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## The Changing UK Prime Ministership from an Institutional Perspective

Kensuke TAKAYASU

### **Abstract**

This article explores the scope and limitation of the power of the UK prime minister from an institutional perspective. It begins by exploring and confirming the widely recognised tendency towards a more centralised core executive at the heart of the UK government, which dovetails with recent developments in Japan as discussed by Shinoda in this special issue. However, the article thereafter argues that this tendency has been constrained once a wider institutional perspective beyond the core executive is adopted. This perspective emphasises the impact of recent constitutional reforms relating to the House of Lords, devolution, and the judiciary. These reforms resonate with the idea of a ‘Madisonian turn’ towards greater separation of powers, albeit unintended. Rather than the UK and Japan converging, these institutional changes in the UK narrow the sphere of, and impose constraints on, the authority of the UK parliament and government, which naturally restrict the power of the prime minister.

### **Keywords**

UK prime minister, power resource, core executive, constitutional reforms, ‘Madisonian turn’

### **Introduction**

Prime ministers are embedded in institutions. Institutions both provide the prime minister with power resources and limit their usage of these resources. In the preceding article, Shinoda outlined recent developments in Japan by which prime ministerial power has increased in parallel with the centralisation of the core executive. In the case of the UK, the centralisation of the core executive was particularly pronounced under Tony Blair, and has been further advanced under the recent prime ministers.

However, the story of prime ministerial power does not end there. The UK prime minister has come to be constrained by several other institutions. These institutions include the House of Lords, the sub-national political entities, and the judiciary. To understand the full picture of prime ministerial power in the UK we need to take these institutions into consideration, as part of the wider institutional context.

Concretely, this article first explores recent institutional changes within the UK government to confirm the centralisation of the core executive. This trend is similar to that in Japan, as outlined by Shinoda in the previous article. The article then proceeds to outline how institutions have long shaped our understanding of

the power of the prime minister, before then applying this understanding to recent events in the UK. To this end, it explores the government's relationships with the House of Lords, the devolved legislatures, and the judiciary. The article identifies recent changes in all these institutions and demonstrates how they have limited and circumvented prime ministerial power in the UK.

### **The core executive and prime ministerial power in the UK**

In modern political history, the UK government has always been led by a group of political leaders making up the cabinet (Mackintosh, 1962; Burch and Holliday, 1996). In contrast to a presidential system, the cabinet as a collective body is supreme in taking decisions in government. The prime minister is embedded in the cabinet. When he/she wishes to take a particular line of policy, the prime minister needs to carry the cabinet with him/her.

The UK prime minister, nonetheless, occupies a unique position in government. Although embedded in the cabinet, the prime minister has the powers to appoint, sack, and move ministers. The prime minister has the authority to change the governmental structure; he/she can create, merge, divide, and abolish government departments. The prime minister can decide which minister has which portfolio (James, 1999: 113). He/she has crucial influence on, and, in some cases, determines the political fate of his/her fellow politicians.

The prime minister is also influential in that he/she can decide on the creation of cabinet committees, their membership (and who to exclude), what the terms of reference should be, and most of all, who should chair them (James, 1999: 108-110). The chair has the power to influence the agenda, information, and its minutes, and, thus, its decisions.

The cabinet and the cabinet committees function differently from their Japanese counterparts. Collective decision-making means that UK ministers have a voice in policymaking, yet decisions have never required unanimity, in contrast to the convention in the Japanese government. In the UK, ministers can express different views from their colleagues including the prime minister. However, once decisions are taken, ministers are obliged to publicly follow and defend the decided line. Collective responsibility 'preclude[s] a minister from publicly disagreeing with government policy or attacking the actions of the Prime Minister' (Rose, 1980: 4-5). Otherwise, ministers and parliamentary private secretaries are expected to resign.

The UK prime minister can resort to the committee system and the principle of collective responsibility to control government ministers. In other words, the UK prime minister is embedded in the cabinet and the cabinet system, but simultaneously can resort to the system to steer the direction of the government.

While such institutional arrangements have been stable in the UK, notable changes in the prime minister's staff have taken place, which could be described as the

centralisation of the core executive. The Blair government was a watershed in the development of the prime minister's office (PMO) and the cabinet office (CO), as seen in Tables 1, 2 and 3, and Figure 1.

- principal private secretary
- 4 private secretaries
- personal assistant
- secretary for appointments
- foreign affairs adviser
- political secretary
- policy unit (eight members)
- chief press secretary
- deputy chief press secretary
- 2 assistant private secretaries
- parliamentary private secretary
- parliamentary clerk

**Table 1 PMO Composition in 1993**

Source: Civil Service Yearbook 1993

- chief of staff
  - director of communications and strategy
  - director of government relations
  - principal private secretary and head of policy directorate
  - advisor on EU affairs and head of the European Secretariat
  - advisor on foreign policy and head of the overseas and defense secretariat
  - parliamentary private secretary
  - policy directorate: head of policy
  - policy directorate: 13 senior policy advisers
  - 4 senior policy advisers: foreign policy
  - head of the delivery unit
  - head of the office of public services reform
  - head of the forward strategy unit
  - secretary for appointments
  - executive secretary
  - political secretary
  - director of events and visits
  - personal assistant (diary)
  - parliamentary clerk
- Communications and Strategy**
- 2 prime minister's official spokesmen
  - strategic communications unit
  - research and information unit
  - corporate communications

**Table 2 PMO Composition in 2001**

Source: Civil Service Yearbook 2001

First, the number and remit of political staff increased substantially; offices and units were created within the PMO (and the CO) in line with the prime minister's priorities. Up until 1997, the prime minister's staff was predominantly made up of civil servants. In this way, the UK prime minister's staff in the PMO did not differ greatly in nature from their Japanese counterparts. However, from 1997, more special advisers (SPADs) came into in these offices and units, and worked closely with civil servants. These political staff in the PMO and the CO became involved in policymaking and intervened in government departments at the requested of then prime minister, Tony Blair (Kavanagh and Seldon, 1999: 263). Instead of a civil servant, a chief of staff, a political staff, was put in charge of the PMO. Gordon Brown, when prime minister, appointed civil servants as his chiefs of staff, but after David Cameron, successive prime ministers appointed political staff as their chiefs of staff.

Table 3 shows the numbers of the special advisers in government between 1995 and 2021. Two points can be observed. First, the Blair government was a turning point in terms of the increase in the premier's special advisers, which accelerated notably after 2015. Second, the ratio of the prime minister's special advisers compared with their over number in government increased at the same time. The prime minister was not only concerned with the civil servants, but he/she also did not want to politically empower his/her ministers, who could threaten him/her. Indeed, when Harold Wilson circumscribed these ministers to the appointment of only two special advisers, he was seeking to avoid empowering them by allowing additional political resources. The prime minister wanted to increase the power of his/her staff in dealing with not only the civil servants but also his/her ministers.

Second, communications were given particular emphasis. The Blair government was notorious for its highly politicised communications strategy (Jones, 2001). Prime ministers previously had press secretaries and the press office in the PMO, but under the Blair government and thereafter, special communications sections were created in the PMO. The Brown and Cameron governments both attempted to distance themselves from the Blair years, although mostly in vain. Communications strategy became a core function at the very centre of government. Political considerations increased in importance in both policy-making processes and communications strategies at the very top level of government.

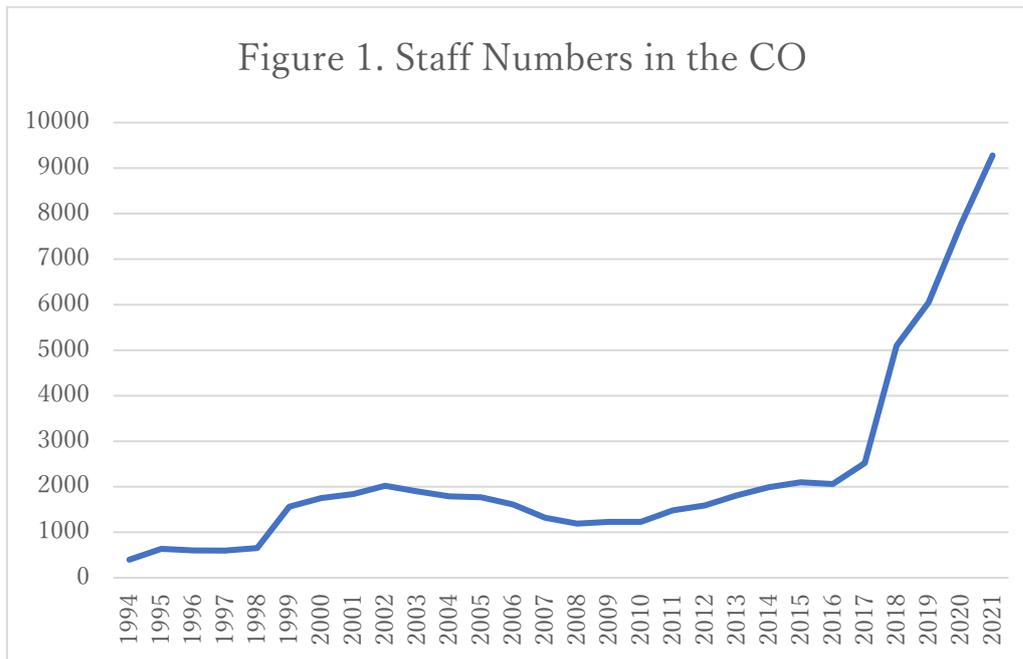
Month/year	PM	DPM	Ministers	Total	PM/Total
Jul-95	6		28	34	17.6
Jul-96	8		30	38	21.1
Jul-97	8		30	38	21.1
Jul-98	18		52	70	25.7
Jul-99	25		49	74	33.8

Jul-00	26		52	78	33.3
Jul-01	25		54	79	31.6
Jul-02	27		47	74	36.5
Jul-03	26		48	74	35.1
Jul-04	29		57	86	33.7
Jul-05	24		55	79	30.4
Jul-06	25		59	84	29.8
Jul-07	18		48	66	27.3
Jul-08	24		48	72	33.3
Jul-09	25		49	74	33.8
Jun-10	18	4	41	63	28.6
Jul-11	20	5	49	74	27.0
Oct-12	20	16	49	85	23.5
Oct-13	23	19	56	98	23.5
Nov-14	26	20	61	107	24.3
Dec-15	32		63	95	33.7
Dec-16	32		51	83	38.6
Dec-17	32		55	88	36.4
Dec-18	37		62	99	37.4
Dec-19	44		65	109	40.4
Dec-20	51		63	114	44.7
Dec-21	43		74	111	38.7

**Table 3 Number of Special Advisers 1995-2021**

Sources: Figures for 1995-2001 are cited from Everett and Faulkner (2017: 13). See also Committee on Standards in Public Life (2003: 50). Figures for 2002-2009 are found in HC Deb 24 July 2002 c1371W; HC Deb 16 July 2003 c328-9W; HC Deb 22 July 2004 c466W-470W; HC Deb 21 July 2005 c159160WS; HC Deb 24 July 2006 c87-91WS; HC Deb 22 November 2007 c147-149WS; HC Deb 22 July 2008 c100-102WS; HC Deb 16 July 2009 c73-75WS.

Third, the CO expanded after Blair came into power, and has grown remarkably after the late 2010s (Figure 1). The CO also came to describe its role as supporting the prime minister instead of the cabinet or ministers collectively.



Sources: The figures for 1994 to 1999 show the staff numbers of the CO excluding the Office of Public Service from the *Civil Service Statistics 1999*, 'Table C: Staff Numbers in Each Department and Executive Agency - 1994 to 1999'; figures for 2000 to 2009 show the full-time equivalent (FTE) of the CO permanent staff, while figures 2010 to 2021 are the FTE of all CO employees. Data were used from respective editions of the *Civil Service Statistics* from 2000 to 2021.

*The Civil Service Yearbook* describes the role of government organisations from its 1974 edition onwards. By 1998, the basic description of the CO (particularly its cabinet secretariat) had not changed and read 'The Cabinet Office comprises the secretariat, who support Ministers collectively in the conduct of Cabinet business [...]'. This description was changed in 1999 to 'The Cabinet Office aims to help the Prime Minister and Ministers collectively reach well-informed and timely decisions on policy and its presentation, and drive forward its implementation [...]'. The term 'Prime Minister' was added to its role alongside 'Ministers collectively'.

The 2002 edition described four main roles of the CO, starting with the role 'to support the Prime Minister in leading the Government'. The 2011-12 edition described three core functions of the CO, which, reflecting the coalition government, stated 'Supporting the Prime Minister and Deputy Prime Minister [...]'. Supporting the cabinet was mentioned as the CO's second purpose. In the 2016-17 edition, the cabinet was mentioned alongside the prime minister once again; the 2022 edition read 'It [CO] supports the Prime Minister and the Cabinet, helping to ensure effective development, co-ordination and implementation of policy and operations across all government departments'. The recent CO website in fact explained 'What the Cabinet Office does' by stating 'We support the Prime Minister and ensure the effective running of government' (Gov.uk, 2022). There was no mention of the cabinet or ministers collectively.

As the prime minister expanded his/her staff in the PMO and the CO (not only political staff but also civil servants), accordingly, information, monitoring capacity inside government, and tools to convey the prime minister's narrative instead of others' naturally increased all to the advantage of the prime minister. As was the case in Japan, the prime minister succeeded in strengthening the institutional support he/she could gain in government, and by so doing, he/she increased the capacity to intervene in and, on occasion, override relevant ministers' and government departments' policies, narratives, and judgements.

### **Prime ministerial studies and the institutional setting**

The Introduction to this special issue reviewed the literature on prime ministerial power. So, this section will only briefly discuss previous research related specifically to the institutional setting in order to provide context for the focus of this article.

Power-resource analysis has been a key approach in the study of prime ministerial power, providing the basis for the famous prime ministerial government thesis. This thesis emphasised the increasing power resources the prime minister could leverage against the cabinet, cabinet ministers and his/her own backbenchers in the governing party (Mackintosh, 1962; Crossman, 1963). This approach typically regarded these relationships as confrontational and a constant-sum game; if the prime minister won something, the cabinet or any other relevant actor lost the equivalent.

However, this confrontational and constant-sum understanding of the relationships at the heart of government was challenged in later scholarship. The power-dependence approach, employed by scholars such as Rhodes, revealed the interdependent nature of the relationships in politics and government, with special focus placed on the relationships within the executive, particularly those within the core executive (Dunleavy and Rhodes, 1990; Rhodes, 1995; Smith, 1999). Following this approach, relationships were not seen as merely confrontational or collaborative but also fundamentally as exchanges of resources.

Recent research has suggested that the prime minister tends to be 'predominant' when more power resources are centralised around him/her (Heffernan, 2003, 2005a, 2013; Marsh et al., 2003). It can be assumed that the more resources the prime minister can deploy, the more leverage and power the prime minister can enjoy.

Another approach to understanding prime ministerial power has been that of principal-agent theory, which depicts the relationships surrounding the prime minister as a series of delegations in a parliamentary system (Strøm, 2000; Strøm et al., 2003). Concretely, the electorate delegates power to parliament, parliament to the prime minister, the prime minister to ministers, and ministers to the civil servants. The former actors are considered to be the principals and the latter the agents. Political control of the agencies (whether they are the prime minister,

ministers or civil servants), or to put it differently, preventing agency slack, is the key concern of principal-agent theory in political science (Calvert et al., 1989; Epstein and O'Halloran, 1999; McCubbins and Schwartz, 1984). Scholars pursuing this analytical approach emphasise the difference of preferences between the principal and the agent, information asymmetry, and control mechanisms.

When the prime minister is taken as a principal, whether he/she can gain information about his/her ministers and officials' preferences and behaviour, and whether he/she can sufficiently deploy resources to sanction and/or reward them to alter their behaviour are questions that are key to understanding prime ministerial power. In other words, information as well as control mechanisms are the central resources of prime ministerial power. Principal-agent theory provides an interesting perspective on which power resources are significant in understanding the power of prime minister.

When the prime minister is understood as an agent, the principals are parliament and the governing parties that control the majority of parliament, but could also be the electorate. Strøm and Bergman(2011: 10-13) argue that the Westminster model of parliamentary democracy, the UK being the typical example, is a model in which 'its lines of accountability are all vertical and hierarchical, not horizontal, which is to say political agents are not set up to check or compete with one another but are rather given sole authority to serve their principals within their respective competencies' (10).

Here, political parties are the key to connect the electorate and the politicians. Politicians, including the prime minister, are recruited, screened and vetted through political parties and their organisations; at elections, the electorate chooses the political parties and the politicians with a party label. As Bergman and Strøm (2011b: 382) argue, 'the Westminster model relies heavily on *ex ante* controls for political accountability'<sup>1</sup>. Heppell and Uchiyama' articles in this special issue address this relationship between the prime minister and the governing party.

A further perspective is the 'presidentialisation thesis', famously formulated by Foley (1993, 2000) and later further developed by Poguntke and Webb (2005a), which arguably takes US politics as a template. What interested Poguntke and Webb in particular was 'the shift of *political power resources and autonomy* to the benefit of individual leaders and a concomitant loss of power and autonomy of collective actors like cabinets and political parties' (Poguntke and Webb, 2005b: 7; emphasis in original). To them, the notion of 'presidentialisation' indicates the centralisation of power within government and political parties as well as the personalisation of politics.

What is notable about the presidentialisation thesis is that it does not consider the US presidency from the viewpoint of the separation of powers. As Jones (2005) convincingly argued, the US presidency is most noticeably a separated system of

diffused responsibility. Indeed, critics such as Heffernan (2005b) and Dowding (2013) stressed the fundamental institutional differences between the UK, a fusion-of-powers system, and the US, a separation of powers system; yet none of them suggested that the UK system was converging with that of the US.

Prime ministerial studies adopting an institutional perspective have shown particular interest in the relationships and the power resources the prime minister can leverage in government. When focusing on the relationships in government, the UK prime minister did increase his/her power resources in the core executive against his/her ministers and civil servants. These developments complement the Japanese case and Shinoda's argument in this special issue.

Nevertheless, it is important not to ignore the recent institutional developments in the UK and their impact on the power of the prime minister, which provides the focus for this article. Prior prime ministerial studies have shown only limited interest in the relationships between branches of the state. This article investigates the institutional changes surrounding the prime minister and examines whether they enhanced or restrained the power of the UK prime minister. It is not only the bureaucracy and the governing party that constrain prime ministerial power, as expected in a traditional parliamentary system. It is necessary to consider wider institutional conditions.

Bergman and Strøm (2011a) provides us with a useful insight to address such wider institutional conditions. They divide parliamentary democracies into two categories: the Westminster model and the Madisonian model. James Madison, the fourth president of the United States, was one of the founding fathers of the US Constitution and contributed to its grand design in the form of the separation of powers. According to Strøm and Bergman (2011: 13):

Madisonianism is characterized by complex delegation schemes, institutional constraints, and checks and balances. The key features of a Madisonian parliamentary democracy is that political authority is dispersed and that different branches of government are made to check one another such that ambition counteracts ambition.

The aim of Madisonianism is to prevent power from concentrating on any single person or groups of people (Dahl, 1956). The Madisonian model reflects a deep distrust of power. Its control logic is *ex post*, which relies more on external constraints to scrutinise what politicians do and decide. Bergman and Strøm (2011b: 382) argue that this means a greater dependence on courts and other independent auditors rather than political parties.

Although the UK is not a separation-of-powers system, it has experienced a major constitutional change. Prime ministers have come to face more constraints after assuming power. Madisonianism or the 'Madisonian turn' provides us with a valuable concept to understand the recent changes in UK politics.

Before examining recent institutional changes, however, the next section discusses the basic institutional setting that characterises prime ministerial power in the UK.

### **Embedded prime ministers: the institutional setting in the UK**

Constitutions are the most fundamental institutional setting that characterises the prime ministership in the UK and Japan. Arguably, the most critical difference between UK politics and Japanese politics is that the latter has a single codified constitution, while the former does not. The existence of a single codified constitution with a special legal status firmly restricts what actors, including the prime minister, can do in Japan.

As the UK does not have a single codified constitution, observers traditionally had to rely on constitutional experts and authorities to capture the UK constitution. Dicey (1915) proclaimed three principles in the UK constitution: parliamentary sovereignty, the rule of law, and the conventions of the constitution. Parliamentary sovereignty indicated that parliament was the highest authority in the land and that there was no higher law than those passed by parliament.

The survival of the government depends on parliament, particularly the House of Commons, which is directly elected by the people. Parliament can topple the government, and the government collapses when it loses parliament's confidence.

As democracy evolved in the UK, the Crown and the House of Lords, which both lacked democratic legitimacy, ceased to be real powers in the constitution. The House of Commons has flexed its democratic muscle to put the House of Lords in its place, for example in 1911 and 1949. Although the House of Lords occasionally voted against the government of the day, it also showed self-restraint to survive as an institution in an era of democracy.

Traditionally parliament has always been sovereign in the UK political system. No other institution, such as the second chamber, the subnational entities, and the judiciary, could directly challenge parliament and its legislation. The judiciary was to interpret and apply the law to individual cases. Hence, the government could successfully pursue its policy agenda so long as it enjoyed the support of parliament, which was controlled by the governing party. In turn, as long as the prime minister enjoyed the support of the governing party, he/she could usually rely on the power of the sovereign parliament.

However, the constitutional reforms and changes of the last few decades, which could be traced back to 1972, when parliament passed the European Communities Act 1972, deeply affected the functioning of the conventional parliamentary system of the UK, and thus the institutional setting conditioning the power of the UK prime minister.

### **Recent institutional reforms in the UK**

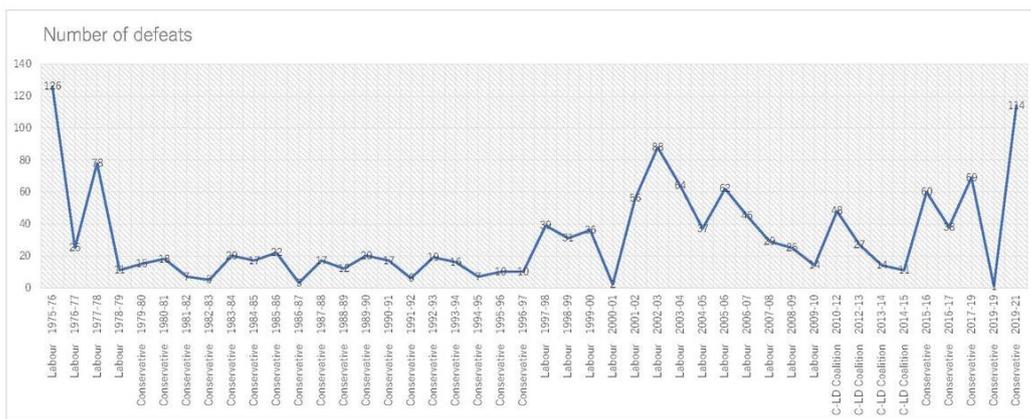
While the prime minister’s power resources inside government grew, the UK government gradually but sharply lost its power to make policies and decisions on its own. Major constitutional reforms and changes created constraints on the functioning of the UK government, which naturally restricted the remit of the prime minister’s power, albeit unintended.

Recent constitutional reforms have brought a more assertive House of Lords, three devolved legislatures and administrations, and a more independent Supreme Court: the three institutional aspects that have come to restrain the government. The remainder of this article focuses on these reforms, which changed the nature of the traditional UK parliamentary system and naturally affected the power of the prime minister.

*The House of Lords*

The House of Lords was traditionally occupied by hereditary peers. Other members of the House included twenty-six Church of England clergies and the law lords. There were appointed members who sat as life peers since 1958, based on the recommendation of political parties, or as independent cross bench life peers. Yet the majority of members still consisted of hereditary peers until 1999 and they tended to sympathise more with Conservative governments than with Labour governments. Government defeats in the House of Lords were substantially more common for the Labour governments (see Figure 2).

Figure 2 Government Defeats in the House of Lords



Source: <https://www.parliament.uk/about/faqs/house-of-lords/faqs/lords-govtdefeats/>, accessed 29 August 2021.

**FIGURE 2: GOVERNMENT DEFEATS IN THE HOUSE OF LORDS**

The Blair government was a watershed in the reform of the House of Lords when it got rid of most of the hereditary peers except ninety-two of them in 1999. The House of Lords basically became a chamber composed of appointed members. This change effectively enhanced, to a certain extent, the democratic legitimacy of the House of the Lords, as most of the members were nominated either by the prime minister in cooperation with other party leaders who had the democratic authority or by the independent House of Lords Appointment Commission. The Liberal Democrats and independent crossbench peers, in particular, became more important and more assertive in the legislation processes. Moreover, this reform created a House of Lords with no party securing a majority.

In addition to the lack of majority, the government also lacked a crucial 'stick' in the House of Lords to force even its own members to vote with the government. Members of the House of Lords were life members and did not have to face re-election, so they did not have to worry about re-election when standing up against their own government (Russell, 2012). The House of Lords could still not stop government legislation but, consequently, became more active in seeking to revise it (see Figure 2; Russell, 2010, 2013).

The reform of the House of Lords imposed constraints on the government and thus the prime minister, although they were not fatal. For instance, the Labour government suffered defeats in the House of Lords notably in policy areas relating to civil liberties and wider constitutional propriety (Russell, 2013: 144). Prevention of Terrorism Bill was a key security policy for Tony Blair, but his government had to accept a type of a sunset clause in the bill with other restrictions on ministerial power (Russell, 2013: 155-6). Meanwhile, following a defeat in the Lords, Gordon Brown decided to drop a policy, which would have made it possible to extend minimum detention without trial from 28 to 42 days. The revising power of the House of Lords elicited concessions from the prime ministers.

In October 2015 the House of Lords took a controversial step and defeated the government over its planned tax credit cuts, which was proposed as a piece of delegated legislation by the government's own choice. Delegated legislation is made by a minister or a public body under powers conferred by an act of parliament, whereas an act of parliament, in other words, primary legislation, is the term used to describe the main laws passed by the UK parliament and other devolved legislatures (Rogers and Walters, 2006: 190-1)<sup>2</sup>. Financial bills were conventionally considered to be out of the reach of the House of Lords, but the Lords believed that while they could not reject primary legislation, they could halt delegated legislation (The Guardian, 2015; Russell, 2015; Maer, 2016: 17).

This step became controversial and opened a discussion over the relationship between the two Houses. David Cameron, then prime minister, threatened the Lords with a constitutional crisis that could trigger a flood of new Conservative peers if it blocked the tax credit cuts (The Huffington Post UK, 2015). Ultimately,

this move by the Lords demonstrated that they were ready to re-examine various conventions, as well as further constrain the government and a policy that the prime minister fully supported.

Since 1999, every government has faced an increasing number of defeats in the House of Lords (see Figure 2). While the UK parliament did not have a bicameral system in the sense that the Upper House could veto government legislation as in Japan, prime ministers needed to consider how the House of Lords would react when preparing legislation, and were thus constrained by the Lords, although not in a fatal fashion.

### *Devolution*

It was also the Blair government that initiated the devolution projects for the three nations in the UK, further deepened by later reforms. The Scotland Act 2016 and the Wales Act 2017 declared that their respective legislatures and governments were permanent parts of the 'United Kingdom's constitutional arrangements' (legislation.gov.uk, 2016; legislation.gov.uk, 2017).

Scottish devolution went the deepest. The devolution settlement in Scotland operated under the so-called 'reserved powers' model. In other words, unless specifically set out in statute as 'reserved' to the UK parliament, matters were assumed to be devolved to the Scottish parliament (Torrance, 2022b: 8-9). These matters covered agriculture, forestry and fisheries, culture and creative industries, economic development, education and training, environment and planning, fire services, health and social services, housing, justice, local government and local government elections, social work, sport, tourism, and various aspects of transport (Devolution Committee of the Scottish Parliament, 2016: 2).

Devolution in Wales was initially limited but has deepened since. The Wales Act 2017 changed devolution in Wales from a conferred powers model to a reserved powers model similar to Scotland.<sup>3</sup> A conferred powers model indicated that specific powers were conferred to the devolved assembly. Devolution in Northern Ireland also adopted its own version of a reserved powers model, although the terminology differed. Reserved matters were subjects that would be transferred by orders in council to the Northern Ireland Assembly provided there existed cross-community consent, while excepted matters were subjects reserved to the UK parliament that would not be transferred unless under primary legislation. Anything not listed as reserved matters or excepted matters was considered to be transferred to the Assembly (Torrance, 2022a: 5-7).

The UK parliament could still abolish devolved parliaments; they were, after all, created by parliamentary legislation. Yet particularly in Scotland, such a move to abolish its parliament would be regarded as incendiary and was likely to further accelerate the independence movement so much so that it was highly unlikely to be seen in ordinary situations. Furthermore, although the UK parliament retained

authority to legislate any issue, the Sewel Convention, a constitutional convention, was established by the UK government to self-restrain the usage of such power.

Based on the Sewel Convention, a memorandum of understanding (MoU) was agreed between the UK government and the devolved administrations in 1999<sup>4</sup>. It stated that ‘the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature’. The convention was later included in the Scotland Act 2016 and Wales Act 2017 (Cowie and Torrance, 2020: 4-5).

The MoU did make clear that ‘the devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK government’. It was also established that the convention or the MoU had no legal effect and was not legally binding (Cowie and Torrance, 2020: 5). Indeed, Brexit created serious challenges to the convention. The Scottish parliament withheld consent for the European Union (Withdrawal) Act 2018, and all three devolved legislatures withheld consent for the European Union (Withdrawal Agreement) Act 2020. However, the UK parliament passed both (Cowie and Torrance, 2020: 3).

Despite such reservations and continuing tensions, devolution meant that the prime minister and the British government could not freely intervene in devolved matters. They were to be decided chiefly by the devolved legislatures and devolved administrations. The Covid-19 pandemic revealed that the four nations, which were run by different governments, took different courses of action to respond most noticeably in the areas of public health and education. In these policy areas, decisions by Boris Johnson, then prime minister, only applied to England. The UK government and the devolved administrations implemented different policies such as school closures, workplace closures, restricting private gatherings, stay-at-home requirements, restricting internal movement, protection of elderly people, and facial coverings policies (Hale et al., 2021: 35). It was obvious that the power of the prime minister did not reach the other three nations in certain policy areas.

Initially when the government set the overall policy to respond to the pandemic, the prime minister chose to cooperate and coordinate policies with leaders of the other three nations; the prime minister chaired meetings of the civil contingencies committee (COBRA), in which first ministers of the devolved administrations participated. However, soon after, the responses of the four nations began to diverge (Institute for Government, 2020: 1).

In responding to the Covid-19 pandemic, Japanese prime ministers also faced prefectural governors within their own statutory authorities, which limited the scope of prime ministerial power. However, the autonomy of the three nations was much significant in the UK compared to Japanese prefectures.

### *The Judiciary*

British law has gone through a fundamental change in the last half a century with the appearance of statutes with special statuses. As regards ordinary statutes, 'when two statutes conflict, the later statute prevails even if the later statute does not explicitly repeal the former'; this is referred to as the doctrine of implied repeal (Bogdanor, 2009: 59). The doctrine of implied repeal did not apply to these special statutes. They included the European Communities Act 1972, the Human Rights Act 1998, and the devolution legislation. Once legislated, these statutes gained special statuses, and constrained later parliaments, and thus governments and their legislation. These statutes gave the judiciary a new role to apply them in individual cases, which effectively constrained the power of the prime minister.

The European Communities Act 1972 initiated this change. Later legislation was required not to contradict this act. The judiciary's verdict over the *Factortame* case<sup>5</sup> confirmed the ascendancy of the European Communities Act over the later statute, the Merchant Shipping Act 1988 (Bogdanor, 2009: 28-9). The European Communities Act 1972 was indeed a unique statute. The act had to be explicitly repealed in January 2020 by the European Union (Withdrawal) Act 2018, as the UK left the EU.

In 2000 the Human Rights Act 1998 came into force and incorporated the rights set out in the European Convention on Human Rights (ECHR) into British law. Section 3 of the ECHR provided that primary legislation and subordinate legislation must be read and given effect in a way that was compatible with Convention rights. The Human Rights Act expected parliament and government to comply with its requirements.

When the judiciary judged that a provision of primary legislation was incompatible with a Convention right, the Human Rights Act stated that the judiciary 'may make a declaration of that incompatibility' (Legislation.gov.uk, 1998: Section 4 (2)). The judiciary gained the power to declare that (part of) a particular statute was incompatible with it. Although it was not a veto power, parliament and government were expected to respond to the judiciary's declaration (Bogdanor, 2009: 59). Forty-three declarations of incompatibility were made between 2000 and 2020; government and parliament addressed twenty-eight cases by primary legislation, secondary legislation, and remedial orders, a type of secondary legislation (Ministry of Justice, 2020: 30).<sup>6</sup>

Prime ministers' policies were bound to be constrained by the judiciary, whose judgements were often based on the Human Rights Act. Policies concerning asylum seekers and terrorist suspects attracted much public attention. In 2004 the judiciary declared that part of the Anti-terrorism, Crime and Security Act 2001, introduced by the Blair government, was incompatible with the Human Rights Act. Blair argued that the UK was at war with terrorism and this bill was intended to arm the government to fight against it. Nevertheless, the government later had to

repeal and replace it with the Prevention of Terrorism Act 2005 (The Guardian, 2009).

The Constitutional Reform Act 2005 set up the new independent Supreme Court, which started operating from 2009. Previously the UK's highest court in the land had been the appellate committee of the House of Lords, which meant that the judiciary and parliament were not separate entities. According to the Supreme Court website, 'The Supreme Court was established to achieve a complete separation between the United Kingdom's senior Judges and the Upper House of Parliament, emphasising the independence of the Law Lords and increasing the transparency between Parliament and the courts' (The Supreme Court, 2022). The new Supreme Court symbolised an advancement of the British judiciary in the twenty-first century.

During the Brexit debate, the Supreme Court effectively forced then prime minister, Theresa May, to acquire parliament's authorisation to trigger Article 50 of the Lisbon Treaty, which set the legal mechanism for a member state to leave the EU (BBC News, 2017). Later, the Supreme Court declared that Boris Johnson, then prime minister, had acted unlawfully by recommending the prorogation of parliament to the Queen (BBC News, 2019). These examples demonstrate that the judiciary could and did reject the prime ministers' most significant political strategies.

The judiciary is no longer a passive institution in relation to parliament and government, but actually and actively (although possibly hesitantly) restricts the power of the prime minister. The British judiciary has increasingly found an active role in the policy processes, which is hardly evident, if not totally absent, in Japanese politics (Law, 2011).

### **Conclusions**

This article has explored the scope and the limits of the power of the UK prime minister from an institutional perspective. Shinoda's contribution to this special issue argued that recent institutional reforms have transformed the core executive into a 'prime ministerial government', a more centralised core executive, in Japan. This article identified a similar tendency in the UK towards a larger and more centralised core executive with more (political and non-political) staff and a communications section supporting the prime minister at the centre of government.

Having said that, once a wider institutional perspective is brought into the discussion, it becomes apparent that the UK prime minister faces more restraints and obstacles when trying to exercise power. This article emphasised the significance of the House of Lords after its reform in 1999, the devolved legislatures and administrations, and the judiciary, when considering prime ministerial power. They narrowed the sphere of, and imposed constraints on, the

authority of the UK parliament and government, which naturally restricted the power of the prime minister.

The House of Lords could slow down the policy process and by so doing make the government and the prime minister reconsider their policy, which could lead to revision and occasionally dropping the policy itself. The prime minister could not (directly) intervene in policy areas devolved to the Scottish parliament, Welsh parliament, and the Northern Ireland Assembly. The judiciary took on a new role to interpret EU law, the Human Rights Act, and potentially the devolution acts, which effectively constrained the prime minister's decisions. The judiciary did not withdraw from, but rather chose to intervene in, the policy processes during the Brexit debate, which critically affected the prime minister's political strategies.

Prime ministerial studies in the UK have often focused on the relationships within government. This focus is founded on the assumption that power is centralised in the UK parliament and the government, the latter of which arguably controls the former. Since the constitutional reforms and changes outlined above, however, power became more dispersed, although parliamentary sovereignty itself survived. Although more power resources were centralised around the prime minister in government, he/she became more constrained by these external entities to a different degree.

These constraints on the prime minister are *ex post* controls, imposed from outside the parliamentary system, which complement the *ex ante* control of the Westminster model of parliamentary democracy. Such *ex post* controls resonate with the idea of a 'Madisonian turn' towards greater separation of powers. As there was no grand design to create such a new institutional setting, there have been political backlash and attempts to change it. It is yet to be seen which aspects of the new institutional setting will survive. While these constraints are not complete, and parliamentary sovereignty is still alive, it cannot be denied that there are more limits and constraints on the power of the prime minister when such wider institutional setting is considered.

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<sup>1</sup> Of course, parties with appropriate procedures can scrutinise and put pressure on the prime minister even after his/her appointment, but such scrutiny is not for the electorate but an intra-party activity.

<sup>2</sup> ‘Understanding legislation’. Available at <https://www.legislation.gov.uk/understanding-legislation> (accessed 2 August 2022).

<sup>3</sup> ‘Explanatory Notes to the Wales Act 2017, Chapter 4’, p.4. Available at [https://www.legislation.gov.uk/ukpga/2017/4/pdfs/ukpgaen\\_20170004\\_en.pdf](https://www.legislation.gov.uk/ukpga/2017/4/pdfs/ukpgaen_20170004_en.pdf) (accessed 3 August 2022). The most significant difference with Scotland was that justice policy was not devolved to Wales. Wales was part of the English and Welsh legal system.

<sup>4</sup> The MoU has been revised six times since it was first introduced. The latest version was published in 2013 (Cabinet Office, 2013).

<sup>5</sup> The Merchant Shipping Act 1988 contradicted various rights under EU law. Spanish fishing boat companies, which were adversely affected, took the matter to court. The House of Lords gave effect to the latter, holding that EU rights trumped national legislation (Adams, 2020: 59).

<sup>6</sup> Nine cases were overturned on appeal, one case was addressed by various measures, and two cases were announced to be addressed by remedial orders.