuminate the processes and actions of government. There is, however, also a ‘dark side’: where the principles and practicalities of scrutiny are not aligned. While an aversion to parliamentary scrutiny has been hard-wired into the ‘executive mentality’, the ‘ministerial mindset’, and the ‘instincts of secrecy’ shared by all contemporary UK governments, an examination of the first eighteen months of Boris Johnson’s premiership—in the exceptionally turbulent times of ‘getting Brexit done’ and ‘beating coronavirus’—reveals a distinct propensity of his Conservative government to walk on the dark side of parliamentary scrutiny in this period.

Keywords: Parliament, Westminster, Brexit, Covid-19, scrutiny, executive mentality

Introduction

PARLIAMENTARY SCRUTINY is deemed to be ‘a good thing’. As with its closely associated concept, accountability, it can be seen as a ‘virtue’, as a ‘desirable quality’ of democratic governance.¹ Not surprisingly, the UK Parliament itself subscribes to this view. It identifies scrutiny, which it defines as ‘the close examination and investigation of government policies, actions and spending’ as one of its main roles.² So too, historically, have Leaders of the House of Commons, with Jacob Rees-Mogg providing no exception. As Leader of the House, Rees-Mogg affirmed that he took his role ‘extraordinarily seriously’ and that he saw it as the job of the House of Commons ‘to hold the Government to account, not simply facilitate whatever the Government want to do’.³ Not only did he declare that he was ‘a great

believer in parliamentary scrutiny’ but, in the exceptionally turbulent times of ‘getting Brexit done’ and ‘beating coronavirus’, he also saw it as his responsibility ‘to make the case for more scrutiny’.⁴ The case was simple: ‘scrutiny actually matters from the point of view of the Government, as well as Back Benchers ... the work of scrutiny is so important’.⁵

In short, the importance of parliamentary scrutiny is grounded in the virtuous principles of openness, transparency, reflection, and evidentiality. Simply stated, the processes and outputs of government are deemed to be better, in terms of effectiveness, if subject to sustained external examination, evaluation and public counsel. Yet, equally, and fundamentally, the virtuous view of scrutiny is also grounded in presumptions about ‘willingness’ and ‘capacity’. It assumes a dual willingness—a willingness of government to be scrutinised and a willingness of Parliament to scrutinise, alongside a singular capacity: the ability of Parliament to scrutinise. In the ‘official’ Westminster view of scrutiny, propounded by the institution of Parliament and its institutional leaders, these

¹M. Bovens, T. Schillemans and R. E. Goodin, ‘Public Accountability’, *Oxford Handbook of Public Accountability*, Oxford, Oxford University Press, 2014, pp.7–8.

²UK Parliament, Scrutiny (parliamentary scrutiny), 2021; <https://www.parliament.uk/site-information/glossary/scrutiny-parliamentary-scrutiny/> (accessed 26 February 2021).

³*House of Commons Debates*, 25 July 2019, vol. 663, col. 1446.

⁴HC Deb., 19 March 2020, vol. 673, col. 1184.

⁵HC Deb., 8 June 2020, vol. 677, cols. 70, 74.

principles and practicalities are aligned, and serve to illuminate the processes and actions of government. This is the ‘bright side’ of scrutiny. There is, however, also a ‘dark side’: where the principles and practicalities of scrutiny are not aligned; where ‘willingness’ and ‘capacity’ are constrained or, in some instances, non-existent.

It is important to note from the outset, however, that the ‘dark side’ is not synonymous with the ‘down-side’ of scrutiny. The latter is symptomatic of the pathologies associated with some scrutiny processes. Hannah White, of the Institute for Government, neatly captures this ‘down-side’ in her listing of its ‘negative impacts’ on government: reduced innovation and risk-taking; limited openness; restricted lesson-learning; imposition of unnecessary costs; amended priorities; creation of unhelpful incentives, and inappropriate politicisation of process issues. Significantly, all of these negative features are connected to the ‘excessive fear’ of governments of ‘failure and public criticism’ and ‘blame and scapegoating’, which result in ‘defensive reactions’ by the executive.⁶

From light into shadow

The UK has a distinctive ‘institutionalised arrangement’ of representative government, with its distinctiveness resting in a combination of a theory of legitimate decision making (derived from authorisation and accountability accounts of representation), with a legal conception of sovereignty (derived from the constitutional experience of the Westminster Parliament).⁷ And, most particularly, at the heart of this institutionalised arrangement are parliamentary procedures designed to secure scrutiny, accountability, and transparency in decision making—neatly captured in the notion of ‘throughput legitimisation’.⁸

⁶H. White, *Parliamentary Scrutiny of Government*, London, Institute for Government, 2015, p. 11.

⁷D. Judge, *Democratic Incongruities: Representative Democracy in Britain*, Houndmills, Palgrave Macmillan, 2014, p. 107.

⁸See V. A. Schmidt, *Europe’s Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone*, Oxford, Oxford University Press, 2020, pp. 25–55; see also D. Judge and C. Leston-Bandeira, ‘Why it matters to keep asking why legislatures matter’, *Journal of Legislative Studies*, 2021, early view; <https://www.tandfonline.com/doi/full/10.1080/13572334.2020.1866836> (accessed 26 February 2021).

The basic elements of this distinctive arrangement are easily found in official government documents, for example in the *Cabinet Manual* and the *Ministerial Code*. Both documents list the core principles that ministers ‘should be governed by’: ‘to account, and be held to account, for the policies, decisions and actions of their departments and agencies’; ‘give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity’; be ‘as open as possible with Parliament and the public’ except ‘when disclosure would not be in the public interest’; and ‘require civil servants who give evidence before Parliamentary Committees on their behalf and under their direction to be as helpful as possible in providing accurate, truthful and full information’.⁹ Of particular importance is the use of the modal verb ‘should’ in these documents, as it provides ministers with the interpretative space to treat the scrutiny elements of this listing as ‘indicating a desirable or expected state’ rather than as unambiguous instructions or requirements for compliance.

The latitude afforded within this interpretative space is, in turn, marked out by a ministerial defensive mindset characterised by the ‘excessive fear’, noted above, of public criticism, blame and political scapegoating. This mindset, this ‘executive mentality’, fosters a predisposition towards working in the shadows away from scrutiny.¹⁰ Paradoxically, however, it is a corollary of the hyper-importance assigned to parliamentary scrutiny of executive actions within the UK’s constitution. In linking scrutiny with responsibility, the conventions of ministerial responsibility hold that ministers, both individually and collectively, are openly and publicly to be held accountable for the actions and

⁹Cabinet Office, *The Cabinet Manual*, London, Cabinet Office, 2011, pp. 2–4; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf. Cabinet Office, *Ministerial Code*, London, Cabinet Office, 2019, pp. 1–3; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf (both accessed 26 February 2021).

¹⁰D. Judge, *The Parliamentary State*, London, Sage, 1993, p. 143.

decisions of government. Yet, the underpinning constitutional logic of this linkage is inverted in the political rationality of UK parliamentary government. This inversion pivots on two defining features of UK parliamentary politics, which, in their combination, provide institutionalised shade under which executives are able to screen their actions from parliamentary ‘close examination and investigation’. First, a conjunction of three nominally discrete leadership roles—of the executive, the House, and the majority party—in a single centralised ‘authority hierarchy’ dominated by the Prime Minister and Cabinet, enables ministerial manipulation of the incentives for scrutiny, and for the subversive management of parliamentary scrutiny. Second, the adversarial nature of parliamentary proceedings and discourse—often caricatured as partisan electoral campaigning inbetween elections—contributes significantly to an executive mentality wherein ministers work from a longstanding default premise, neatly summarised by former Labour statesman James Callaghan in the 1970s, that ‘we are not going to tell you anything more than we can about what is going to discredit us’.¹¹ These two defining features provide both the means and the motive for governments to operate on the dark side of parliamentary scrutiny.

Indeed, all UK governments have displayed a propensity to privilege circumspection over candour in their dealings with Parliament. Yet, the readiness of executives to work in institutionalised shade is neither necessarily uniform nor consistent across government and across time: there are degrees of darkness. An examination of some of the main procedures of parliamentary scrutiny in the exceptionally turbulent times of the first eighteen months of a Johnson government—committed to ‘getting Brexit done’ and ‘beating coronavirus’—provides a unique opportunity to illustrate this dark side and the defensive predispositions and the propensities of UK government. What follows, therefore, is a brief ‘spectrophotometric’ analysis of two of the main modes of parliamentary scrutiny—committee investigative work and legislative scrutiny. The period under study runs from July 2019, when Boris Johnson became Prime Minister vowing to get Brexit done, until December 2020, when, after the passage of the European Union (Future

Relationship) Act, he pronounced that Brexit had indeed been done.

Select committee scrutiny

Select committees have become the ‘poster organisations’ of parliamentary scrutiny. In recent decades these committees, especially departmental committees, have built an impressive fanbase amongst parliamentarians and students of Parliament alike, and have been adjudged to be ‘at the apex of public scrutiny’.¹² In the crucial early stages of the Covid-19 crisis, especially when Parliament was in recess for four weeks from 25 March 2020, select committees were empowered to operate virtually, with multiple committees holding evidence sessions on the health, social, cultural and economic impacts of the crisis. On the basis of evidence collected, the committees proceeded to produce piercingly critical reports of government actions and policies. Overall, select committees acted throughout 2020 as ‘the main mechanism through which parliament ... conducted policy scrutiny’.¹³

The pre-eminent status of select committees as ‘the main mechanism’ of scrutiny owes much to the permissive organisational conditions within which they operate. In essence, the effectiveness of select committees is not dependent primarily upon their orders of reference or their formal powers to send for ‘persons, papers and records’, both of which are problematic, but rather upon informal capacities derived from their modes of working. By definition they are ‘cross-party’, with their memberships roughly proportionate of the House as a whole. More particularly, consensus is deemed to be ‘a foundational element’ of their work; but, as Marc Geddes notes, consensus is not a given: it has to be ‘constructed’.¹⁴ The insulation of committee activities from the partisan grip of party

¹²L. Maer, ‘Select committee reform: shifting the balance and pushing the boundaries’, *Parliamentary Affairs*, vol. 72, no. 4, 2019, pp. 761–778, at p. 776.

¹³A. Lilly and H. White, *Parliament’s Role in the Coronavirus Crisis*, London, Institute for Government, 2020, p. 8.

¹⁴M. Geddes, ‘Performing scrutiny along the committee corridor of the UK House of Commons’, *Parliamentary Affairs*, vol. 72, no. 4, 2019, pp. 821–840, at p. 825, p. 836.

¹¹Cmnd 5104, *Departmental Committee on Section 2 of the Official Secrets Act 1911, Volume 4*, London, HMSO, 1972, p.190.

managers, and from the intrusions of governmental defensive dispositions or ethos into their workings, are, therefore, essential elements in the process of consensus construction. On both counts, parliamentary committees were subject to government attempts to restrict their permissive operational bandwidth in the first eighteen months of Johnson's premiership.

Delay and interference

Particularly stark examples of such attempts at restriction were provided by the experiences of the Liaison Committee and the Intelligence and Security Committee (ISC). Both witnessed delays in convening their first meetings, and, relatedly, both encountered direct majority party (and hence executive) intervention in the choice of their respective chairs. What distinguished the re-establishing of these committees in early 2020, however, was not simply the sheer length of delay, but more darkly, the executive's intertwining of procedural, process and partisan stratagems to deepen the shadows within which parliamentary scrutiny might be averted. In the case of the Liaison Committee the government combined the procedural issue of the composition of the committee with the process issue of the nomination process of its chair, and with the partisan issue of actively managing, through its party whips, a vote on a named nominee, Sir Bernard Jenkin. In the case of the ISC, a similar combination of procedural, process and partisan stratagems was evident. Boris Johnson chose to infuse established procedures and processes with partisan priorities by proposing Chris Grayling as the ISC's chair, seeking assurances from other nominated Conservative members that they would support Grayling, and ensuring that there would be a Conservative majority on the committee in abandoning the convention that no party should have a majority on the committee. Despite denials from Downing Street that there was partisan intent behind the nomination process, the prompting of a contested election for the ISC's chair by Julian Lewis (a former Conservative chair of the Defence Committee), and his success in that election, led to an immediate partisan reaction in the withdrawal of the party whip from Lewis. In the opinion of Dominic Grieve—Lewis's immediate predecessor as ISC chair—this episode bore the sinister imprint of 'the mindset' of

Downing Street, which sought 'to politicise every aspect of ... parliamentary activity and party politicise it'.¹⁵

Attendance: reluctance and avoidance

Although select committees cannot force ministers to appear before them, they rarely refuse outright—preferring delay and postponement instead. In this regard, Johnson led the way. Between his appointment as PM in July and the December 2019 general election he declined invitations to appear before the Liaison Committee on four occasions. The PM's example was later matched by a number of his ministerial colleagues, adding to a sense of an executive *modus operandi* developing to avoid detailed parliamentary scrutiny. In the period March to April 2020 it took five invitations, and protracted correspondence from the Home Affairs Committee, to secure an appearance by the Home Secretary, Piri Patel. In October 2020, Sarah Champion, Chair of the International Development Committee, wrote to Dominic Raab, the Foreign, Commonwealth and Development Secretary, lamenting his failure to meet with the Committee to discuss the significant changes wrought by the merging of the Department for International Development with the Foreign and Commonwealth Office. She noted: 'It is hard not to make the assumption that you are seeking to defer being properly accountable for some very significant decisions ... If this is the case, you are pre-empting and presuming decisions of the House and could well be regarded as treating Parliament with contempt'.¹⁶ By December 2020 Mark D'Arcy, the BBC's parliamentary correspondent, reported that 'the hot new Westminster trend seems to be cabinet ministers declining to appear before

¹⁵D. Grieve, quoted in, 'Russia Report: new intelligence committee chair loses Tory whip', BBC, 16 July 2020; <https://www.bbc.co.uk/news/uk-politics-53422010> (accessed 25 February 2021). D. Grieve, quoted in, 'No. 10 warned by Tory MPs over "sinister" bids to suppress dissent', *The Guardian*, 19 July 2020; <https://www.theguardian.com/politics/2020/jul/19/no-10-warned-by-tory-mps-over-sinister-bids-to-suppress-dissent> (accessed 26 February 2021).

¹⁶S. Champion, 'Letter to Rt Hon Dominic Raab MP Foreign, Commonwealth and Development Secretary FCDO, by email', 14 October 2020; <https://committees.parliament.uk/publications/2992/documents/28476/default/> (accessed 25 February 2021).

Select Committees'.¹⁷ The Chairs of the Business, Energy and Industrial Strategy Committee, the International Trade Committee and the Treasury Committee all had occasion in late 2020 to record their disappointment and dismay at the unwillingness of the respective ministerial heads of these departments to give evidence on crucial issues of government policy.

Unlike ministers, civil servants and special advisers (SpAds) are not 'collaterally exempt' from being compelled to attend committees.¹⁸ Nonetheless, ministers retain the decision as to which Whitehall officials and advisers are best able to represent them when called before select committees. Indeed, with the exception of David Frost (in his former capacity as the PM's Europe Adviser, and Chief Negotiator of Task Force Europe)—who appeared twice before the Committee on the Future Relationship with the European Union in May and December 2020—no other special adviser appeared before a select committee in the first eighteen months of the Johnson government. Yet, the breadth of responsibilities exercised generally by SpAds, and specifically by the PM's chief adviser, Dominic Cummings, raised widespread and deep concerns about the darkening of accountability at the centre of government in 2020. Cummings, already held to be in contempt of Parliament for failing to appear before the Digital, Culture and Sport Committee in 2018, was reported to have dismissed outright an invitation, in March 2020, from the Defence Committee to provide evidence about his role in the defence review.¹⁹

Equivocation

The dark arts of equivocation are often performed by ministers in appearing before select

committees; either consciously and skilfully to evade scrutiny, or unconsciously and guilelessly to the same effect. As supporting actors for their ministers, civil servants, however, are expected to be 'as helpful as possible' when appearing before select committees. This expectation is specified unambiguously in the *Guidance for Civil Servants* (the so called Osmotherly Rules), which reminds civil servants that when they provide evidence 'they do so on behalf of their Ministers, and under their directions'.²⁰ In the Whitehall world of 2020—with the PM's chief adviser acting as a self-styled storm-maker intent on ensuring that a 'hard rain is coming' for the state's bureaucracy—the incentives for civil servants to shroud departmental activities in the shade of equivocation appeared to have increased markedly. The disincentives for not doing so were seemingly exemplified by the case of Sir Simon McDonald, Permanent Under-Secretary at the Foreign Office. In April 2020, during the first wave of the Covid-19 pandemic, he informed the Foreign Affairs Select Committee that 'it was a political decision' for the UK not to be involved in the EU's ventilator procurement scheme.²¹ Within five hours of making this statement Sir Simon wrote to the committee chair to inform him that: 'due to a misunderstanding, I inadvertently and wrongly told the Committee, that Ministers were briefed ... on the [scheme] and took a political decision not to participate in it. That is incorrect'.²² While a Downing Street spokesperson saw this retraction as evidence that 'it is important that select committees are given accurate information and that's why he corrected what he had said', sceptics within Whitehall, and on the opposition benches in Westminster, however, were far

¹⁷M. D'Arcy, 'The week ahead in Parliament', BBC, 4 December 2020; <https://www.bbc.co.uk/news/uk-politics-55188768> (accessed 25 February 2021).

¹⁸Liaison Committee, *The Effectiveness and Influence of the Select Committee System*, Fourth Report of Session 2017–19, HC 1860, London, House of Commons, 2019, para. 172.

¹⁹A. Woodcock, 'Dominic Cummings must face Parliament questioning if he plays role in UK defence policy, senior MP says', *Independent*, 9 July, 2020; <https://www.independent.co.uk/news/uk/politics/dominic-cummings-defence-committee-boris-johnson-security-armed-forces-a9610036.html> (accessed 25 February 2021).

²⁰Cabinet Office, *Giving Evidence to Select Committees: Guidance for Civil Servants*, London, Cabinet Office, 2014; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/364600/Osmotherly_Rules_October_2014.pdf (accessed 25 February 2021).

²¹Foreign Affairs Committee, *Oral Evidence: Coronavirus: FCO Response*, HC 239, London, House of Commons, 2020, Q.99.

²²Foreign Affairs Committee, 'Correspondence from the Permanent Under-Secretary of State, FCO, on the EU Ventilator Procurement Scheme', London, House of Commons, 21 April 2020.

from convinced by this explanation: fearing instead that Sir Simon ‘had been leant on’ by ministers.²³

Scrutiny of legislation

The opportunities for parliamentary scrutiny of government legislation are extensive, with detailed examination—through line-by-line scrutiny of a bill—seen to be at the heart of the legislative process. Yet, the capacity of MPs to perform such scrutiny effectively, and the incentives for them to do so, are limited by ‘time and partisanship’.²⁴ While there is some evidence that parliamentary scrutiny provides for ‘interconnected forms’ of policy influence and ‘quite hard’ testing of the content of legislation, nonetheless, the specific notion of line-by-line scrutiny is largely fanciful.²⁵ This is not to claim that all legislative scrutiny is superficial, just that cursory examination of bills tends to be relatively routine. Significantly, an outlier to this ‘normal’ pattern occurred in the ‘abnormal’ times of the 2017–19 Parliament. In this topsy-turvy period, the ‘normalities’ of parliamentary politics (government majorities, relative intra-party cohesion, distinct inter-party differentiation, secure executive agenda control, and procedural conservatism) were upended. In this context, the deeply contentious EU (Withdrawal) Bill 2018 introduced by the government of Theresa May was subject to prolonged scrutiny. By the time the Bill reached its Royal Assent, it had been subject to thirty-six days of scrutiny, over half of the lines of

the original text had been amended; and it was 63 per cent longer than when first introduced.

After the December 2019 general election, however, internal parliamentary politics reverted to something resembling normality (or at least pre-2010 normality). Yet, by early 2020, government and Parliament were confronted by profoundly exceptional exogenous circumstances: of the immediacy of withdrawal from the EU, and rapid immersion in a worldwide Covid-19 pandemic. In these circumstances, when ‘detailed examination’ was imperative for the effectiveness of Brexit and Covid-19 legislation, the Johnson government’s default position appeared, paradoxically, to be to shield itself from parliamentary scrutiny.

Scrutiny of primary legislation

‘Getting Brexit done’ was the self-proclaimed priority of the Johnson government immediately after the 2019 general election. To this end the new government introduced a 100-page EU (Withdrawal Agreement) Bill (WAB), to implement the Withdrawal Agreement negotiated with the EU. This Bill was similar in scope and complexity to the EU (Withdrawal) Act 2018 (EUWA), but this time passed unamended after only eleven sitting days of scrutiny. Significantly, the parliamentary oversight provisions of the EUWA were deleted from the WAB. While it might be a mistake to read too much into the smooth passage of the WAB, given the time exigencies of implementing the government’s Brexit manifesto pledge, nonetheless, it was remarkable that not a single amendment made it into the final text of such an historically significant Act of Parliament. But the speed with which the WAB was processed was positively glacial when compared to the passage of the European Union (Future Relationship) Bill (EUFEB) on 30 December 2020.

The EUFRB, which completed all of its parliamentary stages in just over twelve hours, implements the agreements on trade, security and nuclear cooperation finalised on 24 December 2020 between the UK and EU. At eighty pages in length, with a further sixty-five pages of explanatory notes, the Bill was published less than eighteen hours before the formal scrutiny process began in Parliament. Not surprisingly,

²³A. Allegretti, ‘Coronavirus: top civil servant Sir Simon McDonald withdraws claim’, Sky News, 21 April, 2020; <https://news.sky.com/story/coronavirus-top-civil-servant-sir-simon-mcdonald-withdraws-claim-uk-chose-not-to-join-eu-medical-kit-scheme-11976778> (accessed 26 February 2021).

²⁴P. Norton, *Parliament in British Politics*, 2nd edn., Houndmills, Palgrave Macmillan, 2015, p. 110; see also N. Besly and T. Goldsmith, *How Parliament Works*, 8th edn., London, Routledge, 2019, p. 184.

²⁵M. Russell and D. Gover, ‘Parliamentary scrutiny and influence on government Bills’, in C. Leston-Bandeira and L. Thompson, eds., *Exploring Parliament*, Oxford, Oxford University Press, 2018, p. 86; M. Russell and D. Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Laws*, Oxford, Oxford University Press, 2017, pp. 28–42.

MPs from all parties lamented the government's cavalier attitude to scrutiny of this historically important legislation.²⁶ Beyond Westminster the verdict was equally damning, with, Brigid Fowler, Senior Researcher for the Hansard Society, arguing that 'this process represents an abdication of Parliament's constitutional responsibilities to deliver proper scrutiny of the executive and of the law'.²⁷

If the time pressures of processing EU withdrawal legislation were self-inflicted, the time pressures confronting the Johnson government for swift legislative action to deal with the spread of Covid-19 in March 2020 were entirely extraneous. On 25 March two major Acts received royal assent: the Contingencies Fund Act 2020 (CFA), and the Coronavirus Act 2020 (CA). The former empowered the government to fund unprecedented levels of departmental expenditure and the latter conferred the powers to spend those funds. The CFA was one page in length and completed its passage, unamended, in two days. The CA was 348 pages in length and completed its Commons scrutiny in a single day on 23 March, and all of its legislative stages within four days. The government made only one concession in the final CA, in response to widespread concerns within and beyond Westminster, to allow an amendment to enable a six-month parliamentary review (rather than every twenty-four months) to keep the Act's temporary vote in force.

Scrutiny of secondary legislation

A vast amount of secondary legislation (also referred to as delegated legislation) accompanied the primary legislation dealing with Brexit and Covid-19. Longstanding concern had existed about the use of secondary legislation by successive governments to side-step

parliamentary scrutiny—in the form of framework or skeleton bills, Henry VIII clauses, and individual statutory instruments (SIs). But it was the sheer scale of legislative change contained within secondary legislation dealing with Brexit and Covid-19 that tipped concern into alarm. The House of Lords Constitution Committee accused the Johnson government in June 2020 of using secondary legislation 'for convenience rather than necessity', and as a 'convenient means of executive law-making' in the Brexit process.²⁸ Six months later, the Lords Secondary Legislation Scrutiny Committee raised the more particular concern that the government's use of framework/skeleton legislation—where broad delegated powers were sought without accompanying policy detail—was 'extraordinary' in asking Parliament to pass legislation without adequate provision for scrutiny of how ministerial powers were to be exercised or the impact of such legislation.²⁹ The passage of the EU (Future Relationship) Act, only served to heighten these fears, as its provisions for delegated powers, especially in sections 29 and 31, conferred upon the government immense powers unencumbered by any, or any meaningful, parliamentary scrutiny.

The government's legislative approach to dealing with the Covid-19 crisis similarly highlighted the extent to which secondary legislation was deployed to provide ministers with extensive legislative powers with minimal parliamentary scrutiny and control. Some 331 Covid-19 related SIs were laid in 2020. The majority were laid under the arcane and restrictive rules of the 'made negative' and 'made affirmative' procedures; and, in the face of perpetually changing circumstances, many of these SIs were rapidly amended, repeatedly amended, or even quickly revoked. However, seventy-seven Covid-19 related SIs were made under an 'urgent procedure' specified in the Public Health (Control of Diseases) Act 1984, including all regulations covering 'lockdown'—described as 'some of the

²⁶HC Deb., 30 December 2020, vol. 686. See Liz Saville Roberts (Plaid Cymru) col. 549; Philippa Whitford (Scottish National Party) col. 551; Damian Green (Conservative) col. 559; Meg Hillier, (Labour/Co-op) col. 574.

²⁷B. Fowler, 'Parliament's role in scrutinising the UK-EU Trade and Co-operation Agreement is a farce', *Hansard Society Blog*, 2020; <https://www.hansardsociety.org.uk/blog/parliaments-role-in-scrutinising-the-uk-eu-trade-and-cooperation-agreement> (accessed 8 January 2021).

²⁸Select Committee on the Constitution, *Brexit Legislation: Constitutional Issues*, Sixth Report of Session 2019–21, HL 71, London, House of Lords, 2020, para. 47.

²⁹Secondary Legislation Scrutiny Committee, *Interim Report on the Work of the Committee in Session 2019–21*, HL 200, London, House of Lords, 2020, para. 29.

most “draconian” powers ever seen in peacetime’.³⁰ Under the 1984 Act it is ‘possible to introduce regulations without any form of parliamentary approval or scrutiny, and for these regulations to operate without any form of parliamentary approval or scrutiny’.³¹

It was perhaps unsurprising, therefore, given the sheer scope and comprehensive conferment of powers under Covid-19 related secondary legislation, that MPs increasingly became vexed with their inability to scrutinise such measures in detail. The renewal of the Coronavirus Act 2020, upon its first six-monthly review on 30 September 2020, provided MPs with the opportunity both to express their exasperation with the SI provisions of the CA itself, but also to register their concerns with the inadequacies of the scrutiny processes for Covid-related urgent measures more generally. Pressed by its own backbenchers, especially by members of the Covid Recovery Group, the government pledged to change its approach to introducing urgent measures by holding votes ‘wherever possible’ before regulations came into force. In announcing this new approach, Matt Hancock, Health Secretary of State for Health and Social Care, also asked MPs to recognise ‘two contrasting needs—the need for proper scrutiny and the need for very speedy action’.³² The practical effect of such recognition, however, would be unlikely to heighten expectations that parliamentary examination would trump executive exigency in the future.

The importance of presence

Brexit and prorogation

On 28 August 2019, the PM announced the prorogation of Parliament, and so, metaphorically, placed Parliament in total darkness. The intent of this decision was ruled, by Scotland’s highest court, to have been motivated by the improper purpose of ‘stymying’ parliamentary scrutiny

³⁰Public Administration and Constitutional Affairs Committee, *Parliamentary Scrutiny of the Government’s Handling of Covid-19*, Fourth Report, HC 377, London, HMSO, 2020, para. 56.

³¹K. D. Ewing, ‘Covid-19: government by decree’, *King’s Law Journal*, vol. 31, no. 1, 2020, pp. 1–24, at p. 14.

³²HC Deb., 30 September 2020, vol. 681, col 390.

of government action;³³ and its practical effect was adjudged by the UK’s Supreme Court to be that: ‘While Parliament is prorogued, neither House can meet, debate or pass legislation’. ‘Neither House can debate Government policy. Nor may members ask written or oral questions of Ministers or meet and take evidence in committees’.³⁴ In order for Parliament to perform its constitutional functions as a legislature and as the body responsible for the scrutiny and supervision of the executive, a basic requirement, therefore, is that it has to be assembled, it has to be ‘present’. Without becoming embroiled in the politicised convolutions as to why the PM advised the Queen to prorogue Parliament, the clear intention was to close Parliament for five weeks, out of a possible eight, immediately prior to the UK’s scheduled exit from the EU on 31 October 2019. At the time, the government’s justification for prorogation convinced few beyond the PM’s most ardent supporters. Beyond Downing Street there was a widespread counterview, captured pithily by Joanna Cherry (Scottish National Party, Edinburgh South West) in the Commons: ‘The dogs in the streets know that the reason the Prime Minister is proroguing Parliament is to avoid scrutiny as he hurtles towards 31 October and a no-deal Brexit’.³⁵

Covid-19: ‘virtual’ vs ‘physical’ presence

From the outset of the Covid-19 pandemic there was a clear collective commitment at Westminster that ‘although Parliament may have to

³³[2019]CSIH 49, ‘Opinion of Lord Carloway in the Reclaiming Motion by Joanna Cherry QC and Others’, P680/19, First Division, Inner House, Edinburgh Court of Session, 2019; <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih49.pdf?sfvrsn=0> (accessed 25 February 2021).

³⁴[2019]UKSC 41, ‘Judgment: R (on the Application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)’, London, Supreme Court, 2019; <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf> (accessed 25 February 2021).

³⁵HC Deb., 9 September 2019, vol. 664, col. 540.

operate differently, it must remain open'.³⁶ Equally, there was also a recognition that existing parliamentary procedures, which required members to be physically present at Westminster, would have to be adapted to comply with social distancing requirements. With commendable agility and technological innovation, Parliament—its leadership, members, officials, authorities, and staff—acted to establish virtual and hybrid working methods.

By April a temporary regime had been established, which allowed MPs to participate virtually in hybrid scrutiny and substantive proceedings, as well as to vote remotely. Despite the success of these hybrid proceedings, in enabling Parliament to continue its scrutiny and legislative roles in a responsibly socially distanced manner, the government—as part of its *Plan to Rebuild*—announced in May that Parliament 'must set a national example of how business can continue in the new normal' by moving towards 'further physical proceedings in the House of Commons'.³⁷ With no apparent intended irony, given the attempt to prorogue Parliament only nine months earlier, Rees-Mogg declared his support for the plan, and his belief that 'this House cannot be as effective in carrying out its constitutional duties without Members being present'.³⁸ Right up until the end of 2020 he continued to espouse the belief that 'scrutiny is more effective ... when it is not dialled in'.³⁹ However, Rees-Mogg's conflation of 'presence' with 'physical presence', was roundly criticised by those MPs willing to argue that their 'virtual presence' allowed for effective scrutiny, recognised the equality of opportunity for all members to participate in parliamentary proceedings (irrespective of shielding or logistical restrictions), and that virtual proceedings were constrained not by technology but by governmental reticence to subject itself to scrutiny across the full range of procedures.

Conclusion: mixing mindsets and mentalities

There is nothing new in the propensity of governments to walk on the dark side of

parliamentary scrutiny. Indeed, the aversion to parliamentary scrutiny is hard-wired into the 'executive mentality', the 'ministerial mindset', and the 'instincts of secrecy' shared by contemporary UK governments. What is perhaps new, however, is the enthusiasm displayed by Johnsonian governments for such dark perambulations since July 2019.

Something appears to have changed and a few directional pointers towards explaining this change may be usefully offered here. One would point towards examining how Johnson as PM combined an existing executive mentality with a populist mindset (reflective of a political strategy rather than an ideology). A mindset fostered by his closest Brexiteer political allies, and bolstered throughout 2020 by his chief adviser, Dominic Cummings, until his departure from Downing Street in late December. A mindset that is populist in favouring sloganeering and evasion over reasoned discourse and engagement. A mindset that privileges neutralising criticism, demonises Parliament and parliamentarians as likely impediments to the fulfilment of the pledges of the 'people's government', and prefers to communicate with the public directly rather than indirectly through Parliament (a preference pursued variously through daily ministerial press conferences at the height of the Covid-19 crisis, routine ministerial announcements of policy to the media before presentation to Parliament, and the development of the online 'People's PMQs'). The pursuit of this populist communication strategy led the Speaker and other senior parliamentarians to express, repeatedly, their profound concerns. Indeed, Conservative backbencher Peter Bone (staunch Brexiteer and avid believer in the sovereignty of Parliament), speculated that the problem was that too many people in Downing Street 'just do not understand how government works'.⁴⁰ And this provides a second pointer towards explaining what has changed in the mindset of government under Johnson.

An outline sketch of this second explanation is provided by Andrew Blick and Peter Hennessy. They start from the premise that 'a key characteristic of the British constitution is the degree to which the good governance of the

³⁶HC Deb., 16 March 2020, vol. 673, col. 704.

³⁷Cabinet Office, *Our Plan to Rebuild: The UK Government's Covid-19 Recovery Strategy*, CP 239, London, HM Government, 2020, p. 29.

³⁸HC Deb., 12 May 2020, vol. 676, col. 213.

³⁹HC Deb., 30 December 2020, vol. 686, col. 655.

⁴⁰HC Deb., 12 May 2020, vol. 676, col.188.

UK has relied on the self-restraint of those who carry it out'.⁴¹ The essence of this argument is that in the UK 'we have trusted politicians to behave themselves' and that political leaders will be 'good chaps' who know the unwritten constitutional rules and seek to adhere to them. Although there is plenty of historical evidence to show that such adherence has been far from absolute, nonetheless, Blick and Hennessy now believe that 'the current political environment has tended to elevate "chaps" who are less inclined to be good'.⁴² This is not a judgement about the moral or personal characteristics and foibles of the PM and his closest ministerial colleagues and advisers; rather it is about their political strategy of disruption, of rectifying what they see as 'the profound problems at the core of how the British state makes decisions'.⁴³ To do this required, what Dominic Cummings called, 'true cognitive diversity' at the centre of government and the hiring of, what he notoriously described as 'super-talented weirdos' and 'true wild-cards'.⁴⁴ This is the mindset of action, not accountability.

It is also a mindset at odds with the remnants of notions of 'club government' at Westminster. The notion of club government is closely aligned with the 'good chaps' perspective: both revolve around ideas developed in the nineteenth century of 'honourable secrecy', of 'club regulation' where the UK's political elite 'trusted each other to observe the spirit of the club rules' and of benign interaction between executive and Parliament.⁴⁵

Even a transition away from club regulation to a 'regulatory state' from the late 1970s onwards still left distinctive residues of club government. The scrutiny of government actions by Parliament still necessitated 'honourable' intent on the part of the executive to abide by 'club rules' and submit itself to examination. What is distinctive about the period since July 2019 is that the PM and his chief adviser appeared to be playing by new club rules. And John McDonnell, as Shadow Chancellor, pointed to the Bullingdon Club—of which the PM was a member in his Oxford undergraduate days and which was renowned for irresponsible, disruptive and destructive behaviour—as a reasonable comparator for the new rules.⁴⁶ If this is the case, then Peter Bone might have been mistaken in his belief that too many of the PM's special aides and advisers who inhabited Number Ten, 'just do not understand how government works'. They, and Johnson, did know how government has worked in the UK; they didn't like it, they wanted to change it, and they sought to circumvent parliamentary restraints upon their capacity to effect change. To this end, they were more than willing to walk on the dark side of scrutiny.

Biographical note

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⁴¹A. Blick, and P. Hennessy, *Good Chaps No More? Safeguarding the Constitution in Stressful Times*, London, Constitution Society, 2019, p. 5.

⁴²*Ibid.*, p. 17.

⁴³D. Cummings, "'Two hands are a lot—we're hiring data scientists, project managers, policy experts, assorted weirdos'", Blog, 2 January 2020; <https://dominiccumings.com/2020/01/02/two-hands-are-a-lot-were-hiring-data-scientists-project-managers-policy-experts-assorted-weirdos/> (accessed 26 February 2021).

⁴⁴*Ibid.*

⁴⁵M. Moran, *The British Regulatory State: High Modernism and Hyper-Innovation*, Oxford, Oxford University Press, 2003, p. 32.

⁴⁶J. McDonnell, quoted in N. Bartlett, 'Labour's John McDonnell compares Boris Johnson to a "dictator"', *The Mirror*, 29 August 2019; <https://www.mirror.co.uk/news/politics/labours-john-mcdonnell-compare-boris-19029211> (accessed 25 February 2021).