Our Forgotten Constitutional Guardians

Jones, Brian Christopher

Published in:
Statute Law Review

DOI:
10.1093/slr/hmz007

Publication date:
2021

Document Version
Peer reviewed version

1. INTRODUCTION

When the Great Repeal Bill was announced,[1] a collective sigh of antipathy amongst many constitutional watchers emerged. But for some the concern did not revolve around repeal of the European Communities Act (ECA) 1972 not being "great"; after forty plus years of stormy relations with its European partners, that much was assured. The danger was that the sloganeering and propaganda seen throughout the heated referendum would now be incorporated into statutory form, through the bill's short title. Such a wantonly symbolic gesture may have poisoned the bill's parliamentary processes, including its debate in both chambers, and probably even influenced the reporting and understanding of the legislation outside of Parliament.[2] However eventually the government dropped the idea of such a grand label, and changed the title before officially submitting the bill to Parliament to: European Union (Withdrawal) Bill. And yet, the story of why the government changed their minds remains somewhat of a mystery.[3] The significance of this change may be minor for some, but I believe it carries more important implications for the UK constitutional system: statutory law is a legitimate indicator of state functionality, and if pathologies are present in legislation—such as overtly polemical language—then this can be indicative of larger pathologies within the state. After all, statutes are one of the only state outputs that are sanctioned by both the executive and legislative branches.[4] And when it comes to producing high-quality legislation that will enter the statute book, a host of front-end constitutional guardians that straddle executive and Parliamentary offices, largely forgotten in the traditional constitutional process, are responsible for this task. This paper is about them, and especially the key position they play in helping uphold our respect for the law.

Just as the masses continue to queue at cinemas worldwide for epic superhero battles of good versus evil, legal scholarship remains obsessed with classic battles of constitutional authority: the legislature versus the judiciary, or the judiciary versus the executive. The *Miller v Secretary of State* case[5] perfectly embodied this enduring desire

[1] "Brexit: Theresa May to trigger Article 50 by end of March" *BBC News* (2 October 2016), http://www.bbc.co.uk/news/uk-politics-37532364 (Accessed 15 November 2018).
[2] In fact, this label may still be influencing coverage. As of June 2018, Sky was still referring to it as the Great Repeal Bill (Faisal Islam, "Brexit moves from procedure to substance" *Sky News* (21 June 2018, https://news.sky.com/story/brexit-moves-from-procedure-to-substance-11411631 (Accessed 15 November 2018)).
[3] D.A. Green, "Whatever happened to the 'Great' Repeal Bill?" *Financial Times* (21 June 2017), https://www.ft.com/content/05253602-ce4a-3f64-8ace-6a6f0387603f (Accessed 15 November 2018). Green notes in his article that when he questioned why name would not be used for the short title, they responded that, they "can't use it because it is a parliamentary thing".
[4] At least, this applies to bills that originate in the government's legislative programme, and are therefore approved at the Cabinet level. Some statutes, of course, may also go on to be approved by the judiciary, which would then make three branches sanctioning these important documents.
[5] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, [2017] UKSC 5.

This is a pre-copyedited, author-produced version of an article accepted for publication in *Statute Law Review* following peer review. The version of record Jones, B.C., (2019) 'Our Forgotten Constitutional Guardians: Preserving Respect for the Law', *Statute Law Review* 42(1), pp. 1-19 is available online at: https://doi.org/10.1093/slr/hmz007.

for legal drama, as it received wall-to-wall coverage in newspapers, blogs, classrooms, and virtually everywhere else it could have done so. It epitomised the traditional legal spectacle: protagonists versus antagonists (contingent on your personal views), key players (Gina Miller, Lord Neuberger and Jeremy Wright) and even a host of pre-decision drama.[6] And yet, for all the voluminous attention it received,[7] one prominent academic has recently characterised it as a "damp squib",[8] and another argues that history may regard Brexit as a constitutional "blip".[9] And that is only a year and half after the judgment was delivered! In reality constitutional authority is more nuanced than this, and can be found in some places that constitutional scholars have provided cursory attention. Just as the film critic can bring a relatively unknown movie to our attention, so should legal scholars be searching beyond legal blockbusters. Although the literature has picked up on many topics of constitutional nuance, some things are still completely left out of the equation. This paper discusses a couple of these "forgotten" constitutional actors. In particular, it focuses on two groups within the British constitutional state that believe they are not only constitutional actors, but constitutional guardians: the Office of Parliamentary Counsel (OPC) and Parliamentary Clerks (in particular those in the Commons Public Bill Office).

The legal significance and understanding of the Office of Parliamentary Counsel within the British system has been marked as lacking. Edward Page noted in 2009 that we "know little about the process of drafting primary legislation", and that the OPC itself is "not very well understood".[10] What was true close to a decade ago is true now: a Westlaw journal search identifying "parliamentary counsel" as the subject/keyword produced only 17 results over the span of three decades, stretching back to 1988.[11] But this dearth of legal scholarship should not cloud one's judgment regarding the significance of the OPC. As Daintith and Page asserted in 1999, "in the absence of a higher law by which a sovereign Parliament is bound, the concept of legal policy as interpreted by Parliamentary Counsel is as close that our system has traditionally come

[6] No, this is not a reference to the *Daily Mail* "enemies of the people" headline after the High Court decision. Even after that judgment, a speech by Lady Hale caused controversy, as did the Twitter habits of Lord Neuberger's wife.
[7] See, e.g., all the UKCLA Blog entries on the subject here: https://ukconstitutionallaw.org/tag/miller-v-secretary-of-state-for-exiting-the-european-union/ (Accessed 15 November 2018).
[8] M. Elliott, "Sovereignty, Primacy and the Common Law Constitution: What has EU Membership Taught Us?" Public Law for Everyone (https://publiclawforeveryone.com/2018/07/20/sovereignty-primacy-and-the-common-law-constitution-what-has-eu-membership-taught-us/)(Accessed 15 November 2018).
[9] A. Young, Will Brexit change the UK constitution? Hansard Society Blog (7 August 2018) https://www.hansardsociety.org.uk/blog/will-brexit-change-the-uk-constitution (Accessed 15 November 2018).
[10] E.C. Page, "Their Word is Law: Parliamentary Counsel and Creative Policy Analysis" (2009) PL 790, 791.
[11] Search performed on Westlaw UK (15 November 2018).

to a check on the 'constitutionality' of legislation".[12] Of course, HRA statements of compatibility may now serve this function at the Parliamentary level,[13] and declarations of HRA incompatibility can arise in the courts,[14] but these statements and declarations are in relation to human rights compatibility, and not necessarily on the "constitutionality" of statutes. Nonetheless, as will be seen below, Parliamentary Counsel undoubtedly serve a pre-statement function, before bills are even presented to Parliament. Daintith and Page go on to note that the importance of Parliamentary Counsel as guardian of legal values "reflects their own conception of their role and in particular the belief that they owe a responsibility to the law and statute book as well as to the minister whose policy they are responsible for translating into statutory form".[15] But some have indicated that this role is changing, and that the OPC is not the robust check on government that it used to be. Further discussion of the OPC's role and whether or not their role may be changing is discussed below.

The House Authorities, (in practice a handful of the most senior Clerks) also do not receive much attention in the legal literature, although—as will be seen below—their influence on the shape of statutory law is also considerable. As Greenberg noted in 2011, "Many lawyers have never so much heard of the Clerks of Public Bills or the other Parliamentary authorities involved in the passage of legislation. Even if they have heard of the figures known collectively as the 'House Authorities', most lawyers will only have a very shadowy conception of what it is they do".[16] Although they may not have as much input on the final product of legislation, the House Authorities could also be considered front-end guardians of the constitution. But they do so in a different way from Parliamentary Counsel. This paper focuses on the Public Bill Office, which "examines the drafts of Government and private Members' bills to ensure that they conform to the rules of the House".[17] Some things that may arise in their constitutional duties include: determining whether the short and long titles of bills are fit for purpose (something that played a significant role in *Miller*[18]); whether bills with financial provisions on spending or taxes require the cover of money resolutions or ways and means motions; whether the Queen's or Prince of Wales's consent may be required; whether or not measures involve a charge on the people; and determining the scope of

[12] T. Daintith and A Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (Oxford: Oxford University Press, 1999) 254.
[13] Human Rights Act 1998, s 19.
[14] Human Rights Act 1998, s 4.
[15] Daintith and Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control*, 256.
[16] D. Greenberg, *Laying Down the Law: A Discussion of the People, Processes, and Problems that Shape Acts of Parliament* (London: Sweet & Maxwell, 2011) 83.
[17] House of Commons Information Office, "The Clerk of the House: Factsheet G16" (2006), https://www.parliament.uk/documents/commons-information-office/g16.pdf (Accessed 15 November 2018).
[18] *Miller v Secretary of State* [2017].

bills, which of course has implications for any amendments during the parliamentary process. At times the scope issue can be extremely difficult to determine, but this is one of the most important constitutional functions that Clerks carry out, subject ultimately to the Speaker's power to make the final decision on the selection of amendments. Taken together, these duties have a large impact on the final form of statutory law, and therefore can impact our respect for law.

A small number of research interviews were performed in connection with this article. Participants included lawyers working in the Speaker's Office or other counsel within the Commons, former members of the OPC, the head of the Commons Public Bill Office, and three academics who specialise in the study of statutory drafting and the legislative process. Material from these interviews is presented throughout the article. This piece first discusses the idea of constitutional guardianship generally, followed by a section on guardianship in the British context, and on the OPC and House Authorities (Commons Public Bill Office) in particular. It then discusses the idea of respect for the law and why the substance of statutory law matters, followed by a section on whether disrespect for the law is a significant threat. Next, it discusses whether the nature and function of the OPC may have recently shifted, potentially putting more pressure on other constitutional actors and also potentially impacting the operation of the UK constitution.

2. THE IDEA OF CONSTITUTIONAL GUARDIANSHIP

The notion of constitutional guardianship is certainly not new, but the popularity of employing "constitutional guardian" language has taken hold over the past two or three decades.[19] It can now be called a phenomenon, as books, journal articles and even news stories throughout numerous jurisdictions regularly employ this phrase.[20] Whether we like it or not, the expression appears here to stay. Generally the idea of constitutional guardianship sounds like a positive notion, as it conjures up images of citizens and others protecting shared fundamental values in the face of those attempting to trample them. In reality, however, the phrase is often used by one branch—or specific set of constitutional actors—to assert dominance over another branch, thus attempting to quell constitutional conflict by appealing to (a sometimes elusive) constitutional authority. Additionally, the expression's use has often been focused on back-end or "ultimate" constitutional guardians who usually possess the so-called "final word" within a particular jurisdiction, which nowadays throughout most jurisdictions tends to

[19] (forthcoming) _____, "Constitutional paternalism: the rise (and problematic) use of constitutional 'guardian' rhetoric" (2018) 51 *NYU Journal of International Law & Politics*.
[20] (forthcoming) _____, "Constitutional paternalism: the rise (and problematic) use of constitutional 'guardian' rhetoric" (2018) 51 *NYU Journal of International Law & Politics*.

be fixated on the courts, as opposed to other constitutional actors.[21] Given that the idea of "guardianship" seems here to stay, a more sophisticated understanding of who constitutional guardians are and what this job entails is sorely needed. This piece attempts to provide a fuller meaning regarding which actors should be included as constitutional guardians, and where they are located in the constitutional process. Generally, I tend to take a more expansive approach to constitutional guardianship than most, believing that almost everyone in a particular democratic citizenry, from judges to taxi drivers, could be included as guardians. After all, there is good reason for not putting guardianship into a silo, especially if that silo only includes one relatively small set of state actors. But most would probably disagree with that sprawling notion of guardianship. Even with my expansive view, however, it is acknowledged that some constitutional actors possess more power and influence than others.

Constitutional scholarship's obsession with back-end or ultimate constitutional decision-makers has disregarded those actors that shape the constitution through mostly front-end constitutional decision-making. In some sense this is understandable, as back-end constitutional decisions often resemble elaborate dramas that include a plethora of high-profile constitutional actors. Given the major players involved, such back-end decisions are also likely to receive more press attention. But although these back-end constitutional decisions are commonly portrayed as "protecting" and "defending" the constitution, they may also change the law, or the protections provided by the constitution, more frequently than many realise.[22] If that is the case, it is difficult to justify such actions as merely "protecting" or "defending", as opposed to "amending" the law or the constitution.

As I have demonstrated elsewhere, written constitutions themselves are relatively quiet about explicit "guardian" language, especially in prominent sections such as preambles,[23] where we would expect to see something such as this mentioned. However some democracies do contain formal mechanisms in terms of this language, as government officials take oaths to support and defend the constitution. For example, in the US all federal officials (both elected and appointed) take an oath to "support and defend the Constitution of the United States".[24] Federal judges take an additional oath

---

[21] (forthcoming) _____, "Constitutional paternalism: the rise (and problematic) use of constitutional 'guardian' rhetoric" (2018) 51 *NYU Journal of International Law & Politics*.

[22] As Larry Alexander said in a recent chapter regarding how judicial review can bring about constitutional amendment: "the real question is whether the people are actually aware of what is going on" (L. Alexander "What are constitutions, and what should (and can) they do?" in E.F. Paul, F.D. Miller and J. Paul, *What Should Constitutions Do?* (Cambridge: Cambridge University Press, 2011) 178).

[23] See, e.g., (forthcoming) _____, "Constitutional paternalism: the rise (and problematic) use of constitutional 'guardian' rhetoric" (2018) 51 *NYU Journal of International Law & Politics*. This is true even in jurisdictions that possess a dedicated constitutional court.

[24] SCOTUS, Text of the Oaths of Office for Supreme Court Justices, https://www.supremecourt.gov/about/oath/textoftheoathsofoffice2009.aspx (Accessed 15 November 2018).

that requires they will "faithfully and impartially discharge and perform all the duties incumbent upon me as [enter job title] under the Constitution and laws of the United States".[25] Thus, within their respective jobs, they are sworn to certain particulars in relation to the Constitution. But these oaths are not merely for federal officials or judges; even those in the postal service are required to take similar pledges.[26] Also most representatives in State legislatures take a similar oath, which usually includes upholding both the US and the respective State Constitution.[27] But again, this type of oath taking is not exclusive to federal or state elected or appointed officials. Practicing attorneys in most States swear an oath to support the US Constitution and also the respective State Constitution.[28] And indeed, many city and county employees of their respective States, such as police officers, also have to take such an oath.[29] Throughout the US, therefore, a wide variety of actors take formal pledges to support, protect or defend the US Constitution and sometimes an additional State Constitution.

Many of the US actors required to take such an oath can be characterised as front-end guardians. Elected and appointed officials who work in the legislature or executive designing laws or constructing policies could be characterised as such.[30] They draft these with the understanding that there is a shared consensus regarding what the constitution is and how it operates. And yet, in America it has been repeatedly acknowledged that most high-level political issues end up in the courts, and most often usually the Supreme Court, which possesses strike down powers regarding the constitutionality of legislation.[31] Thus although there are a variety of actors within the US who take an oath to support and defend the Constitution, when it comes to ultimate constitutional authority, the courts still have the upper-hand.

(a) Who are the UK's constitutional guardians?

---

[25] *ibid*.

[26] Cornell Law School, Legal Information Institute, 39 U.S. Code § 1011, https://www.law.cornell.edu/uscode/text/39/1011 (Accessed 15 November 2018).

[27] See, e.g., the oath for officers in Virginia: "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia, and that I will faithfully and impartially discharge all the duties incumbent upon me as _____ according to the best of my ability, so help me God". Virginia Code, Title 49, § 49-1.

[28] See, e.g., the oath for attorneys in the State of New York: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of [attorney and counselor-at-law], according to the best of my ability". (Supreme Court of the State of New York, "Orientation to the Profession", http://www.courts.state.ny.us/courts/ad2/forms/law%20guardian%20handbook/orientationtotheprofessionprogrammaterials.pdf (Accessed 15 November 2018).

[29] See, e.g., the oath for police officers in Tulsa, Oklahoma: https://www.tulsapolice.org/join-tpd/oath-of-office.aspx (Accessed 15 November 2018).

[30] Those such as police officers, who have law enforcement functions, may be considered back-end constitutional actors: even if they do not possess the final word, they also have little influence on those designing laws or constructing policies.

[31] Just as Alexis de Tocqueville said, "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question" (A de Tocqueville, *Democracy in America*).

The UK's unique constitutional arrangements provide an interesting challenge regarding the idea of constitutional guardianship: who protects and defends the constitution when there is no written constitution? Of course, the unwritten nature of the UK's constitution has been blown out of proportion on many occasions.[32] The UK, after all, behaves very similarly on a number of indicators to states which employ written constitutions,[33] especially when the traditional roles of the branches of government (the executive, legislative and judicial) are considered. However when it comes to constitutional guardianship, a convincing argument can be put forward that the UK behaves quite differently: back-end constitutional actors do not have as much influence over the content of the UK's constitution as they do in other jurisdictions. This is because rather than a focus being on a written constitution and the inevitable constitutional adjudication surrounding it, the focus is on statutory law, which is where a vast bulk of the constitution is located. Statutes are also the primary vehicle used in terms of implementing constitutional change. In theory the entirety of statutory law is flat (i.e., there are not "constitutional" or "quasi-constitutional" statutes), and any piece of statutory law can be repealed or amended through normal parliamentary processes.[34] Ordinary statutes passed by the legislature therefore have much more power and significance than in jurisdictions which contain a written constitution. Thus, the likelihood of guardians outside of the traditional constitutional actors remains a more distinct possibility than in other jurisdictions.

Above we saw how a wide variety of US citizens are subjected to oaths concerning aspects of constitutional guardianship. In the UK oaths of office are not focused on a written document, but on an entity: the sovereign.[35] MPs, including those in devolved territories,[36] take the following oath:

"I (name of Member) swear by Almighty God that I will be faithful and bear

---

[32] See, e.g., when Lord Neuberger, then president of the UK Supreme Court, declared, "[I]t may be said with considerable force that we have no constitution as such at all, merely constitutional conventions, and that it is as a consequence of this that we have parliamentary sovereignty" (Lord Neuberger, "The British and Europe", Cambridge Freshfields Annual Lecture (12 Feb 2014), para 26 https://www.supremecourt.uk/docs/speech-140212.pdf)(Accessed 15 November 2018).

[33] See, e.g., the Freedom House scores, which include measures on political rights and civil liberties. The UK scores 94/100 on this indicator (https://freedomhouse.org/report/freedom-world/2018/united-kingdom)(Accessed 15 November 2018).

[34] However the UK courts have challenged this, most prominently in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), where they articulated a number of "constitutional statutes" that can only be repealed through explicit wording, rather through any type of implied repeal.

[35] Although, perhaps it could be argued that if the sovereign is the ultimate symbol of the state, then the oaths are not necessarily to the sovereign, but to the present unwritten constitution.

[36] As the Scottish Parliament notes: "Any Member who refuses to take the oath or the affirmation will be unable to take part in any other proceedings of the Parliament and will not be paid any salary and allowances until he or she has done so. If any Member has not taken the oath or affirmation within two months of the day of their election they shall cease to be a Member of the Parliament (unless the Parliament agrees to extend this period" (http://www.parliament.scot/newsandmediacentre/99397.aspx) (Accessed 15 November 2018).

> true allegiance to Her Majesty Queen Elizabeth, her heirs and successors, according to law. So help me God".[37]

Judges throughout the UK take a revised version:

> "I, _____ , do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of _____ , and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will".[38]

Neither of these could be said to acknowledge the UK constitution to any significant degree, although the rule of law and judicial independence are alluded to. But for the most part, they deal with allegiance to the sovereign. Nevertheless, oaths have been mentioned as significant in certain contexts. In a 2015 speech in St. Andrews, Lady Hale quite prominently referred to it when discussing the UK constitution, declaring, "[t]he rule of law is something more than the mere servant of Parliament. The quid pro quo is that we must stay true to our judicial oath, 'to do right by all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will'".[39] Thus far from being irrelevant, the oaths do provide some indication for how various constitutional actors may undertake their job. Ultimately, however, not much can be gleaned from an oath that is concentrated on the sovereign.

So who are the UK's constitutional guardians? If we go by the traditional view of the constitution which acknowledges Parliament as the highest legal authority, then MPs are certainly one important set of guardians, perhaps even the highest. This aligns with the view put forward by Dicey,[40] which ultimately sprung from the Glorious Revolution and the Bill of Rights 1689. And as we have seen in *Miller*,[41] when it comes to major constitutional change, there is wide consensus that Parliament should be involved to at least authorise such change (even if it is not driving it). Within Parliament sits the executive, which controls much Parliamentary business and therefore has a substantial influence on the UK constitution. Parliament's legislative programme is largely controlled by the Cabinet, which decides what legislation will be put forward in each legislative session.[42] Outside Parliament, Cabinet members run the various

---

[37] UK Parliament, "Swearing in and the parliamentary oath", https://www.parliament.uk/about/how/elections-and-voting/swearingin/ (Accessed 15 November 2018).
[38] Courts and Tribunals Judiciary, "Oaths", https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/oaths/ (Accessed 15 November 2018). Scottish judges also take this oath (Judiciary of Scotland, "Judicial Independence", http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialIndependence_2.pdf (Accessed 15 November 2018).
[39] Lady Hale, "The UK Supreme Court in the United Kingdom Constitution" (8 Oct 2015) at 17, { HYPERLINK "https://www.supremecourt.uk/docs/speech-151008.pdf" } (Accessed 15 November 2018).
[40] A.V. Dicey, *The Law of the Constitution*, edited by JWF Allison (Oxford: Oxford University Press, 2013).
[41] *Miller v Secretary of State* [2017].
[42] Although, it should be noted that Private Members' Bills have at times had a significant impact, and that there is also the relatively recent Backbench Business Committee, which has provided more time to

agencies and departments that make up the administrative side of government. The judiciary also serves a significant constitutional role, as it has done for centuries. Critically, however, judges do not possess statutory strike down powers for primary legislation that other supreme and constitutional courts enjoy. Nevertheless, the judiciary retains a prominent role within the constitutional structure, and given their HRA powers to issue declarations of incompatibility, the courts have taken on a noticeably more robust role than previously.[43] The Constitutional Reform Act (CRA) 2005 furthered this role, creating an official UK Supreme Court whilst also acknowledging the principles of rule of law and judicial independence in statutory form.[44] Interestingly, however, the CRA 2005 took away any front-end powers that the Law Lords (now UKSC justices) previously possessed. Before the Supreme Court was established, the Law Lords were part of the House of Lords, and therefore could participate and provide input into the legislative process, which at times included non-controversial commenting on particular bills.[45] Any such influence has now been stripped away.[46] But whilst these groups are highly influential on the UK constitution, they are not the only actors who could be considered "guardians".

Given the UK's dearth of back-end constitutional protections (as the courts do not possess strike-down powers for primary legislation), some view executive power within the UK constitution as inherently problematic. The phrase "elective dictatorship" has been commonly used in reference to how much power the Government has to pass legislation,[47] and Parliament is regularly portrayed as a "rubber stamp"[48] or "weak and ineffective".[49] But these complaints about Parliament and legislation often come from those advocating a written constitution or stronger powers for the courts. Indeed, as Waldron persuasively argues, legal scholars unjustifiably "paint legislation up in these lurid shades in order to lend credibility to judicial review", and to silence embarrassment about its "counter-majoritarian" operation.[50] Some of those myths regarding Parliamentary ineptitude were dispelled in a recent book on the Westminster legislative process, as Russell and Gover demonstrated that Parliament—not merely the

---

debates initiated by backbenchers.

[43] See, e.g., *R (on the application of Evans) v Attorney General* [2015] UKSC 21; *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

[44] Constitutional Reform Act 2005, Part 1 & Part 2(3).

[45] R. Cornes, "Reforming the House of Lords: the Role of the Law Lords" (1999), UCL Constitution Unit, pp 6-9.

[46] However after retirement former UKSC justices can go back and sit in the Lords.

[47] Lord Hailsham coined this phrase in 1976, whilst arguing for a written constitution.

[48] S. Katilowski, "Rubber Stamp or Cockpit? The Impact of Parliament on Government Legislation" (2008) 61(4) *Parliamentary Affairs* 694.

[49] G. Brady, "Parliament is weak and ineffective — it needs to change" The Spectator (20 March 2015), https://blogs.spectator.co.uk/2015/03/parliament-is-weak-and-ineffective-it-needs-to-change/ (Accessed 15 November 2018).

[50] J. Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999) 2.

Cabinet or Executive—possesses a significant influence on the final form of Acts.[51] But their analysis does not contain the whole story. Whilst important, two other groups of constitutional actors also play a role here.

(b) The OPC and House Authorities as constitutional guardians

Underestimating or neglecting these constitutional actors is a time-honoured legal tradition; and given the lack of a written constitution and the resulting power of UK statutory law, such neglect just seems downright strange. Given that the OPC drafters are working on instructions from departmental lawyers, many may perhaps think that drafters are simply translating policy into law. But this notion is far off base. Geoffrey Bowman—former First Parliamentary Counsel—noted in 2005:

> "The popular belief is that the drafter's main function is to turn policy ideas into some kind of special statutory language. This is a misconception. The drafter's main and most valuable function is to subject policy ideas to a rigorous intellectual analysis. It is no good putting onto the statute book something that simply will not stand up. It has to stand up to scrutiny in Parliament and (once enacted) to scrutiny by practitioners and the courts. If the analysis means that the ideas collapse, the client will be sent away to think again or might even conclude that the particular project should be abandoned".[52]

Page also confirmed this scrutiny by the OPC in a 2009 article, acknowledging that, "[t]he drafting stage is likely to be the first at which the policy as a whole is subjected to a form of rigorous scrutiny, and a scrutiny with a high degree of legitimacy. If a drafter says that a policy cannot work it is taken extremely seriously".[53] But Page goes even further:

> "The legal character of its prospective evaluation gives the views of Counsel enormous force even on core issues in legislation. It is a force sufficient to convince those involved in putting the legislation forward, whether officials or politicians, that the basic architecture of what they are proposing needs to be changed. It is also a force that routinely leads to such changes, if not invariably on the central thrust of the legislation, then on important sections of it: it does not appear to be confined to the odd quirky case".[54]

Indeed, when it comes to drafters and the policy process, "the only certainty is that the hypothesis that drafters consider neither policy nor substance just form has been disproven".[55] These findings further dispel the "elective dictatorship" notion, where the

---

[51] M. Russell and D. Gover, *Legislation at Westminster* (Oxford: Oxford University Press, 2017).
[52] G. Bowman, "Why is there a Parliamentary Counsel Office?" (2005) 26(2) *Statute Law Review* 69, 70.
[53] Page, "Their Word is Law: Parliamentary Counsel and Creative Policy Analysis" (2009) PL 790, 791.
[54] Page, "Their Word is Law: Parliamentary Counsel and Creative Policy Analysis" (2009) PL 790, 810.
[55] C. Stefanou, "Drafters, Drafting and the Policy Process" in C Stefanou and H Xanthaki, *Drafting Legislation: A Modern Approach* (Ashgate Publishing, 2008) 333.

Westminster legislative agenda is construed a top-down process through which the executive get everything they want. Initial pushback from the OPC may not just lead to legislative changes, but could also be a sign that the legislation may experience difficulty getting through the parliamentary process, or will run into opposition from the courts or practitioners.

Beyond influencing policy development, Daintith and Page provide a wider assertion that OPC drafters are "guardians of values customarily regarded as integral to the legal order",[56] even providing the first check on the "constitutionality" of legislation.[57] But even given the wide success of their text, *The Executive in the Constitution*, the implications of this astute assertion has gone virtually ignored—or at least not critically examined—in the legal literature. Perhaps some of this neglect is because of other changes taking place in the UK constitution, such as the increasing importance of Parliamentary select committees, the evolution of the HRA, and an increased assertiveness by the judiciary. Nevertheless, as the UK constitution borders on another major change, with Brexit looming in 2019, Daintith and Page's insightful assertion deserves more attention.

My research interviews confirmed that OPC drafters and House Authorities are viewed as constitutional guardians, or at the very least as guardians of the statute book. Former First Parliamentary Counsel Stephen Laws said, "It is our job to advise [Government] about things that appear unwise, that threaten the system integrity of the statute book. We are the experts on producing statute law and that involves being an expert in things you can do wrong that create risks for the future".[58] Former OPC drafter Daniel Greenberg asserted, "Definitely…legislative drafters are the frontline of the battle to maintain, or indeed impose sometimes, the rule of law".[59] Clerk of Legislation Liam Laurence Smyth agreed, adding that, "a lot of things we do are not subject to legal challenge but are entirely internal processes".[60] Academics were even more assertive that these two groups were constitutional guardians. Asked whether this was the case, Prof Constantin Stefanou said, "Yes. And in many respects, they are…they do see themselves as custodians of the rule of law in general".[61] He further asserted, "The informal interpretation they will give you is as good as that of any judge".[62] Prof Michael Zander replied, "Definitely. Most certainly. Both the officials in Parliament and the Parliamentary Counsel very much play that role. They see it as part of their

[56] Daintith and Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control*, 254. They note especially values such as: non-retrospection, proper use of delegation and respect for the liberties of the subject, amongst others.
[57] Daintith and Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control*, 154.
[58] Interview with S. Laws (London: 19 February 2018).
[59] Interview with D. Greenberg (London: 20 February 2018).
[60] Interview with L. Laurence Smyth (London: 19 February 2018).
[61] Interview with C. Stefanou (London: 20 February 2018).
[62] Interview with C. Stefanou (London: 20 February 2018).

role".[63] Meanwhile, Prof Helen Xanthaki noted, "the drafter must certainly defend the constitution by alerting client departments to any unconstitutionality, hidden or unhidden".[64]

It seems that many of those who have studied or worked inside these two groups would agree that OPC drafters and House Authorities play significant constitutional roles. The essence of these roles boils down to a front-end form of "constitutionalising" bills: without these two groups of constitutional actors deciding that bills are ready to be delivered to Parliament, they simply do not move forward. And even during the legislative process, many significant decisions are being made as bills are shaped by parliamentary processes (i.e., as amendments are proposed and added to legislation). It is obvious that some in these two groups see themselves as the frontline in upholding constitutional principles such as the rule of law, while others see themselves as protectors of the statute book, the UK's highest form of law. This mind-set is readily connected to how both sets of constitutional actors perceive and maintain their constitutional duties, and also in how they help preserve a respect for law that is increasingly coming under strain.

3. UPHOLDING OUR RESPECT FOR LAW

Statutes used to be instruments that only highly specialised professionals would interact with. Nowadays, however, a range of individuals interact with statutes on a variety of levels. A 2012 joint study by the OPC and National Archives found that the legislation.gov.uk website had two million separate visitors per month, and that 60 per cent of those were non-lawyers who needed to consult the site for work-related reasons (e.g., police officers, local officials or HR professionals).[65] As Prof Xanthaki said during our interview, "we know that people in the UK want direct access to legislation", and "we know that [accessibility of legislation] is an aspect of the rule of law".[66] After all, Tom Bingham's first principle to his conception of the rule of law is that: "The law must be accessible and so far as possible intelligible, clear and predictable".[67] Even if vague, these aspirational qualities are important, and form the baseline for a common respect for law amongst the citizenry.

---

[63] Interview with M. Zander via telephone (28 February 2018).
[64] Interview with H. Xanthaki (London: 20 February 2018).
[65] A. Bertlin, "What works best for the reader? A study on drafting and presenting legislation" *The Loophole* (May 2014), p 27 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/326937/Loophole_-_2014-2__2014-05-09_-What_works_best_for_the_reader.pdf (Accessed 15 November 2018).
[66] Interview with H. Xanthaki (London: 20 February 2018).
[67] T. Bingham, *The Rule of Law* (London: Penguin, 2010) 37.

Governments—whether liberal or conservative, coalition or minority—will continue to put forward controversial legislation. Given the operation of democracy and the inherent battles between government and opposition, many pieces of legislation will rub the other side as inherently flawed, unnecessary, or even unlawful. Nevertheless, once a bill receives the Royal Assent it is then recognised not merely as government policy, but as law. But statutory law—even given its inherently political origins—is supposed to be qualitatively different from the political realm. As one interviewee noted, "The statute book is thought of as being a sober instrument. Obviously it reflects politics in the highest degree… but there is a sense that statute law has to be sober, restrained, dignified".[68] Therefore, whilst reflecting politics, the statute book is also a legal instrument, where citizens can find a coherent set of text that is free from political sloganizing and partisan language, and contains the necessary qualities that Bingham articulates in his rule of law principles.

Interviewees repeatedly highlighted the importance of statute book neutrality. Daniel Greenberg noted, "The traditional answer is that it is a rule of law issue, not about preventing propaganda…It is less about reining the government in from free advertising and more about good law".[69] But what is good law that adheres to rule of law? Former First Parliamentary Counsel Stephen Laws provided a possible answer, emphasising,

> "One of the functions of legislation is to produce law people will comply with because it has the authority of the law, rather than the authority of the political slogan. You fail in that process if you don't convince people you have created something impartial enough to be properly regarded as law rather than a slogan. That's a balance. You want the law to be expressed in a way that gives people the message how you want them to behave and why, but you don't want to be polemical about it. That detracts from the dignity of the law, on which it depends in order to be respected and complied with".[70]

These points are undoubtedly important. A focus on non-polemical or non-sloganistic language can help provide legislation with the "dignity" and "authority" needed for compliance (i.e., a type of psychological currency),[71] which certainly impacts the operation of the rule of law. As Daniel Greenberg quipped during our interview, "Ordinary people, in the same way that they like judges to look like judges, like law to read like law".[72]

In terms of policing polemical statutory language, the presentation and articulation of bill titles attracted significant attention. This is understandable, given that the origins

---

[68] Interview with M. Zander (28 February 2018).
[69] Interview with D. Greenberg (London: 20 February 2018).
[70] Interview with S. Laws (London: 19 February 2018).
[71] For more on the psychological aspects of statutory law, see: D. Feldman, "Legislation Which Bears No Law" (2016) 37(3) *Statute Law Review* 212.
[72] Interview with D. Greenberg (London: 20 February 2018).

of my interviews were about the Great Repeal Bill, and also because as opposed to the main text of bills, drafting conventions for short and long titles have been established throughout the years.[73] It is also significant because statutory titles came under consideration in *Miller*.[74] But even with these drafting conventions in place, head of the Public Bill Office Liam Laurence Smyth still admitted, "We are constantly, every week, policing non-sloganising titles".[75] His statement is primarily in reference to bills proposed by private members, whose bills are far out-numbered by the Government bills, which dominate the parliamentary landscape.[76] This acknowledgement is somewhat disconcerting, given the established conventions already in place on these matters; although it is acknowledged that backbenchers—just like government—may want symbolic political victories, and statutory language may help them achieve that goal. Nevertheless, when it comes to government legislation, some saw draftsmen as still having the upper-hand in this situation. One interviewee noted that "certainly the draftsmen are on top in this situation",[77] whilst another noted that getting "particular words on the face of the Bill…depends on how appropriate they are or how accommodating the drafter is".[78]

So how is statutory language policed? The answer lies in a familiar—and essential—part of the UK constitution: through conversations. Drafters consult with departmental lawyers, House Authorities and others to determine what language is appropriate is what is not. If there is a significant dispute, then the Attorney General or the House Speaker could get involved at some point, but controversies reaching that level are unlikely. These everyday conversations about language also help to prevent the legislative pathologies present in other jurisdictions. For instance, in the US Congress log-rolling and pork-barrel legislation is quite typical. But this is not so in Westminster. According to Liam Laurence Smyth, the reason this does not occur is that, "on a very mundane daily basis…we have those conversations: what's the scope of the Bill, what amendments are going to be allowed as admissible or not admissible. So it's connected with having a very strong but equally impartial chair in the House of Commons, and the tradition in the Lords, of respecting the rules of what's relevant".[79] These everyday "mundane" conversations are key to upholding the quality of the statute book, and subsequently our respect for law.

---

[73] Sir M. Jack, *Erskine May's Parliamentary Practice: The Law, Privileges, Proceedings and Usage of Parliament* (24th Ed.)(London: LexisNexis, 2011) 526.
[74] *Miller v Secretary of State* [2017].
[75] Interview with L. Laurence Smyth (London: 19 February 2018).
[76] House of Commons Standing Orders accord private Members Bills thirteen plenary sittings a year, all on Fridays.
[77] Interview with M. Zander (28 February 2018).
[78] Interview with S. Salimi (London: 20 February 2018).
[79] Interview with L. Laurence Smyth (London: 19 February 2018).

4. IS DISRESPECT FOR LEGISLATION A SIGNIFICANT THREAT?

The turn of the century has brought about some dire warnings regarding the current state of legislation, and how it may impact our political and constitutional realities. After a couple of conspicuous laws were passed in Australia bearing evocative US-style titles, Graeme Orr noted that such practices could "hasten a decline in respect for democratic governance".[80] More recently David Feldman criticises promissory, declaratory, aspirational and politically rhetorical statutory language, arguing that "[l]egally pointless legislation could debase the psychological currency of legislation generally".[81] Going further, Feldman notes that, "If Acts of Parliament are used to make political points, people may start to regard them as just another kind of political rhetoric, which can be ignored if one disagrees with it. This may ultimately tend to undermine the psychological commitment to law on the part of subjects".[82] Daniel Greenberg has also been a vocal critic about the current state of UK statutory drafting. Concluding a 2015 article analysing "dangerous trends" in drafting, Greenberg stresses that these "have the potential to diminish significantly from the accountability and effectiveness of Parliamentary democracy in the UK".[83] Taken together, these warnings are not constrained to merely a drafting and statutory interpretation context (or even a "legal profession" context), and bear significant implications for constitutional democracy more generally. This section ties together some of the dangers identified, and also recognises further implications for disrespect for legislation.

Given the current state of many long-enduring constitutional democracies, there are strong reasons to take the warnings above seriously. It is true that the quality of legislation is often seen as a technical aspect of the rule of law or of parliamentary processes. Daniel Greenberg stated in our interview that statutory language laced with propaganda or advertising "risks lowering the credibility and respect for the rule of law… We learn to be naturally resistant to advertising… Formal and neutral language helps to preserve its credibility".[84] But beyond adding respect and credibility to the rule of law, a more significant implication can be identified: ultimately, statutory law is a legitimate indicator of how states are operating. If statutes contain obvious disorganisation, polemical language, pointless provisions, or other types of pathologies (such as log-rolling or pork-barrel legislation), then this is evidence that the state more generally is suffering from other ill effects. Further, when it comes to official state

[80] G. Orr, "Names without Frontiers" (2001) *Statute Law Review* 188, at 189. The titles he focused on were: "A New Tax System", "More Jobs, Better Pay", and "Fair Access and Better Prices for All".
[81] D. Feldman, "Legislation Which Bears No Law" (2016) 37(3) *Statute Law Review* 212, 224.
[82] Feldman, "Legislation Which Bears No Law" (2016) 37(3) *Statute Law Review* 212, 224.
[83] D. Greenberg, "Dangerous trends in modern legislation" (2015) PL 96, 110.
[84] Interview with D. Greenberg (London: 20 February 2018).

outputs, statutes are arguably the highest form of interaction between the citizen and the state. These documents are often produced and sanctioned by the most accountable and responsive branches of government—the executive and the legislature—and sometimes may even get further validated by the judiciary. Very few, if any, other state documents receive a seal of approval from two branches of government, let alone a potential third. Thus when commentators make the connection from pathologies in statutory law, to declines in respect for statutory law, and then to a more general decrease in respect for democratic governance, it should be taken seriously, and as a legitimate warning for not just those in the legal profession, but for the entire citizenry.

But there are other implications for statutory pathologies that may influence the operation of the state. Stephen Laws noted in our interview, "If you pollute the system, it becomes less capable of being used for the purposes you want to use it for. If you debase the coinage of communication with the courts…you risk creating a sepsis in the system that then makes the job much more difficult in future. It is the job of the drafter to advise on that".[85] Stephen's observation is especially critical, as disrespect for legislation may also increase conflict between branches. This has been seen in a number of jurisdictions in relation to the legislature and the judiciary. Take an example from Australia. In 2014, considering a challenge to the Vicious Lawless Association Disestablishment (VLAD) Act 2013, the Australian High Court noted the following (obiter):

> "The term 'vicious lawless association', which appears in the title to the VLAD Act, is not defined and appears nowhere in the body of the Act. It is a piece of rhetoric which is at best meaningless and at worst misleads as to the scope and substance of the law".[86]

The High Court followed this up later in the judgment with another stinging rebuke:

> "The task of those administering and enforcing the relevant provisions is made no easier by the fact that the relevant provisions of the VLAD Act hinge on the definition of a 'vicious lawless associate'. As will shortly be explained, that expression is defined in a way that does not depend upon any determination that the person concerned is personally 'vicious' or generally 'lawless'. The expression is, therefore, at least inapt. Perhaps it was thought to reflect the stated political objective of dealing with 'criminal gangs', but it is an expression which is likely to mislead in at least two ways. First, it is an expression which suggests a much narrower focus for the Act than its provisions require. Second, it is an expression which, at a trial, can only create prejudice and divert attention from the issues which a jury would have to decide. The adoption of this manner of

[85] Interview with S. Laws (London: 19 February 2018).

[86] *Kuczborski v Queensland* [2014] HCA 46 (14 November 2014), http://austlii.edu.au/au/cases/cth/HCA/2014/46.html, para 14 (Accessed 15 November 2018).

> drafting is antithetical to the proper statement and administration of the criminal law".[87]

The labels "meaningless", "inapt", and "a piece of rhetoric" that is "likely to mislead" can only be considered damning indictments regarding failures in drafting. These mistakes make the Australian parliamentary counsel look bad, which may influence their relationship with the executive. And for the legislators that passed the law, these words will certainly cut deep, and will not soften the relationship between the legislature and the judiciary. One can only imagine the comments from the judiciary if the Great Repeal Bill would have become the Great Repeal Act, especially considering that much of what the EU Withdrawal Act does is implement a large swath of EU law into UK domestic law. The only Act that it repeals is the European Communities Act 1972.[88]

Similar judicial comments have been seen in the American context. In *US v Windsor*,[89] largely considered the pre-cursor to *Obgerfell v Hodges*,[90] SCOTUS justices commented on the title of the Defense of Marriage Act (DOMA), which was ultimately ruled unconstitutional by the majority of the Supreme Court.[91] The majority found that the short title displayed evidence of animus, which was taken into consideration when the Act was struck down. And in the case of *Shelby County v Holder*,[92] which found a provision of the landmark Voting Rights Act unconstitutional, the late Justice Scalia noted that the name of the law was "wonderful", adding that not re-enacting the legislation would lose votes for some members.[93] Thus, he concluded, the re-authorisation of the statute could not be left in the hands of lawmakers.[94] For a sitting judge to say that legislators could not be trusted to re-authorise a 1965 statute that they had already re-authorised on a number of occasions, simply because the new title—which legislators themselves had written and approved of—is beyond merely inter-branch disagreement…it is borderline constitutional dysfunction.

Given the UK's unique constitutional arrangements, with Parliament considered the highest legal authority and statutes as the highest form of law, a decline in respect for statutory law could produce more significant effects than in other jurisdictions.

---

[87] *Kuczborski v Queensland* [2014] HCA 67.
[88] In this way the EU (Withdrawal) Act is similar to the Abolition of Domestic Rates etc. (Scotland) Act 1987, which accomplished its title in Section 1, and then went about implementing the poll tax.
[89] 570 U.S. 744 (2013).
[90] 576 U.S. ____ (2015).
[91] _____, "SCOTUS Short Title Turmoil: Time for a Congressional Bill Naming Authority" (2013) 32(1) *Yale Law & Policy Review Inter Alia* 25.
[92] 570 U.S. 2 (2013).
[93] _____, "Personalised Bills as Commemorations: A Problem for House Rules" (2013) 46(9) *Connecticut Law Review Online* 11.
[94] Transcript of Oral Argument at 47–48, Shelby Cnty., 133 S. Ct. 2612 (No. 12-96), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf (Accessed 15 November 2018).

Significant disrespect could potentially change one or both of those realities. Instead of looking to Parliament as the main (and final) law-making authority, people may start looking to other constitutional actors—particularly the courts. This is compounded by the fact that UK citizens do indeed interact with legislation quite a lot, and that many of those doing so are non-lawyers.[95] Thus, disrespect could go beyond the legal profession. Additionally, if drafters and House Authorities are frontline constitutional guardians in terms of what gets added to legislation—which I certainly believe—further disrespect for legislation may not attract the highest-quality draftsmen or clerks available, or may send current drafters or clerks towards the exits. After all, no one wants to go into a profession that is widely disrespected.

(a) Change in culture for the Office of Parliamentary Counsel?

Above I argued that the OPC has served an important constitutional function since its inception, but in recent years troubling signs have emerged that the culture within the OPC may be changing. If this is the case, then from a practical perspective it is likely to affect other constitutional actors, such as the House Authorities, who often interact with OPC drafters on statutory drafting matters. But it also may have wider constitutional implications. Whilst it has always been the case that drafters within the office are instructed by Ministers and departmental lawyers on policy matters, drafters have also looked at themselves as the protectors of the statute book, and throughout the years have been willing to question and push back against Ministerial demands that have gone too far. This seems to have been a strong characteristic of the office throughout the years. As Geoffrey Bowman stated in a 2005 article: "We look for people who tend to not take things for granted, and who are prepared to question ideas—and if need be, to the point of destruction".[96] This point ties in with those above about drafters not being merely translators or technicians, but often affecting the core substance of legislation. Greenberg noted in a 2015 article that, "Ministers have always inevitably pushed out the boundaries of acceptability in legislative terms, not because of dictatorial or authoritarian ambition, but simply because their focus is on what will work most pragmatically and effectively; and they have traditionally left it to career legal civil servants to be the guardians of what is proper in constitutional terms".[97] The major questions are whether Ministers are still leaving this job to civil servants, and also whether civil servants are still up to the job.

---

[95] Bertlin, "What works best for the reader? A study on drafting and presenting legislation" *The Loophole* (May 2014), 27.

[96] Bowman, "Why is there a Parliamentary Counsel Office?" (2005) 26(2) *Statute Law Review* 69, 73. He did add, "Of course, it is not enough to merely destroy bad ideas. The capacity to contribute fresh and constructive ideas is also important".

[97] Greenberg, "Dangerous trends in modern legislation" (2015) PL 96, 103.

Some of my interviewees indicated that there has been a culture change within the OPC. Daniel Greenberg stated in our interview:

> "When I joined Parliamentary Counsel we were told that Ministers were not our clients. In so far as we had a client that was Ministerial it was the Attorney-General and we could appeal to the Attorney-General if we did not like what the Ministers were telling us to do. That changed very dramatically towards the end of my time there…I think Ministers are now seen more as clients than they were".[98]

Other interviewees agreed. Liam Laurence Smyth, a career parliamentarian, said that, "These days, Parliamentary Counsel consider themselves bound to represent the government".[99] Greenberg also noted in a 2015 article that "the quality of advice" that Ministers receive from drafters had changed, as drafters "no longer appreciate the basic legal and constitutional concepts".[100] Academics were a bit more sceptical about such a dramatic change taking place within the OPC, and especially how it would affect their constitutional role. Prof Xanthaki stated, "I am certain they will express any concerns of constitutionality. I am certain that they will do their best to avoid constitutionality from taking place. But, at the same time, I know they will bow down to their clients".[101] Another academic, however, was a bit more pointed, "Times have changed. It is not because they are weak individuals or they've done a deal with a devil. Civil servants need different skills. Having managerial skills is not a bad thing…but I don't think this is because there is a general drop in standards or that the wrong people have been employed, because they are very high calibre drafters".[102] Michael Zander noted that there had been "some slippage" in recent years, but that still, "I would look to Parliamentary Counsel's office for a measure of control and a sense of responsibility about what the statute book should look like".[103] These latter responses suggest that some type of cultural change may have occurred, but that the OPC still adequately performs its constitutional duties.

Indeed, some interviewees pushed back firmly against there being any type of culture change within the OPC. Former First Parliamentary Counsel Stephen Laws declared, "No. I think that's wrong. Operating within the system I've described where they are your client, your job is to do the best you can for them; not to regulate them but to advise them fearlessly on risks, while leaving them the decision of whether or not they want to take the risk".[104] This statement asserts that although Ministers and

---

[98] Interview with D. Greenberg (London: 20 February 2018).
[99] Interview with L. Laurence Smyth (London: 19 February 2018).
[100] Greenberg, "Dangerous trends in modern legislation" (2015) PL 96, 103.
[101] Interview with H. Xanthaki (London: 20 February 2018).
[102] Interview with C. Stefanou (London: 20 February 2018).
[103] Interview with M. Zander (28 February 2018).
[104] Interview with S. Laws (London: 19 February 2018).

departmental lawyers are viewed as "clients", drafters have a duty to advise them "fearlessly" in terms of risks. As has been indicated by others above, this "fearless" advice—connected to Bowman's point regarding questioning ideas to "destruction"—would include concerns centred on constitutionality.

Nevertheless, even slight changes within the OPC on presentational statutory matters could affect other constitutional actors, such as those working in the Commons Public Bill Office. Any change within the OPC that diminishes that first check on the constitutionality of legislation would be highly significant, as it may even lend more credence to those who attempt to diminish the value of legislation, and Parliament's influence on it, and reinforce those who label the UK an "elective dictatorship". Ultimately, if there has been a culture change within the OPC, then such a change is something legal scholars should be paying attention to, and which is just as significant—or perhaps even more so—than blockbuster cases such as *Miller*.

5. CONCLUSION

The implications for this paper, whilst argued from a public law perspective, certainly go beyond merely the constitutionality of legislation. The constitutional actors featured above impact every type of law, from contract to commercial, from family to criminal. No doubt this has been noticed by some writers.[105] As Daniel Greenberg noted in our interview, "The reality is that people that draft legislation have an unbelievable amount of power"; they could "undermine judicial independence", "disguise retrospective legislation", or "break lots of constitutional and fundamental legal principles" if they wanted to, and perhaps even do so with little notice.[106] But not all drafting errors, even significant ones, are going to be brought to the attention of the courts. And even if they do receive court attention, the judiciary lacks the power to change them: they can critique and interpret, but not compose, legislation. Thus, preserving our respect for law largely begins with these front-end constitutional actors.

Although these "forgotten" constitutional actors do not provide the high-stakes drama that many blockbuster legal cases provide, they are integral to the success of our legal and constitutional system. Our current conversations about upholding constitutionality seem a bit oversimplified: democracy versus rule of law actually has much more nuance. Front-end constitutional guardians such as the OPC and House Authorities also serve invaluable constitutional functions. The OPC is rightly

[105] P. Sales, "The Contribution of Legislative Drafting to the Rule of Law" (2018) 77(3) C.L.J. 630; R. Mulheron, "Legislating Dangerously: Bad Samaritans, Good Society, and the Heroism Act 2015" (2017) 80(1) *Modern Law Review* 88.

[106] Interview with D. Greenberg (London: 20 February 2018). Mr Greenberg further noted, "On a very, very good day, maybe as much as 1% of what you draft will be considered carefully by anybody else".

considered by some as the first check on constitutionality, and this should not be discounted—even if there has been a slight culture change within the office. Additionally, the House Authorities also play a role in terms of assessing constitutionality, as they accept and approve various types of legislative language—from short and long titles to relevance of amendments—and their role in upholding the quality of legislation, and more generally the statute book, should not be discounted.

In his classic text, *The Politics of the Judiciary*, John Griffith had this to say about defending liberty within the UK:

> "[W]e depend far more on the political climate and on the vigilance of those members of society who for a variety of reasons, some political and some humanitarian, make it their business to seek to hold public authorities within their proper limits. That those limits are also prescribed by law and that judges may be asked to maintain them is not without significance. But the judges are not – as in a different dispensation and under a different social order they might be – the strong, natural defenders of liberty".[107]

Given recent changes in the UK, with an HRA and a relatively new Supreme Court, whether Griffith's words hold up in relation to defending liberty is debatable. When it comes to defending the "constitutionality" of legislation within the UK context, however, the statement appears right on point. As Prof Zander noted in our interview, "We depend on all sorts of protections, all sorts of safeguards, pressures and conventions", from the OPC to the judiciary, from the media to academia, "[t]here are many different ways of helping the constitution".[108] Indeed, the variety of constitutional guardians in the UK is diverse, and that should be recognised, and celebrated.

[107] J.A.G. Griffith, *The Politics of the Judiciary* (5th ed)(London: Fontana Press, 1997) 342.
[108] Interview with M. Zander (28 February 2018).