The Codes of the Constitution

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OXFORD AND PORTLAND, OREGON
2016

Hart Publishing
An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

First published 2016

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-84946-681-3
ePDF: 978-1-50990-409-9
ePub: 978-1-50990-410-5

Library of Congress Cataloging-in-Publication Data

Names: Blick, Andrew, author.

Title: The codes of the constitution / Andrew Blick.

Description: Oxford ; Portland, OR : Hart Publishing, 2016. | Series: Hart studies in constitutional law ; volume 6 | Includes bibliographical references and index.

Identifiers: LCCN 2016019862 (print) | LCCN 2016020003 (ebook) | ISBN 9781849466813 (hardback : alk. paper) | ISBN 9781509904105 (Epub)

Subjects: LCSH: Constitutional law—Great Britain—Codification. | Constitutional history—Great Britain. | Great Britain—Politics and government.

Classification: LCC KD3989 .B553 2016 (print) | LCC KD3989 (ebook) | DDC 342.41—dc23
LC record available at https://lccn.loc.gov/2016019862

Series: Hart Studies in Constitutional Law, volume 6

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

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Historic Origins of Codification

THE CODIFICATION PHENOMENON is historical in nature. It began to come about in the form described in this book from the First World War onwards, arising from a combination of different tendencies, each of which had its own time phase and pattern of development. To consider the historic gestation of the present codification environment, then, is a means of understanding the nature of this process in the contemporary UK. But what are these prerequisites to and drivers of codification we should assess? When did they appear? And how might we detect their impact both in earlier and in more recent times? An effective means of answering these questions is both to assess the tendencies underlying codification and to consider a variety of relevant texts themselves. The latter part of this task can also serve to demonstrate the value of these documents beyond their being manifestations of a particular official literary genre, and as sources providing insight into constitutional perceptions at given points in history.

Fundamental to any project for the writing down of rules is the ability to write. Literacy has existed in UK—or to be precise, English—governmental institutions at least since the early seventh century and the time of the law code of King Ethelbert of Kent. This text represents the first known use—by a considerable margin—of the English language in written form. Indeed it seems likely that more than the ability to write being a precondition for the production of this document, the desire to create the code spurred Ethelbert to bring about the creation of the written English language. After Ethelbert, subsequent Anglo-Saxon rulers continued to produce legal texts.[1] By the post-Conquest era, Latin was the language employed, however.

Describing principles and practices in writing is one feature of codification as defined in this book. Another, developing later, has been that increasingly they are made publicly available. While literacy may have existed among medieval royal officials and the clergy, more widely it was a rare skill. Furthermore the technology for mass dissemination of the written word was not as developed as it would later become. The printing press, for instance, did not appear in Europe until the fifteenth century; while the Internet and World Wide Web were inventions of the

[1] For the history of Anglo-Saxon law making, see P Wormald, *The Making of English Law: King Alfred to the Twelfth Century*, vol 1: *Legislation and Its Limits* (Oxford, Blackwell, 2001).

late twentieth.[2] Nonetheless, it was possible for scribes to produce multiple copies of documents for distribution to key locations such as cathedrals, as happened with the text now known as *Magna Carta*; and they could be read aloud to an illiterate public.

At the time that *Magna Carta* was first agreed, in 1215, Parliament did not exist.[3] Neither, therefore, did Acts of Parliament, let alone secondary legislation deriving its authority from parent Acts or codes issued under the authority of Acts. The differentiations made in this book between the legal status of different documents could not fully apply until the set of categories employed today became more clearly discernible. Only with this means of distinguishing texts could we conceive of official statements of rules that did not have direct legal force, lacking enforcement specifically through an Act of Parliament (though some of the codes considered, such as the *Civil Service Code*, are now issued under statutory authority). Codification should be understand historically in the context of a legal system that has become more sophisticated, within which different categories of instrument or text are possible and can be deployed to suit particular circumstances. However, whether the differentiation that the UK executive today hopes to maintain between texts that are and are not legally enforceable is sustainable remains to be seen, an issue considered more fully in Chapter 4.

I. PRECURSORS TO CODIFICATION

Despite the qualifications set out above, we should avoid imagining that codification as understood today is wholly new. The idea of writing down values, rules and practices is an ancient one. An example of an attempt to codify principles can be found in books of chivalry from medieval Europe. Though they might not be official in the sense that they were issued by a governmental body, they engage with the functions of what could be perceived as public offices. The most famous such text is *A Knight's Own Book of Chivalry*,[4] attributed to Geoffroi de Charney, a French knight who lived from about 1306 to 1356. He participated in the conflict now known as the 'Hundred Years War' (1337–1453), and was the earliest person recorded as in possession of the 'Shroud of Turin'. While his name is attached to the text, how directly involved he was in writing it is not certain—much in the way that in the contemporary era the Prime Minister or the Cabinet may sign off a document that is in practice largely the work of officials. A further similarity with the present codification trend is that the de Charney book reads as an attempt to bring together in a single, written document already existing understandings.

[2] For a work placing the printing press in historical perspective, see E Eisenstein, *The Printing Revolution in Early Modern Europe*, 2nd edn (Cambridge, Cambridge University Press, 2012).

[3] The definitive modern work is D Carpenter, *Magna Carta* (London, Penguin, 2015).

[4] G de Charny, *A Knight's Own Book of Chivalry*, trans E Kennedy (University of Pennsylvania Press, Philadelphia, Pa, 2005), 'Introduction' by RW Kaeuper.

The de Charney book deals with a range of issues, including ethical conduct, general principles of governance, and the characteristics of different groups, such as the knighthood, priesthood and monastic orders. It considers matters such as the types of advice that worthy men should give to others (paragraph 34), and how they should be recruited into particular groups (paragraphs 36–40). The book holds, for instance, that it is possible to join the monastic order at an age

> so young that one has no knowledge of sin nor of the world; those who enter at such an age are brought up in the order and should accept it more willingly; they should, therefore, conduct themselves better and adhere more closely to the rules of the religious order. (paragraph 38)

On the other hand, there are those who have spent time in the outside world and then

> want to enter a religious order, lightly and without being truly devout. Then it is very hard for them to keep to and follow the right paths and the precepts and rules to which religious [*sic*] are required to adhere, and they are very reluctant to do so.(paragraph 38)

These matters—the relationship between recruitment, propriety and the world beyond the institution concerned—remain important subjects in various texts today, such as those that regulate the Civil Service. These later documents might aspire to bring about the highest standards of conduct, and they can in the process become celebrated—as did the de Charney work. Yet how effective they are in practice is a different subject. The extent to which those to whom codes are supposed to apply actually adhere to them is another perennial concern.

Knights are still with us, though the title is honorific and does not denote the specific social role it once did. Some of the precursors to codification offer more direct continuity to the present. The Privy Council was formalised in the fifteenth century out of the inner group of advisers around the monarch. It remains a working body in the twenty-first century. Moreover, membership of the Council in itself has a practical use. All members of the Cabinet are required to take the Oath of a Privy Counsellor (the spelling used in *The Cabinet Manual* and other official present-day texts) to bind them to secrecy. A text of the Oath dating from 1570 (the source uses the spelling 'councillor' rather than 'counsellor') has survived. It stresses, among other stipulations, the importance of loyalty to Elizabeth, the then monarch, and that 'You shall keep secret all matters committed and revealed to you as her Majesty's councillor or that shall be treated of secretly in council.' A further commitment was mirrored consciously in later codes applying to civil servants. The oath taker is bound to 'give true, plain and faithful counsel at all times, with respect either of the cause of the person, laying apart all favour, meed, affection, and partiality'. This service is to be provided to the Queen, as well as to 'her heirs and lawful successors'.[5]

[5] 'The Oath of a Privy Councillor [*sic*], 1570', reproduced in JR Tanner, *Tudor Constitutional Documents: AD 1485–1603, with an historical commentary* (Cambridge at the University Press, 1930) 225. For the Tudor influence on Civil Service codification, see P Hennessy, *Whitehall* (London, Phoenix, 2001) 345.

For comparative purposes, the current version of *The Oath of a Privy Counsellor* reads as follows:

> You do swear by Almighty God to be a true and faithful Servant unto The Queen's Majesty as one of Her Majesty's Privy Council. You will not know or understand of any manner of thing to be attempted, done or spoken against Her Majesty's Person, Honour, Crown or Dignity Royal, but you will lett and withstand the same to the uttermost of your power, and either cause it to be revealed to Her Majesty Herself, or to such of Her Privy Council as shall advertise Her Majesty of the same. You will in all things to be moved, treated and debated in Council, faithfully and truly declare your Mind and Opinion, according to your Heart and Conscience; and will keep secret all matters committed and revealed unto you, or that shall be treated of secretly in Council. And if any of the said Treaties or Counsels shall touch any of the Counsellors you will not reveal it unto him but will keep the same until such time as, by the consent of Her Majesty or of the Council, Publication shall be made thereof. You will to your uttermost bear Faith and Allegiance to the Queen's Majesty; and will assist and defend all civil and temporal Jurisdictions, Pre-eminences, and Authorities, granted to Her Majesty and annexed to the Crown by Acts of Parliament, or otherwise, against all Foreign Princes, Persons, Prelates, States, or Potentates. And generally in all things you will do as a faithful and true Servant ought to do to Her Majesty.
>
> SO HELP YOU GOD

The linkages between the historic Privy Council and the current Cabinet extend beyond the use of an Oath. Part of the function of the Privy Council was as an executive decision-taking body, and it was in this sense a precursor to the Cabinet, an entity that developed from the late seventeenth century onwards and that is frequently described as a sub-committee of the Privy Council. Paragraph 1.14 of *The Cabinet Manual*,[6] for instance, states that 'Cabinet is the executive committee of the Privy Council'. Efforts to codify the practices and principles of Cabinet have their precursors in attempts to do the same for the Council. In 1553, Edward VI issued *A Method for the Proceedings in the Councils*, part of which he wrote out himself.[7] It listed the members of the Council, and then set out a series of subject-specific committees, and who would serve on them. A document issued in the same year sought to ensure that the Council functioned more effectively. It required members to seek permission before leaving court for more than two days (paragraph 9); it set a quorum of four (paragraph 10), with special procedural requirements to follow if there were fewer than six in attendance (paragraph 11). Paragraph 12 required that 'if there rise such matter of weight as it shall please the King's Majesty himself to be at the debating of, then warning shall be given, whereby the more may be at the debating of it'. A need to provide due notice to ensure meaningful discussion remains a concern for Cabinet and its committees.

[6] Cabinet Office, *The Cabinet Manual: A guide to the laws, conventions and rules on the operation of government* (Cabinet Office, London, 2011).

[7] 'A Method for the Proceedings in the Councils, 1553', reproduced in Tanner, above n 5, 221–23.

And recognising a reality that no doubt persists in Cabinet today, since the conduct of government relies on fallible human beings, the 1553 articles sought to deal with the limited attention span of Council members. They required:

> In matters that be long, tedious, and busy there may be appointed or chosen two or three, more or less as the case shall seem to require, to prepare, set forth, and make plain the things being less cumbrous and diffuse may the easilier be dispatcht. (paragraph 15)[8]

Though it has now been supplanted in importance by its supposed executive committee, the Cabinet, the Privy Council remains a subject of codification today. *The Cabinet Manual* describes how the Privy Council—convened under the ancient monarchical authority known as the Royal Prerogative—'advises' the head of state on the deployment of 'prerogative powers' and 'certain functions assigned' to the head of state and the Privy Council by Acts of Parliament. According to the *Manual* the Council is the means of achieving 'interdepartmental agreement' on those official activities that 'for historical reasons' are the responsibility of ministers not in their departmental roles but as Privy Counsellors (paragraph 1.10). The *Manual* goes on to outline the powers of the Privy Council. They include the ability to produce secondary and even primary legislation; to issue orders proroguing Parliament (paragraph 1.16); to oversee regulators and 'Chartered bodies' (paragraph 1.17); and to consent to 'Proclamations for new coinage' and some bank holidays (paragraph 1.18), all on a quorum of three (paragraph 1.15). The monarch is present, and ministers attend, for whom a summons to Privy Council takes priority over any other commitments (paragraph 1.16). So-called 'Privy Council terms' are a means by which government can communicate in confidence with senior members of the Opposition who are themselves Privy Counsellors (paragraph 1.12). The Council also has standing committees, among which the Judicial Committee of the Privy Council is the final court of appeal for some Commonwealth states, and for all Crown Dependencies and Overseas Territories (paragraph 1.14). One-off committees of Privy Counsellors may form to investigate specific issues (paragraph 1.19). Codification, then, has deep roots, in the types of functions it performs, and even the institutions involved.

II. THE CIVIL SERVICE AND CODIFICATION

To understand why codification in its current form came about, it is important to recognise structural tendencies within governmental institutions. Support staff can be important to this process. A political leader wishing to produce a written statement of rules is likely delegate the work. Indeed, without the existence of such assistants to execute it, codification would be less likely to occur. Officials may not

[8] 'Certain Articles devised and delivered by the King's Majesty for the quicker, better, and more orderly dispatch of Causes by his Majesty's Privy Council', reproduced in Tanner, above n 5, 223–24.

always welcome the task. However, from their point of view, it can have benefits. They have some opportunity, within practical limits, to shape the document in ways that may suit them. An important purpose of many texts is the regulation of the same support personnel that help draft them. The end product may perform a clarifying function with respect to roles, relationships and procedures that makes their job more straightforward and protects them from possible criticism. Potentially, a text setting out principles and arrangements can strengthen the place of officials within a governmental system by giving a firmer definition of their positions, perhaps expanding their remits in the process. For these reasons, staff within public institutions may be not only important participants within the codification process, but also a source of encouragement for it. As well as taking part in the drafting and updating of documents, officials are often central to the practical use made of them. Through applying codes, staff can maintain the relevance of these texts. The particular way in which they deploy them is also important, helping to determine the precise impact they have. Public officials, then, are crucial to codification.

A historic development in the UK constitution, the emergence of a politically impartial, career Civil Service, that gained pace from the mid-nineteenth century onwards, was a key development.[9] It meant the emergence of a body of employees who—whatever the possible shortcomings in terms of policy expertise—possessed strong literary skills, enabling them to produce codes, and perhaps even disposing them to do so. They remained in their posts even when ministers moved or governments fell, meaning that they could become the keepers of texts, maintaining and updating them as required. The developing Civil Service became a more clearly defined institution, with increasingly complex bureaucratic structures and procedures. That such trends might lead on to the production of a growing volume of written guidance on good practice should not be difficult to comprehend.

Confirming the importance of war to constitutional change in general and codification in particular, an important event for the developing structure of the Civil Service was the appearance of what became the Cabinet Office. It began as a secretariat to the War Cabinet that David Lloyd George created upon becoming Prime Minister late in 1916, and acquired a central role in the coordination of government activity. At the time the secretariat was formed, the only written record of Cabinet proceedings was the letter the Prime Minister wrote to the monarch after each meeting describing what had taken place. The informality this approach engendered was conducive to chaos and increasingly intolerable during a time of consuming military conflict. Lloyd George created the entity that became the Cabinet Office to minute War Cabinet meetings, ensure that written decisions were circulated as appropriate, and manage communications and the paper-based

[9] For the development of the Civil Service, see Hennessy, above n 5; R Lowe, *The Official History of the Civil Service*, vol 1: *The Fulton Years: 1966–81* (Oxford, Routledge, 2011).

information flow into the War Cabinet. With hindsight it is not surprising that the Cabinet Office would be a primary driver of codification. The production and distribution of documents intended to attain systematisation of government was the central essence of this entity from the outset. Codification arose because the secretariat was concerned not only to record and transmit the output of the processes it supported, but also to formalise those processes themselves, and assert its own role as the focus for this systematised form of administration. Upon its creation, the secretariat immediately set about producing codes (see section III. below).

The personal approach of Lloyd George was in itself important to the early instigation of codification. Another Lloyd George innovation, carried out shortly after the First World War in 1919, was the creation of a single Head of the Civil Service, a post combined at first with that of Permanent Secretary to the Treasury. Lloyd George thereby created two centralised spheres of activity—the operation of government decision-making and the management of the Civil Service—that would over time generate numerous codes. The Cabinet Office and Treasury have been and remain important players in this process, especially the Cabinet Office, which—from 1983—became clearly responsible for most Civil Service management functions, in conjunction with its ongoing Cabinet role.

Just as they did during the First World War when Lloyd George created the War Cabinet secretariat, military conflict and the requirements of the administrative machine drove the codification process. *Estacode*—the name appears to be an abbreviation of 'Establishment Officers Code'—appeared during the Second World War. It was a time of turbulence within the Civil Service, with the import of vast numbers of temporary staff from outside combined with substantial structural change within. A Treasury memorandum from July 1943 described a 'proposed Code', the purpose of which was 'to bring some easy intelligibility into the mass of Instructions that have been issued and provide a code of current Instructions' to assist Treasury Officers and Establishments Officers. This Code, then, was not intended to introduce new rules but to provide coherence to those that existed. The initial intended task was to identify all the relevant instructions, including Treasury Circulars and Establishment Officers Circulars, issued as far back as the earliest phase of the centralised Civil Service in 1920, and remove those that were 'dead and moribund'. It was anticipated that the Code might be 'unpopular at the outset', since it would mean presenting some instructions in a new format, breaking up familiar texts. For this reason some 'duplication of information' might be 'desirable to overcome this possible prejudice against the code'. It was 'desirable to popularise the Code' as a means of preventing officials from 'referring back to original instructions'. The Code would not include Orders in Council, readily available elsewhere. The Treasury anticipated that 'in later years a reformer may wish to amend a particular Rule'—in other words, use the Code as a vehicle for change. There might be problems with such an approach if it entailed altering an agreement reached with employee representatives on the 'Staff side'. It was clear that producing what became *Estacode* would be a substantial task, involving an Editing Group creating drafts, checked by Divisional Officers, who

might suggest changes.[10] In July 1944 a Treasury 'Office Notice' announced that 'Estacode, a standard reference book of the more important directions and decisions on Establishment matters promulgated by the Treasury from time to time should be available for distribution to Divisions and Departments at an early date.'[11] It was issued in 'loose leaf', and demand for copies from the departments seems to have been high.[12]

A precursor to texts such as the *Civil Service Management Code*, *Estacode* was still in use in the 1970s. By this point it had progressed beyond being a mere compendium of circulars, and had moved into the territory of prescribing core values. It included within it a section on 'Conduct and Discipline', which sought to set 'out the rules which govern the conduct of civil servants'.[13] The opening passage betrayed the tensions that are inherent in seeking to encapsulate in writing constitutional understandings, particularly within a constitutional tradition that makes a fetish of its supposedly 'unwritten' quality. It conveyed the sense that the task was impossible and unnecessary, and verging on impolite because it implied that there were participants in the process who did not understand, or did not wish to abide by, the rules, therefore necessitating their express iteration. As *Estacode* put it:

> No attempt has ever been made to prepare a complete list of matters which, because of the particular character and duties of the Civil Service, require regulation, nor has it ever been thought necessary to lay down a precise code of conduct because civil servants jealously maintain their professional standards. In practice, the distinctive character of the British Civil Service depends largely on the existence and maintenance of a general code of conduct which, although to some extent intangible and unwritten, is of very real importance. There are however a number of things on which it has been found expedient from time to time to issue general instructions …

The core rules the text was able to elucidate were that civil servants had a 'first duty' of 'undivided allegiance to the State'. They were prohibited from placing private gain over their public duty. While 'the State' was largely uninterested in their 'private activities', officials should avoid behaving in a way that might damage the reputation of the Civil Service, for instance 'heavy gambling and speculation'—especially if they were based in a role that gave them access to commercially sensitive information. Officials should ensure not only that they behaved well, but also that they were perceived as doing so. If they fell within the 'politically restricted' category, that is if they were advising on and implementing the decisions of ministers, they should avoid becoming drawn into 'matters of public and political controversy, so that their impartiality is beyond suspicion'.

[10] The National Archive/Public Record Office (TNA/PRO), T162/953, 'Code of Rulings for the Guide of Establishments Officers and Treasury Officers', 22 July 1943.

[11] TNA/PRO, T162/953, 'Office Notice: Estacode', 31 July 1944.

[12] TNA/PRO, T162/953, 'Establishment Officers Circular No 737 (Amended): Estacode, Revision of Method of issuing Establishment Officers Circulars', 28 July 1944.

[13] TNA/PRO, PREM 16/104, 'Excerpt from Estacode Vol 2/Amendment No 614', January 1972.

III. *QUESTIONS OF PROCEDURE FOR MINISTERS*

Another text that became established from the 1940s onwards was *Questions of Procedure for Ministers* (QPM). It proved to be one of the defining texts of the codification period. Fortunately, in 2000 Amy Baker published a full history of this document. In the following passages I draw on her account and supplement it with additional analysis and research.[14] The origins of QPM lie in a text entitled *Rules of Procedure* that the Secretary to the War Cabinet, Maurice Hankey, produced in January 1917, distributing it to all government ministers. The Rules were, therefore, an outcome of the Lloyd George reforms discussed in section II. above. Just 10 paragraphs long, they marked the beginning of codification as defined in this book. The text began abruptly, with paragraph 1 informing the reader that '[q]uestions may be referred for decision by the War Cabinet by the Prime Minister, or by Members of the War Cabinet, or by any Member of the Government, or by any Government Department'. The document stated that the 'normal procedure' for such a referral was through the 'Secretary, accompanied, when practicable, by a short Memorandum containing a summary of the points on which a decision is required'.

With its invocation of 'normal procedure' this passage conveyed a sense of firmly established practice. Yet the existence of the Secretary, along with the War Cabinet and its procedures, was new. An important function of codification has always been to manage or even bring about change, though perhaps not to do so openly. It has never—despite implications or claims the documents sometimes make—involved simply describing the already prevailing position. Some of the key principles set out in the Rules are recognisable in the Cabinet system of today. Codification therefore proved an effective tool in helping form lasting rules—or even conventions. The institutional agenda associated with the new arrangements set out in 1917 was also significant, and another foretaste of future codification. Not only did the Rules seek to impose the practices that fitted with the preferences of staff within the official machine (and in particular the most senior secretary, Hankey), they also directly asserted the role of the Secretary as filter and central figure within the nascent system, with the insistence that matters should be raised through him.

Paragraph 2 referred to a practice 'as a general rule' of the War Cabinet's consulting ministers who led departments, and making available to them the relevant information, before reaching a decision. This stipulation must have arisen from a desire to reconcile the decision of Lloyd George to use a small inner War Cabinet of mainly non-departmental ministers with the need to maintain wider government cohesion. Paragraph 3 dealt with another key procedure. The Secretary was required to send copies of the draft minutes of each War Cabinet meeting to its members, to enable them to comment. Additional ministers attending particular

[14] A Baker, *Prime Ministers & The Rule Book* (London, Politico's, 2000). For 'Rules of Procedure' see TNA/PRO CAB 21/102, 'The War Cabinet: Rules of Procedure', 24 January 1917.

meetings would also have this opportunity. After the recipients of these papers responded, the Secretary would send a 'final draft of the Minutes' to the Prime Minister. The crucial point then follows: 'After the Prime Minister has initialed the Minutes of the War Cabinet, the conclusions formulated therein will become operative decisions to be carried out by the responsible Departments.' The premier could, if necessary, 'delegate' his power of authorisation.

Paragraph 4 continued to provide an important role for the Secretary as facilitator of collective government. Having received prime ministerial approval, 'the decisions of the War Cabinet will be communicated by the Secretary to the Political and Civil Heads of Departments concerned, who will be responsible for giving effect to them'. Furthermore, paragraph 5 explained, the Secretary would circulate the minutes to all War Cabinet members and other senior ministers and officials. Availability could be limited over 'decisions of extreme secrecy', including 'dates of forthcoming operations, new engines of war, &c'. As well as depicting the Secretary as a communicator of instructions, the Rules, in paragraph 6, gave him a role in the monitoring of their implementation:

> In order to keep the Committee fully informed, the Head of the Department responsible for action on any of the War Cabinet's decisions is to notify the Secretary as to the action taken, or, if for any reason action is found impossible or unnecessary, is to notify him accordingly.

The text stipulated a preference for copies of orders 'actually sent'.

Moving on to the actual business of War Cabinets, paragraph 7 provided a list of individual post-holders directly involved in war policy, who would 'ordinarily' attend the beginning of War Cabinet meetings to provide an update on developments. Furthermore, 'Other experts may be summoned as required.' Paragraph 8 stated that heads of departments must provide the War Cabinet regularly with relevant information, again via the Secretary, and that the War Cabinet would also 'have the right to call for any information from Government Departments'. Paragraph 9 provided more detail on the sorts of material the War Cabinet had to receive, and from whom. Lastly, paragraph 10 noted that 'Meetings of the War Cabinet will be held at 10 Downing Street. All communications in regard to the circulation and distribution of Papers should be addressed to the Secretary at 8 Whitehall Gardens, S.W.' In producing this text, Hankey left no doubt about his centrality to proceedings. The tendency for Cabinet Office documents to emphasise the importance of the secretariat and the Cabinet Secretary to the proper functioning of government persists today.

The National Archive file containing the Rules includes another document, also dating from January 1917, under the heading 'Notes on the machinery of the British War Cabinet: The War Cabinet'. In its 23 paragraphs it provided information about the membership of the War Cabinet, its meetings, its procedures, its place within government and the organisation of the secretariat. The propensity of the body soon known as the Cabinet Office to produce multiple codes, sometimes with overlapping content, was always present. So too was the practice of regularly

updating texts. From 1919 *Rules of Procedure* became known as *Instructions to the Secretary*. Hankey initially pursued a practice of presenting it to ministers for their agreement when a new Cabinet was formed, but this custom then tapered off. The transition of *Notes on War Cabinet Procedure*, as it was labelled during the Second World War, into QPM provides further evidence of how military conflict, personality and underlying institutional imperatives could combine to drive forward codification. There was a general disposition towards codification, but the precise way in which it manifested itself depended upon how it intersected with major external circumstances, and the approaches of particular individuals such as prime ministers. Baker explains that in August 1945 the new Labour Prime Minister, Clement Attlee, issued the first edition of QPM. It combined *Notes on War Cabinet Procedure* with an added annex compiling a series of prime ministerial procedural instructions issued during the War. The Cabinet Secretary, Edward Bridges, secured the agreement of Attlee to the new document, and it was then disseminated to all ministers in the incoming Labour Government. Bridges had begun this initiative in advance of the General Election, which produced a Labour victory that was surprising to many. The use of such a text suited the temperament of Attlee better than it did the ousted Winston Churchill, who is known for his less formal approach. Attlee placed a premium on efficient, orderly government, a goal QPM could help him pursue. In 1946 an updated version incorporated his numerous additional directives, and they were now added to the main body of the text, rather than being confined to an annex. Baker recounts how it continued to grow and took on the character of an assorted collection of operational stipulations and guidance on ministerial behaviour, such as prohibitions on the leaking of confidential information, a concern that remains with us today, as does QPM itself, under the title attached to it since 1997, the *Ministerial Code*.

A comparison of the 1949 edition of QPM with the most recent edition of its successor text, the *Ministerial Code*, is instructive. The 2015 document[15] opens with a 'Foreword', attributed to the Prime Minister, David Cameron. It reads:

> This Government was elected with a clear set of instructions from the British people. To back working people. To deliver security at every stage of their lives. To build not just a stronger economy, but a stronger society, too. And to govern for one nation: England, Scotland, Wales and Northern Ireland.
>
> People didn't just tell us what to do, but how to go about it. They want their politicians to uphold the highest standards of propriety. That means being transparent in all we do. It means rooting out any form of misconduct. It means spending every pound carefully—because it's not our money; it's taxpayers' money.
>
> This is good government. And it is precious. Around the world, Parliaments have copied the Westminster system. But they also want to copy the way we conduct our politics, because they see that transparency and openness go hand in hand with progress and prosperity.

[15] Cabinet Office, *Ministerial Code* (London, Cabinet Office, 2015).

> So in every decision we take, every speech we make, every policy we formulate, we must keep in mind who put us here and why. If we remember that, if we carry out our duty with the utmost integrity, then together we can make our vision a reality: and make Great Britain greater still.

The 'Note by the Prime Minister' that opened the 1949 edition of QPM set a different tone. There was no attempt to link the text to a vision for society, the economy, the country or the democratic well-being of the entire world. Instead, the then premier, Clement Attlee, wrote:

> My colleagues may find it convenient to have this consolidated and revised statement of the directives which I have issued from time to time on points of procedure and other similar matters. Special attention is drawn to the instructions in paragraph 40 regarding references in Ministerial speeches to Commonwealth affairs, which have not been included in any of my previous directives … I should be glad if Ministers in charge of Departments would bring to the notice of Junior Ministers and officials such sections as concern them. For this purpose additional copies may be obtained from the Cabinet Office.[16]

Cameron, of course, was writing in a text that had, since 1992, been publicly available, encouraging—but not justifying—his hyperbole. Attlee had a narrower internal audience. But whether it would have made any difference to his style were Attlee knowingly addressing a potential audience of millions is doubtful. Yet though this contrast is unavoidable, the main bodies of the two documents, one from 1949, the other from 2015, share important core features, in particular their concern with internal procedure and etiquette, and communications between government and the outside world.

Baker reminds us that it would not have been obvious in the early phase that QPM would become a permanent fixture, and it could well have appeared a document specific to the Attlee Government. This realisation is important. Retrospectively the rise of codification may seem inevitable, but it did not appear so when it was underway. We can now identify some of the trends that drove it, but they were not necessarily plainly apparent all along. Moreover, individual codes have in some cases failed or disappeared, as we shall see. When Churchill returned in 1951, QPM was heavily pruned at the outset, and then left unchanged. But it survived. Anthony Eden (1955–57) did not produce a version of QPM. However, Harold Macmillan (1957–63) introduced a new text in 1958. The fresh provisions incorporated into it that Baker highlights provide an example of the relationship between codes and constitutional change. They included guidance on television appearances, a medium of growing significance. Here was an instance of the creation of completely new rules in response to an external trend. A second type of change involved the clarification of regulations that had previously been more vague in nature. In a climate of rising scrutiny of the personal conduct of ministers, the 1958 QPM incorporated provisions intended to make clear how they

[16] Reproduced in Baker, above n 14, 135.

could avoid financial conflicts of interest. Third was the incorporation of rules that were already firmly accepted, such as the prohibition on ministers bringing civil servants with them to party conferences. Baker's work shows that, generally, alterations to the code in the years that followed were pre-emptive—that is seeking to avoid particular problems in advance—or reactive—that is, responding to a difficulty that had manifested itself.

The text was becoming a fixture, retained through the 1960s and 1970s by successive Conservative and Labour Governments. In 1979, a Conservative Prime Minister, Margaret Thatcher, came to power. Despite her reputed disregard for traditional principles of collective decision taking, she retained in QPM a text that regulated the system within which this form of government operated. From less than secure beginnings, though with consistent support from officials at high level in the Cabinet Office, QPM had managed to survive changes in the party of government and transitions to prime ministers of varied dispositions. By this point—though it lacked legal underpinning—QPM was in practice a firm part of the system. Moreover, while it was confidential, knowledge of its existence began to seep out. An important moment came in 1975. In this year, though it did not formally publish the text until 1992, the Government submitted QPM as evidence as part of its legal attempt to prevent the publication of the diaries of the former Cabinet minister, Richard Crossman. The Government held that Crossman had breached the confidence of Cabinet proceedings. The press, referring to 'a secret document called Questions of Procedure for Ministers', quoted the Attorney-General, Sam Silkin, as explaining that 'The Queen … had given permission for this [the production of QPM as evidence] to be done.'[17] Later governments were insistent that codes should not be used against them in court proceedings, but this case suggests that deploying a text in support of the administration was considered acceptable.

IV. THE *PRECEDENT BOOK*

Another important code from the post-Second World War period was the *Precedent Book*, the earliest existing version of which dates from 1954. This text comprises one of the most important codifications of all, dating from an era when the practice, driven by bureaucratic imperatives, was taking hold, though still a secretive activity internal to the executive. The book consists of a collation of different sets of already existing guidance to the conduct of Cabinet government, for use within the Cabinet Office, primarily, it seems, by the Cabinet Secretary. The name creates the implication that past practice and circumstances are an important guide for future action, and perhaps the main or only basis for legitimate conduct. Analysis of what appears to be the 1954 edition is revealing regarding the nature of codification and the system of government as it operated around this time.

[17] G Parry, 'Silkin hits at diaries', *The Guardian*, 23 July 1975.

Part I, 58 pages long, dealt with 'The Cabinet'.[18] At the outset, in paragraph 1, it reminded the reader of the relatively informal nature of Cabinet, and that there was no statutory reference to it until the Ministers of the Crown Act 1937 (which provided extra income to some ministers inside the Cabinet). Evidently written from the vantage point of the immediate post-Second World War period, it noted that 'in the last thirty or forty years a more formal system has developed', yet that the precise way in which Cabinet operated could alter 'to suit particular circumstances and particular Prime Ministers'. Paragraph 1 then made further important constitutional observations. While Cabinet lacked 'statutory powers or functions', because it comprised senior figures from the group that is pre-eminent within the House of Commons it was able to act as 'the directing body of national policy'. Cabinet, the *Precedent Book* stated, offered a means of reconciling two potentially conflicting constitutional requirements: that a minister at the head of a particular department was individually responsible to Parliament, but at the same time that members of the government were responsible for policy collectively. Alongside these statements of central principle, it contained a large body of description of practice and procedure, including accounts of who made up the Cabinet, who could go to Cabinet meetings, the business of Cabinet, when it convened, and how the conclusions it reached were recorded and put into action. This part referred to authorities such as Ivor Jennings and parliamentary sources, as did other portions of the book. They also made references to a 'Downing Street Handbook', that the present author has not yet located, though it may well be the so-called 'Bible' that the No 10 private secretaries maintained.[19]

Part II of the book covered 'Ministers'.[20] Totalling 59 pages, it considered their appointment, their removal, and various rules and procedures surrounding their activities. In assessing the role of the monarch in the appointment of prime ministers, Part II contained a relatively direct statement of the rights of and limitations upon the ruler, that would be less likely to appear in a document were it intended for public dissemination, then or now. Paragraph 2 tells us that the selection of a Prime Minister by the monarch 'is not made on formal advice or submission'. While frequently the person who would be made Prime Minister was obvious, 'the King has an absolute right in all cases to consult anyone he pleases' over this matter. This discretion in seeking counsel, the book noted, could be of particular use when there was room for uncertainty about who should become premier, for instance if an incumbent had died or decided to stand down unexpectedly, or perhaps because there was 'a complicated political situation'. While this paragraph did not deal expressly with a House of Commons lacking a single-party majority, the term 'complicated political situation' could encompass this eventuality.

[18] TNA/PRO, CAB 181/2, 'Precedent Book, Part I, The Cabinet', undated.

[19] For the history of rule-keeping within No 10, see A Blick and G Jones, *At Power's Elbow: aides to the Prime Minister from Robert Walpole to David Cameron* (London, Biteback, 2013).

[20] TNA/PRO, CAB 181/4, 'Precedent Book, Part II, Ministers', undated.

Notwithstanding the possession of the right to obtain advice, since a monarch 'should not exercise, or appear to exercise, any political bias, he would normally choose as Prime Minister the leader of the Party having the largest number of seats in the House of Commons'. In these straightforward circumstances the ruler would not make 'any overt or personal consultations', because to do so might create an undesirable impression of 'personal partisanship'. In other words, the monarch might appear to be considering the possibility of circumventing an election result. The book went on to state that '[n]o Peer has been chosen as Prime Minister since the end of Lord Salisbury's administration in 1902'. However, it did not offer any explicit conclusions about whether it would still be possible for a premier to be appointed from, or continue to sit in, the Lords rather than the Commons.

'Cabinet Committees' were the subject of Part III (31 pages).[21] It contained in its opening paragraph a justification of their role. They were needed, it explained, as a means of dealing with the 'mass of business engaging the collective responsibility of Government' that would swamp 'a single body', that is, the full Cabinet. Cabinet committees lessened the pressure on Cabinet as a whole and on individual ministers. Furthermore, they made it possible for 'Ministers of Cabinet rank who are not members of the Cabinet to take their share in the formulation of Government policy'.

Part IV dealt in depth over 53 pages with the handling of Cabinet documents, demonstrating the importance to codification of administrative imperatives that might not seem of the highest constitutional significance.[22]

Part V (21 pages) returned to the sensitive, complex and difficult-to-define constitutional role of the monarchy.[23] The Annex to this part, entitled 'The King and the Prime Minister', contained passages that merit reproduction as exemplifying an orthodox view of the UK constitution. It suggested that the authors were encountering similar strains to those suffered by the drafters of the 'Conduct and Discipline' section of *Estacode* (discussed in section III. above):

> The British constitution is unwritten and is built upon on practice and precedent over very many years. Its procedure is well defined in some respects; in others less so; new situations arise and to meet them there are modifications, often imperceptible, which in themselves become precedents and part of established practice. For these reasons it is impossible in many cases to be dogmatic on broad constitutional issues, and it may well be misleading to say, for example, that 'the King must do this' or that 'the Prime Minister must do that.' It will often be found that there is an exception or that an exception can be made which in itself will prove a precedent.
>
> Therefore, to define in precise terms the general relationship between the King and the Prime Minister is difficult even if the matter were to be set out at length … What follows is only a brief and simplified outline of the main principles of this relationship.

[21] TNA/PRO, CAB 181/5, 'Precedent Book, Part III, Cabinet Committees', undated.
[22] TNA/PRO, CAB 181/6, 'Precedent Book, Part IV, Documents', undated.
[23] TNA/PRO, CAB 181/7, 'Precedent Book, Part V, Relations with Buckingham Palace', undated.

The Annex then sought to define what was meant by a constitutional monarchy. The first key feature it identified was that ministers had to be ready to take 'responsibility for every act or omission of the King which has any political significance'. As a consequence of this 'fundamental constitutional doctrine', ministers were able to offer advice on these matters; and there was a 'well-established tradition that in the last resort the King accepts the advice of his Ministers'. Yet he also had a 'right and indeed duty to make known to Ministers his views about or objections to' their proposals. A second crucial principle was that monarchs 'should not take sides in party politics'. The Annex replicated the material in Part II about choosing prime ministers. One important area in which it expanded upon this account involved the issue of prime ministers and the House of Lords. It stipulated that there was 'no constitutional bar' to a Peer's becoming premier. But such an outcome, it noted, had not taken place since the time of Salisbury. An important addition to Part II then followed, when the Annex remarked that 'the passing over in 1923 of Lord Curzon in favour of Lord (then Mr) Baldwin may possibly mark a constitutional convention excluding a Peer from being Prime Minister'. The Annex dealt with prime-ministerial recommendations for ministers. The monarch 'may exercise a considerable influence' in this area, but ultimately had to accept the wishes of the premier 'or find another Prime Minister who can command the support of the House of Commons or the country'. No such breakdown had occurred in 'recent years', the book noted.

Regulating the flow of information to the outside—and keeping it to a minimum—was an important concern for the Civil Service in the post-Second World War era. A later part of the book, Section 5 of Part VII, demonstrated this point.[24] It consisted of 142 pages of guidance on 'Handling Requests for Information' pertaining to 'The Cabinet, Cabinet Committees and the Cabinet Office'. It displayed what might today seem to be a preposterous level of reticence regarding key operational features of a democratic government, and revealed that there was a privileged group of individuals regarded as more worthy and trustworthy than others with respect to some knowledge. Paragraph 3 described the procedure to follow when 'ordinary members of the public' asked about the functioning of the Cabinet system. They were allowed to know the answer to some questions, such as whether minutes were kept at Cabinet or the point at which the post of Cabinet Secretary was created. But if the inquiry extended further than already publicly available knowledge, the usual response was to be 'that information about the procedure of the Cabinet, the organisation of Cabinet Committees, etc is confidential and cannot be made available'. When approaches came from 'specialists' it was possible to be more helpful, but not in an entirely straightforward way (paragraph 4). The precise method of dealing with requests for details about the operation of Cabinet for the purposes of research publications 'depends largely on the standing and

[24] TNA/PRO, CAB 181/10, 'Precedent Book, Part VII, Miscelleaneous (Contd)', Section 5, 'The Cabinet, Cabinet Committees and the Cabinet Office', undated. For 59 further pages on 'Use of Official Information in Private Publications', see CAB 181/11 'Precedent Book, Part VIII', undated.

purpose of the enquirer'. So even within this small group there were subdivisions of importance. The book did not elaborate on how these distinctions were made. A person—or rather a 'he'—who passed whatever obscure, informal screening process was applied then received a flattering reception. But it was not entirely freely given. The book explained:

> Unless this is for some reason undesirable, the enquirer would normally be seen by the Secretary of the Cabinet or his deputy and given, in general terms, information on the developments or aspects in which he is interested. (This interview serves also to elicit the intentions of the enquirer.) If appropriate, he would be offered a short memorandum or a note of references to published material which he may not have seen.

At the meeting with the Cabinet Secretary or deputy, 'the suggestion would be made that he should submit a manuscript, or at least a printed proof, of any material which he intends to publish'. For the author, the guidance suggested, it would be a means of avoiding 'misstatements', while for the Cabinet Office it would provide the possibility of 'seeking the modification of any passages which may be objectionable'. Yet while the Cabinet Office might be willing to provide and verify accounts of how it operated, it would not wish publicly to appear to do so. The standard practice was, according to the book, 'to make it clear to the author that he must himself take full responsibility and must not refer to the Cabinet Office, directly or indirectly, as the source of his information'. The Cabinet Office found this overall approach satisfactory in that 'there has always been the fullest co-operation'. The main problem, it noted, was in deciding how far it should draw back the curtain and make 'information not previously published … available'. But there were benefits in a degree of openness. The book referred to the 'considerable advantage to the Cabinet Office itself' of there being 'an authoritative textbook to which enquirers can be referred'. Given the general outlook regarding outside access to internal information about the way the system operated, the idea of the *Precedent Book* itself's being available potentially to be viewed anywhere in the world, instantly, free, on demand on a screen—which it now is—would be difficult to comprehend.

As the Annex to Part V on the monarch and the Prime Minister revealed, even the apparently more obscure parts of the *Precedent Book* contained within them valuable seams of systemic guidance. Part I of the book also has a series of annexes.[25] The first was a list of Cabinet posts held since 1916, presumably to inform senior staff involved in making appointments of the range of titles held by Cabinet members and the implications for precedence. These issues are important in the frenetic circumstances of Cabinet formation or reshuffles, when various competing political, personal and administrative needs must be fulfilled in a way that appears proper. The past could constrain, through suggesting norms, but also provide opportunities to justify courses of action. In this sense the *Precedent Book*

[25] TNA/PRO, CAB 181/3, 'Precedent Book, Part I, Annexes', undated. Information contained within it runs up to 1950.

was potentially a powerful tool for those who had easy access to it, presumably a small group centring on the Cabinet Secretary, a post held at this point by Norman Brook, the master-manipulator of the bureaucratic machine. It is easy to see how this text could both guide him and strengthen his case when proposing particular courses of action to others.

Annex II was entitled 'Submission of Business to the Cabinet: Action in the Cabinet Office'. Apparently dating from 1949, it shows how far Cabinet business had become codified by this point, even if such guidance was not widely available beyond (and perhaps even within) Whitehall. Despite the typically mundane title, this document dealt with high-order constitutional matters. Moreover, it tended to present its account as a description of practices as they were, rather than as they had been, the implication being that the version it offered was one that should be followed. The Annex began with an account of the purpose of Cabinet: to consider 'major issues of policy', or significant issues over which there is disagreement within the government that can only be settled through 'reference to the highest authority'. There was also 'a considerable variety of miscellaneous business' (paragraph 1). This 'wide range of miscellaneous problems, often unforeseen, thrown up in the day to day activities of Departments' should not be neglected, even if Cabinet faced a consuming emergency demanding its attention. The implication was that senior Cabinet Office officials needed to ensure that distracted ministers avoided overlooking the less attention-grabbing but nonetheless important issues. 'Thus the Cabinet may often have to turn from discussion of some vital economic or international problem to consider some item of domestic legislation or some relatively long-term administrative issue', or papers produced by Cabinet Committees. Given the hard-to-predict nature of Cabinet work, papers should only be sent to Cabinet if 'essential and then in clear and concise terms' (paragraph 2). The text proceeded to provide detailed guidance about the handling of business, including means of ensuring that an issue reached Cabinet only if it had to, and that appropriate advance consultation with relevant Whitehall departments took place. It firmly fixed the role of the Cabinet Office at the centre of the process.

Memorandums, the Annex tells us, should normally be circulated at least two full days in advance of the Cabinet's taking them (paragraph 13). While Parliament was meeting, the document went on, Cabinet normally convened on Mondays and Thursdays, though if parliamentary business permitted, Tuesdays were preferred to Mondays (paragraph 16). The normal venue was the Cabinet Room on the ground floor at the back of No 10 Downing Street, the official residence of the Prime Minister (in the role of First Lord of the Treasury). If circumstances required, Cabinet could take place in the House of Commons, in the Prime Minister's room there. Paragraph 20 was a fascinating account of how the Cabinet Office, no doubt with the Cabinet Secretary in the lead, and Prime Minister's Private Secretary met on Thursdays to agree between them a proposal regarding 'when … Cabinet should meet and what business should be taken'. It included a 'draft of the Agenda' for the initial Cabinet of the following week, as well as a '"provisional programme"

indicating in general terms the business for both meetings'. It was then sent to the Prime Minister for agreement. Paragraph 21 described another proposal drafted following the Monday Cabinet, with a 'draft Agenda' for Thursday. This description demonstrated the importance of officials in No 10 and the Cabinet Office in supporting prime ministers in their role as chair of the Cabinet. Civil servants had (and still have) a crucial part in framing the way in which political discussions at the highest level were framed. They could also use texts such as the *Precedent Book* to assert their position in writing. However, while officials were influential figures, it should not be assumed that they could exploit or would even attempt to utilise their position nakedly to pursue their own particular goals. Prime ministers, who are by definition skilled politicians, would not be likely to submit to such abuse, and civil servants would know that to engage in it would be to risk the closeness of their relationship with the premier on which their status was dependent.

The *Precedent Book* was in use for four decades. But in 2015, the House of Commons Political and Constitutional Reform Committee (PCRC) revealed that it had learned from the Cabinet Secretary, Sir Jeremy Heywood, that since 1992 the Cabinet Office had ceased formally to maintain the book. It had come instead, the Committee found, to rely 'on a more nebulous concept of unwritten corporate memory'.[26] Heywood explained in oral evidence to the PCRC:

> How we deal with these issues now is on the basis of experience of how the ministerial code, for example, has been interpreted in the past, what the recent precedents have been, but we don't collect these together into something called the precedent book. In a sense, the corporate memory is there in the Cabinet Office and in my office but we have not gone to the trouble of bringing all of those individual cases together into a new version of the precedent book.[27]

The Committee noted that it was uncertain whether any clear method had appeared in place of the *Precedent Book* to store and place in context events of constitutional significance. The post-1992 disappearance of the book shows that, even as the practice of producing published codes was in the ascendant, an older method of internal storage declined. The Committee expressed unease regarding the fate of the book, regretting that it was no longer apparent how the Cabinet Office and the Government would store its 'corporate memory'.[28]

V. CODIFICATION AND PUBLIC MONEY

Often codes are issued by individual institutions, frequently but not exclusively the UK executive. However, they can entail agreements between different

[26] House of Commons Political and Constitutional Reform Committee, *Revisiting the Cabinet Manual* (HC 2014–15, 233) para 27.
[27] ibid, 13.
[28] ibid.

constitutional players. The 1932 *PAC Concordat*[29] is a code of the latter type. As a document it remains to the present day central to the financial relationship between Parliament and the executive, and is part of the contemporary canon of codes. The circumstances in which the Concordat came about suggest another important observation: that codification does not take place in a vacuum, and that it tends to arise in the intersection between long-run tendencies and more immediate pressures. The background to the Concordat was sustained apprehension on the part of Parliament, stretching back at least as far as the middle of the nineteenth century, regarding the executive practice of spending money from the Contingencies Fund without deriving express authorisation through specially designed legislation. Parliament objected to this approach because it created difficulties for the task of holding government to account for the use of public funds, since the purpose for which this money was provided was not as clearly defined as it otherwise would be. The House of Commons Public Accounts Committee (PAC), established in 1862, became a persistent critic of this habit. Against this general concern, the immediate driver of the Concordat was an upturn during the 1920s in the government practice of spending money in ways for which it had not obtained specific prior statutory authority. The global economic downturn following the Wall Street Crash of 1929 played its part. After PAC had already objected to government practices in 1930 and 1931, the final trigger for the understanding of 1932 came about as a consequence of Ministry of Labour spending on assistance projects for unemployed people, for which it had no precise legislative power.

The text known as the 1932 Concordat consists of an exchange of letters between PAC and the Treasury. The Parliamentary Committee insisted that if it were intended

> that continuing functions should be exercised by a government department, particularly where such functions may involve financial liabilities extending beyond a given financial year, it is proper, subject to certain recognised exceptions, that the powers and duties to be exercised should be defined by specific statute. (A2.3.6)

The Treasury responded with a minute stating that, though Parliament could provide authorisation through an annual Appropriation Act, 'constitutional propriety requires that such extensions should be regularised at the earliest possible date by amending legislation, unless they are of a purely emergency or non-continuing character'. In other words, following the prompting of PAC, the Treasury was acknowledging in written form the existence of an established understanding, or perhaps even a constitutional convention, that—though not possessing a firm legal basis—was accepted as having force nonetheless. As would often prove to be the case, the authors of the text sought to ensure that,

[29] See HM Treasury, *Managing Public Money* (London, HM Treasury, 2013, revised 2015), Annex 2.3, 'PAC Concordat of 1932'.

while committing to a restriction, they preserved a degree of latitude for themselves. The minute went on to assert that the government needed to retain 'a certain measure of discretion' in being able to seek power through an Appropriation Act, something—the Treasury noted—that Parliament was certainly able to grant. However, through the minute the Government acknowledged its agreement that 'continuing functions'—especially those involving 'financial liabilities extending beyond a given financial year'—ought to 'be defined by specific statute'. The Treasury agreed that it would, for its 'part, continue to aim at the observance of this principle'.

Though there will always be potential for disagreement around some of the concepts the Concordat defines, it has broadly proved successful and lasting. As a Treasury text most recently updated in 2015, *Managing Public Money*, puts it, 'With this Concordat, the matter still lies.'[30] In 2013, the House of Lords Select Committee on the Constitution described the Concordat as 'a self-denying ordinance by the Treasury, which has in general worked well'.[31]

Another text dealing with related issues has proved more problematic. The so-called 'Ram Memorandum' was a letter from Granville Ram, First Parliamentary Counsel, dating from 2 November 1945.[32] A crucial difference between this text and the 1932 Concordat was that the former was a unilateral act of drafting within the executive, while the latter involved an exchange of views between two institutions. Though it became crucial to executive understandings of the extent of its financial power, the Memorandum did not become public until 2003.[33] It was an opinion given by a lawyer (Ram) to a client (the Government), and as such had no legal authority of its own. Yet the Memorandum acquired in practice an exalted status inside the executive. Indeed, regardless of its actual legal grounding, it became a constitutional text—as far as those within Whitehall were concerned at least. It was the basis for the so-called 'Ram Doctrine', though the doctrine as often understood was possibly a misrepresentation of the views of Ram as he expressed them in the Memorandum.

Ram commenced by explaining that he was responding to a request to explain 'how far legislation is necessary to authorise any extension of the existing powers of a Government Department'. He immediately identified a need 'to draw a sharp distinction between what is legally possible and what is permissible having regard to established practice'. This issue is perennial within any political system—perhaps particularly so for the UK with its 'unwritten' constitution—and a reason for codification as defined in this book. Beginning with the 'Legal Position', Ram explained that a Minister of the Crown differed from a corporation founded in statute. While the latter was 'entirely a creature of statute' and possessed only

[30] See ibid, A2.3.8.

[31] House of Lords Select Committee on the Constitution, *The pre-emption of Parliament* (HL 2012–13, 165) para 13.

[32] 'Text of memorandum from Granville Ram, First Parliamentary Counsel, 2 November 1945'.

[33] House of Lords Select Committee on the Constitution, above n 31, para 50.

authorities derived from statute, the former 'as an agent of the Crown', could 'exercise any powers which the Crown has power to exercise, except so far as he is precluded from doing so by statute'. There was, Ram recognised, potential for discussion about whether statutory authorisation could bring with it implied restrictions. However, 'the governing principle', Ram held, 'is that express statutory provision is not necessary to enable a Minister to exercise functions'.

The manifestation of this doctrine in financial terms was that 'a Minister may do anything which he is not precluded from doing', but 'he will only be able to pay for what he does if Parliament votes him the money'. Ram noted that, in its interactions with PAC—including those embodied in the Concordat of 1932—the Treasury had been careful to assert the basic principle that, whatever the ideal practice might be, Parliament nonetheless possessed the power to support government activities solely through Appropriation Acts. Ram found fault with some of the arguments PAC had advanced in the past, including its view that if a grant was derived exclusively from an Appropriation Act, it 'had no statutory basis whatever'. He expressed the view that 'the use of the Appropriation Act without previous general legislation however objectionable it may be is not illegal and therefore not unconstitutional'. Whatever the merits of Ram's legal point, the claim we can infer from the point he made here, that a practice that is legal is by definition constitutional, is difficult to reconcile with widely shared understandings of the UK system. While universal consensus over what precisely is the constitution is absent, many would agree that the constitution has both legal and non-legal manifestations. It would seemingly be legal, for instance, for the monarch to dismiss a sitting Prime Minister who still possessed the confidence of the House of Commons, and to appoint a successor of her choosing.[34] But it would surely not, in the perceptions of many, be constitutional to do so. Ram concluded that 'Legislation is not legally necessary to authorise an extension of the existing powers of a Government Department except where such an extension is precluded by a previous statute either expressly or by necessary implication.' However, 'If the extended powers involve an annual charge extended over a period of years' then 'legislation though not required by law, is required by established practice formally recorded in the transactions between the Public Accounts Committee and the Treasury.' What for Ram was an 'established practice' was probably for others 'constitutional'.

The Ram Memorandum provides us with evidence of how a text can become influential over a sustained period—surely to a greater extent than its author could have imagined. At the same time, problems connected to a document can fester, only fully becoming apparent a substantial period of time after it is issued. In 2013, the same House of Lords Select Committee on the Constitution report that broadly praised the 1932 Concordat expressed more concerns about the Ram Memorandum and its usage. The Constitution Committee stressed that, regardless

[34] See para 2.9 of *The Cabinet Manual*, above n 6.

of its revered standing within the executive, Ram was 'not a source of law' (paragraph 52). Furthermore, events had rendered it out of date. Ministerial activity was now subject to additional constraints, including 'public law limitations … as enforced through judicial review; human rights law; the pre-existing rights and significant interests of private persons'; and the rules included in the Concordat of 1932 and the Treasury text *Managing Public Money*. The Committee objected more forcefully to the idea of a 'Ram doctrine' founded in the Memorandum. It understood the doctrine, as described to it by the Treasury, as meaning that 'ministers can do anything a natural person can do, unless limited by legislation' (paragraph 55). One problem noted in evidence to the Committee, aside from this view being legally incorrect, was that it misrepresented Ram, who had not held that governments could do anything that private people could (paragraph 56). In response to the Committee, the Government recognised that the relevance of the Ram Memorandum was limited by changes in public law and by the introduction of the Human Rights Act 1998. But it maintained that the basic principle expressed by Ram still stood, namely, that the Government was in possession of common law powers, though limited by the law.

VI. CONCLUSION

From the First World War onwards, Whitehall began to acquire the habit of producing texts setting out key constitutional understandings and governmental practices. Some of the main documents that appeared—*Estacode*, the *Precedent Book* and QPM—were important forerunners to the texts of the contemporary codification era and clearly within the overall phenomenon discussed in this book. But there were important differences from the present. Most of these texts were not intended for public consumption, and their availability might be restricted even within Whitehall. With the exception of the *PAC Concordat*, they were issued by the executive alone, and tended to focus on its internal concerns. Nonetheless, they had implications for constitutional power relationships. *Estacode* was intended to ensure adherence throughout Whitehall to edicts issued by the Treasury in its bureaucratic management role. The purpose of the *Precedent Book* was partly to ensure consistency and continuity in the practice of government. It could also be seen as assisting senior permanent officials, in particular the Cabinet Secretary, as guardians of proper practice in their dealings with the temporary component of government, the ministers; and in promoting good practices connected to collective government, part of the institutional interest of the Cabinet Office. Furthermore, the book managed the relationship with outsiders seeking information about the way in which the system worked. QPM and its predecessors similarly served the interests of the Cabinet Office and of officialdom, as well as being tools with which prime ministers might impose behavioural standards on ministers.

The *PAC Concordat*, however, was not purely executive property. It dealt with the relationship between the executive and Parliament in the crucial area of financial control; and it emerged out of a negotiation between different constitutional branches. It can be contrasted with the Ram Memorandum. That dealt with similar subject matter, but Parliament played no a part in its production and was not even made aware of its existence. Such secretive practice was well within accepted standards of the time. But the constitutional system is never entirely static. It was, by the end of the 1970s, already subject to pressures and transformations that would bring with them an acceleration and broadening of, and a change in the nature of, the codification process. Not only would texts proliferate, but they would become public documents, with players beyond the executive increasingly engaging in their manufacture, and in commentary upon them. The outside world became a key player in a process that was previously largely the internal business of Whitehall.