



Unaccountability – The Disease within Government

Dr Ronan Cormacain

This piece is cross-posted with the kind permission of [UK Constitutional Law Association](#), with the piece originally appearing on 17th May 2021.

Pierre Janelle diagnosed the root cause of [The Catholic Reformation](#) as "*anarchy the disease within the church*". It is my contention that unaccountability is the disease within Government and the root cause of many of its shortcomings today. Unaccountability means the reluctance of the Government to be held to account by Parliament, the courts, constitutional conventions or international law. It means that the Government does not have to answer to anyone, other than the electorate, for its actions, as if that electoral mandate frees it of scrutiny under other elements of the constitution. This is being done under the guise, in the words of the [Queen's speech](#), of "[restoring] the balance of power between the executive, legislature and the courts".

The common thread linking many Government policies is the perception that it should have the sole power to enforce its will, and to view constitutional checks and balances as an unwarranted restriction on its sovereign power to do whatever it likes. This fundamentally misunderstands the nature of the British constitution and replaces balance and nuance with dogmatic [executive dominance](#). I set out below in overview a large number of areas of Government policy linked by this common thread of unaccountability. Although in each individual case the merits of the Government's position could be debated, taken in totality they reveal an underlying resentment of constraints.

Overseas Operations (Service Personnel and Veterans) Act 2021 - unaccountability under law

At the heart of this [Act](#) is an unwillingness to subject the state, or those acting on behalf of the state, to legal accountability. Even if there is clear evidence that a soldier has committed a crime, if it took place more than 5 years ago, then only in [exceptional circumstances](#) will they be prosecuted. And if the subject matter of a [civil claim](#) against the MoD took place more than 6 years ago, there is an absolute time bar on that civil claim. The very [presentation](#) of the Bill by the Government was done in such a way to disguise its import and thus reduce parliamentary scrutiny and accountability. The Bill as originally introduced by the Government was even worse with unaccountability for crimes against [international humanitarian law](#).

Northern Ireland Veterans Bill - unaccountability under law and political agreements

If the [leaks](#) are to be believed, the Government is proposing extending the principle of the Overseas Operations Act to Northern Ireland, with a Bill granting an amnesty to troops and paramilitaries. There is no doubt that dealing with [legacy](#) issues in Northern Ireland is intensely complicated. The current model for addressing the problem is the [Stormont House Agreement](#), an agreement made between British and Irish Governments and all major NI political parties. There are two accountability problems with the Government's most recent proposals. Firstly, a blanket amnesty for those accused of offences undermines the Rule of Law as there is no criminal accountability for agents of the state. Secondly, a [unilateral](#) decision by the Government represents a refusal to be bound by a delicate political and international agreement, entered into after a complicated negotiation between all parties, based upon trust, consensus and many compromises.

Coronavirus legislation - unaccountability to Parliament

The [Coronavirus Act 2020](#) was passed with 1 day of parliamentary scrutiny in the House of Commons and in the year since it was passed, Ministers have provided just 5 hours of time to debate it and its renewal, a clear case of executive dominance as described by [Hinks](#). The limited time for debate, lack of ability to amend anything, combined with squeezing additional matters into the debate meant it was more political grandstanding rather than a genuine discussion on the merits of the legislation. Over 400 coronavirus-related statutory instruments have been made over the last year with very little in the way of parliamentary scrutiny. The Government persists in using the [emergency procedures](#) under the Public Health (Control of Disease) Act 1984 to make secondary legislation which comes into force immediately and is only subject to retrospective validation by parliament. In a previous paper I, along with the Constitution Unit, the Hansard Society and the Public Law Project, described this as leading to the [marginalisation of Parliament](#). Relegating Parliament to the subordinate role of merely rubberstamping legislation makes Government unaccountable to Parliament.

UK Internal Market Bill - unaccountability to international law and treaties

This Bill as [introduced](#) contained the shocking provision that it had effect *"notwithstanding any relevant international or domestic law with which [it] may be incompatible or inconsistent"*. This was a brazen attempt at unaccountability under the law. It was the Government clearly stating that it does not matter if what we do breaks international or [domestic law](#), or our international treaty agreements, we are doing to do it anyway and there is no brake on our ability to do so. Thankfully EU pressure aligned with House of Lords objections stopped this breach of the Rule of Law, but the clear intent of Government was the casual disregard of the binding nature of international law and international agreements.

Prorogation of Parliament - unaccountability to Parliament

There were clearly serious political difficulties with the Government advancing its agenda in a divided Parliament without an effective majority. But the Government's 2019 solution was simply to shut down Parliament - to refuse to be held to account by the democratically elected legislature. This is, once more, the essence of unaccountability - the Government doesn't like what Parliament has to say and rather than listening to competing voices, it simply shuts them down. In the [Miller \(No. 2\)](#) case, the Government's argument to the Supreme Court was essentially that it wasn't the courts' business to interfere with what was an inherently political decision. There was a broad sense of political resentment that the Supreme Court could even consider stopping the Government from doing whatever it wanted.

Independent Review of Administrative Law - unaccountability to the courts

The [terms of reference](#) of IRAL and the way in which it was framed pointed to an outcome desired by the Government. That desired outcome was to reduce the areas of Government action which were justiciable by the courts. Although on the one hand justiciability can be seen as the need to demarcate political activity from judicial activity, the end result would have been that even if the Government acted unlawfully, it could not be held to account by the courts. Credit must go to the IRAL panel for a report which was fair and balanced and, in making modest proposals for reforms, did not follow the pre-ordained route of accepting restrictions on justiciability.

The Government's response to IRAL - unaccountability to the courts

The Government's [response](#) to IRAL took a rather selective approach, cherry-picking a few minor points and ignoring the bulk of what the IRAL actually said. In a series of posts, [Elliott](#) dissects the Government's response in strong language, accusing the Government, amongst other things, of *"constitutional gaslighting"*. In his view, the Government's response latched onto a non-

existent recommendation to increase the use of ouster clauses - a legislative attempt to oust the jurisdiction of the courts to question Government action. [Rozenberg](#) describes this as emasculating judicial review. The response also extrapolates hugely the IRAL notion of a suspended quashing order, the net effect of which would be that even if the Government has acted unlawfully, the courts would be precluded from actually negating the effect of that unlawful act, instead they could only prospectively prohibit the Government from doing that. What is the point of going to court to complain about an unlawful act if the court cannot give a remedy which actually deals with the consequences of that unlawful act?

Environmental review under the Environment Bill - unaccountability to the courts

In what may be a pre-cursor to future administrative law review, clause 37 of the [Environment Bill](#) contains a rather odd provision. It seeks to establish a new court procedure, "an environmental review" which is like a judicial review, except that it doesn't really do anything. In particular, if a court finds there has been a breach of environmental law, it can issue a statement of non-compliance, but "a statement of non-compliance does not affect the validity of the conduct in respect of which it is given". There are additional restrictions on the remedies which a court may grant, even if there has been an unlawful act: it can't grant damages, and it can't grant other remedies if they would be "detrimental to good administration". Taken together, this tends to make the state much less unaccountable for breaches of environmental law.

Repeal of the Fixed-Term Parliaments Act 2011 - unaccountability to Parliament and the courts

The point of this short [Bill](#) is to re-establish the prerogative power to dissolve Parliament and, arguably due to the breadth of the clause 3 ouster, in effect to overturn the *Miller (No. 2)* decision and make dissolution and prorogation powers non-justiciable. This makes for double-unaccountability. The Prime Minister could exercise an archaic prerogative power, deriving from the Crown, without any parliamentary accountability (Parliament cannot vote against dissolution) or judicial accountability (the decision cannot be questioned in the courts).

The Sewel Convention - unaccountability to constitutional conventions

Pre-Brexit, the Sewel convention was always [honoured](#) by the Government. Post-Brexit, and reflecting the chasm between Scotland and the UK Government on Brexit, the Sewel convention has been routinely flouted in relation to Brexit-related Westminster Bills. The Scottish Parliament do not give their consent, but Westminster legislates regardless. If the Northern Ireland Veterans Bill does go ahead, it seems unlikely that the Northern Ireland Assembly would consent to it. Ignoring constitutional conventions is another aspect of unaccountability.

The Prime Minister's flat - unaccountability to codes of conduct

It seems rather farcical to conclude a list of serious breaches of the constitutional principle of accountability with the Prime Minister's flat. But following Brazier's [paper](#), *"if no one continues to bang on about these fundamental constitutional principles the risk is that those precepts will slowly, so slowly, lose their importance"*. As Brazier points out, what is the point of a ministerial code if the Prime Minister is the ultimate arbiter of whether or not there has been a breach of that code? Self-accountability is not accountability.

Conclusion

This has been no more than a whistle-stop tour of multiple Government policies all linked by the common element of unaccountability. Individually there are arguments in favour of each policy, but collectively they all point in the same direction, that the Government do not want a brake on their power to govern.

Behind this are two fundamental legal misconceptions. The first is to place sovereignty of Parliament at the top of a hierarchy of constitutional principles, trumping all other principles. This does not cohere with constitutional theory which contains a multitude of competing, overlapping and sometimes conflicting constitutional principles: the Rule of law, the separation of powers, democracy, civil liberties, fundamental rights etc. The business of running the state is a shared constitutional endeavour with built-in checks and balances, and those checks and balances are a key part of the system, not an unnecessary restraint of the power of Government. The second misconception is to conflate the sovereignty of Parliament with the will of the Executive. Sovereignty inheres in Parliament, not in the person of the Prime Minister. Numerical party superiority may sometimes mean that one looks like the other, but this does not make them the same thing. Parliamentary sovereignty is not observed by side-lining Parliament.

Janelle's original thesis may have been flawed in diagnosing anarchy as the sole cause of the church's problems. Likewise, unaccountability is most likely not the only problem the Government may face. But a refusal to acknowledge that sometimes you get it wrong, that there are constraints on your power to act and that scrutiny is of long-term benefit to Government could ultimately lead to political failure. Unaccountability is a disease within Government.

Dr [Ronan Cormacain](#) is Senior Research Fellow and lead of The Rule of Law Monitoring of Legislation Project

URL: <https://binghamcentre.biicl.org/comments/117/unaccountability-the-disease-within-government>