Identity and influence

A role for the rule of law in strengthening British national identity and maintaining the UK's soft power

Richard Hyde

SMF Social Market Foundation

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- All 8 participants in the SMF convened national identity and "soft power" roundtable and the 1,000 UK citizens who responded to the Opinium survey, the results of both inform this paper.

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ABOUT THIS REPORT

The evidence presented in this report comes predominantly from two sources:

- The first is a 90-minute, high-level SMF convened roundtable with politicians (including representatives from the Government), legal academics, legal practitioners and experts from relevant interest groups to discuss the importance of the rule of law to British national identity and the UK's stock of "soft power" assets and the potential for the rule of law to be a more important factor in both areas. The roundtable took place in June 2022 and it was held under the Chatham House rule.
- The second is polling by Opinium of a representative sample of 1,000 British citizens from all four nations of the UK. Survey participants were asked questions about their views on importance of the rule of law, the strength of the rule of law in the UK, the extent to which they thought people in other countries saw the rule of law as an important part of British life and in particular what they might feel if those from other parts of the world no longer saw the UK as a country that adheres to the rule of law.

The two key sources are complemented by desk research, which was undertaken between June and November 2022.

While the views and arguments of participants in the roundtable are reported in this paper, the conclusions and recommendations made in this paper are those of the author alone.

FOREWORD

This is a report about Britain, about Britishness, and about the law. It is published at a time of challenges for all three.

Some of those challenges connect our three topics. The future of the United Kingdom in its current form is in question because of a nationalism that values Scottish identity above a sense of Britishness. The political tensions that creates, have led to the courts, most recently the Supreme Court and its ruling on the scope for devolved Scottish authorities to call their own referendum on leaving the Union. Legal questions also underpin the ongoing debate about not just Northern Ireland's relationship with the EU but also the entire UK's European dealings.

This should not be surprising. As this report shows, Britain is a nation-state where the rule of law is essential not just to our institutional framework but to our cultural one too. Notwithstanding some highly regrettable moments in the turbulent years after the 2016 EU referendum, this remains a country where it is largely and rightly accepted that in some cases it is not just necessary but desirable for difficult and contested decisions to be taken by a legal system operating wholly independently to uphold the law without fear or favour. Notions of fair play and following the rules are not just embedded in our institutions – they are the cornerstones of our ideas about ourselves and our country.

And of the ideas of others, too. As Richard Hyde shows, the conception of Britain as a country dedicated to the rule of law is a vital part of our standing in international affairs. This is not just central to what we are and how we see ourselves, it is crucial to how others see us too.

That is a great strength, and one that we should reinforce. That means intellectual endeavour – to define the rule of law, and better teach our children about its importance – but also institutional work to ensure the vibrancy and relevance of the law.

This is the gloomy part of what should be a wholly positive story. It is a sad but unavoidable fact that the current condition of the institutions that embody and uphold the rule of law makes it increasingly difficult for Britain to present itself, to both the world and its own people, as utterly dedicated to that tradition of law. Would a country that truly valued the law allow its courts to fall into disrepair?

Such a question is unavoidable, and corrosive. It threatens to undermine those precious ideas of Britain and Britishness. It must be answered, firmly and soon. Doing so will not be easy, but we hope that this report will make a positive contribution to the work.

James Kirkup, Director of Social Market Foundation

EXECUTIVE SUMMARY

Overview

The rule of law has a part to play in defining and reinforcing Britishness, an especially important task for a country facing questions about its role in the world and internal challenges in the form of Scottish nationalism.

A UK-wide understanding of the rule of law might be able to play a role in boosting the UK's "institutional cohesion" and subsequently help make the rule of law a more prominent factor in British identity.

The rule of law is also important to Britain's international standing. The UK's public institutions and therefore the country are trusted by majorities of people in many countries. However, this trust could be under threat.

There is a risk that problems such as the poor state of the civil and criminal courts in England and Wales (the UK's dominant legal system) is eroding the rule of law. In turn, if the perceptions of those in other countries catch up with the domestic reality, the UK's "soft power" will decline and the UK's international influence will decrease.

Both challenges are interconnected because some of the solutions to both are the same. For example, improving the quality of the civil and criminal court systems in England and Wales will:

- Make the rule of law more tangible for the UK's citizenry and help bolster its importance.
- Enable more people to see that it is an area of "cultural overlap" among the peoples of England, Wales, Scotland and Northern Ireland.
- Reduce the risk of the UK losing its international reputation as a strong adherent to the rule of law.

Polling

Existing polling from Opinium, highlighted in this report, shows that national identity in the UK is divided and complex. 21% described themselves as "more British" than any other identity. 46% said they were equally British and English/Scottish/Welsh/Irish. And 37% said their English/Scottish/Welsh/Irish identity comes before their Britishness.

In Scotland, 57% said they are "more Scottish than British". 26% put the two identities as equals. And 19% feel "more British". For Wales, it is 40% "more Welsh", 32% equal and 28% "more British".

Around two-thirds (67%) of British citizens say that they are "proud" to be British. This is broadly similar to the proportion of British citizens whom reported that their Brtishness had primacy over their Englishness, Welshness, Scottishness or Irishness, or considered themselves to be equally British and English, Welsh, Scottish or Irish.

In a survey specifically commissioned for this report, when asked about important components of Britishness, most people (62%) cited the NHS, followed by the English language (43%) and the Monarchy (42%). The law and the legal system(s) were only cited by 16% of respondents.

However, for the British, the salience of the rule of law is greater than it first appears. When asked more directly about the rule of law, polling specifically commissioned for this report – also from Opinium – showed that 83% of British citizens agreed that the rule of law is "essential" for a free and democratic society, while 74% agreed that it is "essential" for a successful economy. Britons also want the rule of law to be part of their country's international standing, with 67% saying that they do care that the UK is seen as a country, by others, that adheres to the rule of law.

Definitions

If the rule of law is to play a role in strengthening the UK's "institutional cohesion" and in turn Britishness, there needs to be some degree of agreement over what constitutes the rule of law. This is a contested concept within the common law family as well as across different legal traditions and has been hotly debated by politicians, lawyers and scholars for centuries.

However, to most of the population, the rule of law is a more practical matter and its prominence in people's minds will be determined by the extent to which they consider the law and the legal system to positively affect their day-to-day lives and local communities. For the rule of law to become a uniting factor for British citizens, the UK's legal systems need to perform much better. However, the barriers standing in the way of the kinds of significant improvements that are needed to make the civil and criminal courts world-beating and in turn bolster the rule of law across the UK, are substantial. Vision, able leadership, and competent management will be needed to deliver such change.

There was broad support at our expert roundtable for trying to make the rule of law a uniting principle for the country. As a state of multiple ("nested") identities and legal systems, finding an acceptable understanding that most people can coalesce around is a significant challenge. The work of A V Dicey and his "thin" definition of the rule of law were cited as a good starting point by the expert participants in our roundtable.

Risks

Some of the central tenets of the rule of law are at risk in the UK. In our poll, just 51% considered that the law in the UK is enforced equally across all individuals and classes. Further, the same proportion agreed that the law is effective at delivering on its objectives. Both figures indicate significant amounts of scepticism about the law and legal systems of the UK.

This lack of confidence likely reflects the practical failings in, for example, the civil and criminal court systems of England and Wales, as we set out in earlier reports in this series: "*Law and the Open Economy*" and "*Future-proofing Justice*".

"Soft Power"

The UK has considerable "soft power" in global affairs. It is regularly found in the top 5 of global "soft power" indices. International polling for the British Council supports the contention that the UK's public institutions such as its legal system are important contributing factors to the UK's stock of "soft power" assets, and in turn the UK being seen as a "highly trusted" country, by people in other G20 countries.

One of the main risks to the UK's "soft power" is the decline in the quality of the UK's dominant (English and Welsh) legal system. International survey evidence from the World Justice Project for example, shows that the UK is not ranked in the top 10 in any of four categories measuring perceptions of a nation's commitment to the rule of law.

As the failings of the civil and criminal court systems become more evident the "national narrative", built upon factors such as the UK's reputation as a country that adheres to the rule of law, will inevitably change. Reality cannot diverge from "narrative" forever. Once a change has occurred, it will be difficult to revert back by rebuilding that part of the UK's stock of "soft power" associated with fealty to the rule of law. Policymakers therefore need to prioritise nurturing the rule of law and its underpinning elements.

Recommendations

- Develop a UK-wide understanding of the rule of law that all of the nations of the UK can coalesce around. The key tenets of this mutual accord over the rule of law should be: access, clarity, equality, fidelity and security.
- Reinvigorate citizenship teaching in all British schools – lessons should impart a clear understanding of the rule of law, its long history in this country and the legal traditions of the three legal systems of the UK.
- Reduce the "civil justice gap" in England and Wales by improving access to the civil courts for individuals, families and businesses through making them world leading by 2030.
- Transform the efficacy and efficiency of the criminal courts in England and Wales, such that they become world-leading by 2030.

CHAPTER ONE – INTRODUCTION

This report examines whether and how the rule of law might play a more prominent role in bolstering:

- British identity.
- The UK's reputation abroad and in turn its international influence.

Rule of law: can it help boost British national identity?

National identity is crucial for a functioning modern society. Countries with a robust national identity gain many benefits from it. National identity is sustained in two ways:

- "Institutional cohesion" i.e. support for and identification with a country's public institutions such as its political and legal structures as well as other public entities and their associated cultures.
- "Associational cohesion", i.e. the shared history, culture, language and day-to-day customs and rituals associated with the lives of the people in a particular country.

Britishness is a complex identity because the UK is a country of "nested nationalities". Consequently, British national identity is stronger in some parts of the UK than others. Further, where it is weakest there are significant obstacles to increasing national identity sustaining factors such as UK-wide "institutional cohesion".

The issue of the rule of law in Britain reflects the complicated nature of the UK. The UK contains three separate legal systems: England and Wales, Scotland, and Northern Ireland. This legal patchwork of different jurisdictions and legal histories and cultures makes identifying a consensus across the whole of the UK over what the rule of law might mean difficult indeed. Further, most people see the rule of law as largely a practical matter. More specifically, the British public see the law as a tool that sets the "rules of the game" for society and for delivering practical benefits to both individuals and society, such as security and access to redress. Therefore, any mutual understanding of the rule of law will only be reached if it embodies effective and efficient civil and criminal courts systems. There is considerable evidence that, for example, the English and Welsh courts (the UK's dominant legal system) do not provide these kinds of benefits for as many people as they should. Further, any that are delivered, and which might reinforce the principle of the rule of law in people's minds, would come through the justice systems of the three constituent jurisdictions. As a result, any fundamental commonalities at play between the three legal systems, which could help generate UK-wide "institutional cohesion" among the peoples of England, Wales, Scotland and Northern Ireland, may be obscured.

Despite the seemingly inhospitable conditions for increased "institutional cohesion" at the UK level, this report will argue that, while there are many complications to negotiate, there could be a route for the rule of law to become a more uniting factor because:

- Adherence to the principle of the rule of law - manifest (albeit very imperfectly) through long-established legal systems across the constituent nations of the UK - is evidence of "cultural overlap" between the peoples of the UK.
- Fealty to the principle of the rule of law and the existence of three well developed systems of law within the UK has been and remains to the mutual economic advantage of the constituent nations of the UK.

From these insights, this report contends that it is possible to identify an understanding of the rule of law that most people could coalesce around and which, therefore, could help boost UK-wide "institutional cohesion". This increased "cohesion" would then be expected to feed through into a stronger sense of Britishness among the citizens of the UK.

British "soft power": is there a role for the rule of law?

The geopolitical plates of the world are shifting. China is on the rise and political tensions abound in Asia and across the globe.[1] In Europe a belligerent Russia has invaded Ukraine and threatens others.[2] The flux in international relations will no doubt see new alliances formed and existing ones reinvigorated or dissolved. Closely interconnected with political developments are economic ones. Post-pandemic, the structures and patterns of international economic activity are changing. For example, global value-chains are re-trenching and new ones are being generated.[3] [4] Further, the long march of technology continues to disrupt economies and societies. It is in such a context, that the recently independent UK is forging a new post-EU foreign policy and looking for ways to project its influence over international affairs.[5] [6]

A key aspect of the UK's foreign policy armoury is its stock of "soft power", which is likely to be an important tool in the UK's efforts to project power and pursue its interests in the international arena. Not least because the UK is a world leader in "soft power", with the UK found regularly in the top 5 of global "soft power" indices.

An element of the UK's "soft power" is a perception (held by many people in other countries) of the UK as a country that adheres to the rule of law and values the liberty of individuals. These perceptions help contribute to the UK's public institutions (and in turn the country) being seen as "trusted" by majorities of the people in many countries.

However, this "trust" could be under threat as the reality is that the UK's adherence to the rule of law is often more theoretical than practical. For example, the rule of law for many Britons is a practical matter. It is meaningful to the extent that the law sets out fair and enforced "rules of the game" and delivers benefits for individuals and society, such as security and access to redress when necessary. However, there is a substantial risk that problems such as the poor state of the civil and criminal courts in England and Wales (the UK's dominant legal system) have already eroded for many in Britain a sense that the UK is a country where there is the rule of law. Further, if the problems continue any remaining semblance of the rule of law being important and beneficial may disappear altogether. If the perceptions of those in other countries catch up with the domestic reality, the UK's "soft power" will likely take "a hit", which

will in turn, be detrimental to the UK's ability to influence the international arena and achieve its foreign policy goals.

This report explores the risks to UK "soft power" because of domestic negligence of the UK's main legal system (that of England and Wales) and its ability to deliver for citizens and the consequent likelihood that, in time, international opinion will catch up with the domestic situation.

Specifically, this report suggests that part of the solution to the threat to the UK's "soft power" as a result of the UK losing its international reputation as a county that adheres to the rule of law is also likely to help with the question as to whether the rule of law can ultimately play a role in enhancing a sense of Britishness. Those mutually beneficial answers are to:

- Identify an understanding of the rule of law that can garner widespread acceptance across the whole of the UK.
- Improve the quality of the civil and criminal court systems in England and Wales and modernise the corpus of English law where it is falling behind commercial and technological trends, so that it can be maximally useful for UK businesses and continue to play the role of an "international public good" for global commerce.
- Improve legal education in schools across the UK.

CHAPTER TWO – NATIONAL IDENTITY AND THE RULE OF LAW

National identity in Britain

Defining national identity

National identity is typically linked to a national state. In most instances, the national identity of someone will be that of the country they are a citizen of. This is because the nation state, national identity and citizenship are factors that:[7]

> *"…support and underpin each other…they go hand in hand, and provide the basis for…the inhabitants of a state – to identify as being, or, belonging to a state"*

Citizenship is connected explicitly to the political, legal and other public arrangements of a society and the associated "public culture".[8] [9] The aspect of societal cohesion that derives from the contribution of such public-institutional factors is sometimes described as "institutional cohesion".[10] That cohesion, in turn, is one contributing factor to national identity.

Many scholars of the subject observe that national identities also encompass psychological, historical and cultural elements. These factors are seen as helping generate "associational cohesion".[11] More specifically, the latter emerges from factors such as shared beliefs, a sense of belonging, language, proximity, customs (e.g. the patterns and interactions of everyday life) and rituals.[12] [13]

Further, "pinning down" a clear understanding and setting out a succinct articulation of national identity can be challenging, not least because most people do not have their national identity at the forefront of their minds on a daily basis.[14] It typically asserts itself when there is some national or international moment of import.[15] Otherwise, the evidence suggests that national identity tends to remain in the background.[16] In-part, this is because the elements that help constitute an individual's national identity are pervasive and consequently mundane and taken for granted.[17]

The benefits of national identities

National identities and the national states that they sustain are seen by many as essential to delivering a number of important benefits for humanity. These benefits include:[18] [19] [20]

- Providing a clear and robust platform for political debate, disagreement and action.
- Building trust and solidarity across time and space and therefore a reciprocal willingness to engage in and accept the results of collective decisions and endeavours, even where the interests of some lose out to others.
- Offering a comparatively secure and enduring canvas upon which public institutions and practices and private habits and relationships can be built and maintained.
- Sustaining bonds of mutual responsibility, whether they be for social, economic or security ends.

- Forming a stable foundation for coherent international engagement between polities.

It has been suggested that national identity has been particularly well-suited to the emergence and nurturing of modernity, because it:[21]

> *"…provide[s] the sole basis for…such social cohesion and political action as modern societies, with their often heterogenous social and ethnic composition and varied aims, can muster" .*

Others, such as academic Dani Rodrik, have highlighted how the nation-state (and by implication the national identities that they are intimately bound up with) has been closely associated with:[22]

> *"…economic, social and political progress. It curbed internecine violence, expanded networks of solidarity…spurred mass markets and industrialisation, enabled the mobilisation of human and financial resources, and fostered the spread of representative institutions".*

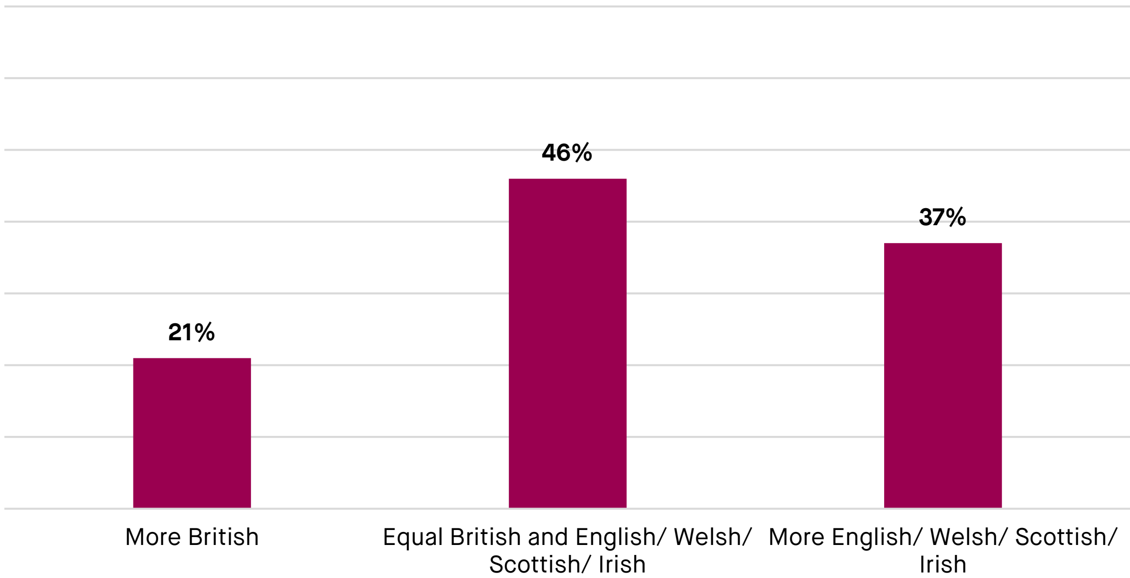
Analysis looking at the UK specifically has indicated that nation-states – such as Britain – are the primary focus for activities such as resource redistribution and the starting point for debates and judgments about issues such as political, legal and social equality.[23]

The complexities of British national identity

National identity in the UK is a complex phenomenon because it is a country which contains pre-existing nations. It is a state with what academics call "nested identities" i.e. where more than one territorial-based community exists within a single polity. In such circumstances, the identities of the members of those communities can often be "split".[24] The rise of separatist politics in constituent countries of the UK, such as Scotland[25] has made the situation even more complex.

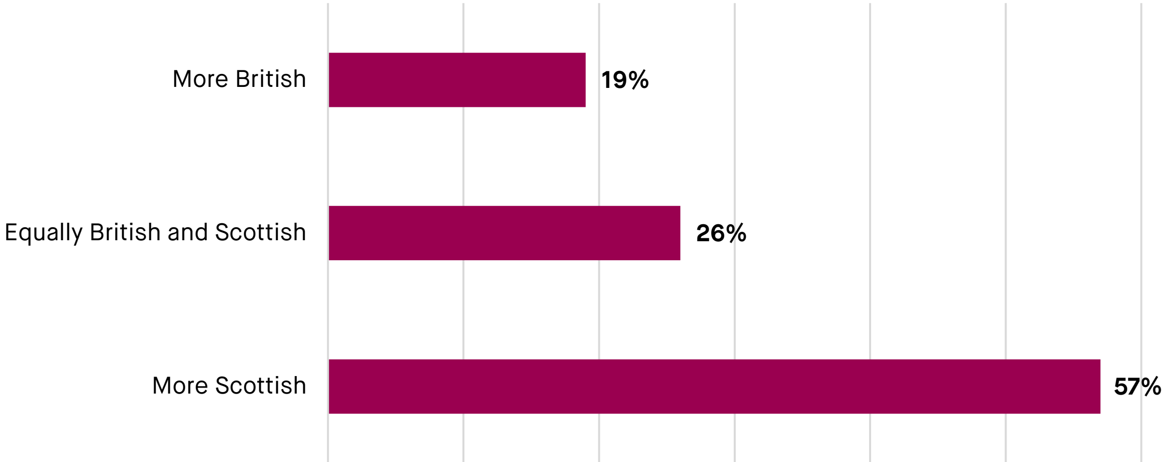
It is perhaps unsurprising then that, as Figures 1, 2 and 3 show, the strength of British national identity is variable. Self-identification with Britishness differs notably, between the component nations of the UK.

Figure 1: strength of British identity among British citizens



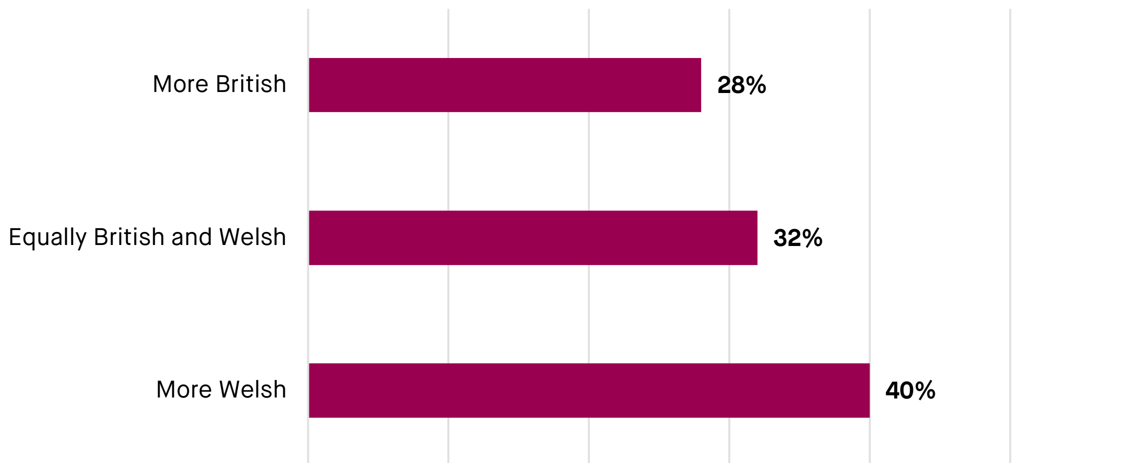
Sources: Opinium (2020)

Figure 2: strength of British and Scottish identity in Scotland



Sources: Opinium (2020)

Figure 3: strength of British and Welsh identity in Wales



Sources: Opinium (2020)

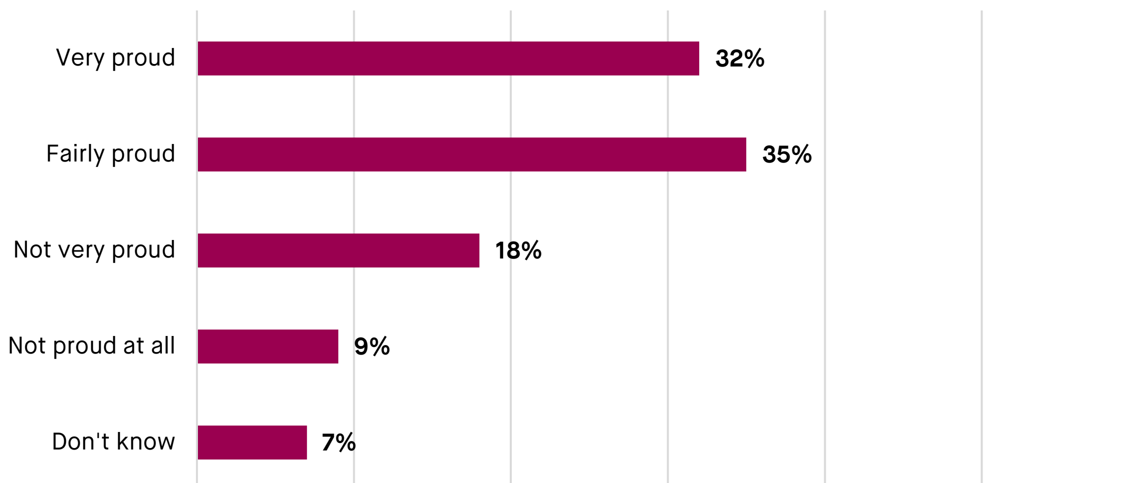
Figures 2 and 3 show that, in Scotland, there is a majority that place primacy on their Scottishness over their Britishness, while in Wales four in ten say they are Welsh first and have a weak British identity.

Among the English, Opinium's data suggests that just under one in five considered themselves more British than English and a further 46% agreed that their English and British identity has equal prominence. Around a third said that they have a primarily English identity.[26]

Pride in Britishness

Figure 4 shows that around two-thirds (67%) of British citizens say they are – to some degree – "proud" to be British. This aligns broadly, with the proportion of Britons that reported their Brutishness had primacy over their Englishness, Welshness, Scottishness or Irishness, or considered themselves to be equally British and English, Welsh, Scottish or Irish (Figure 1).

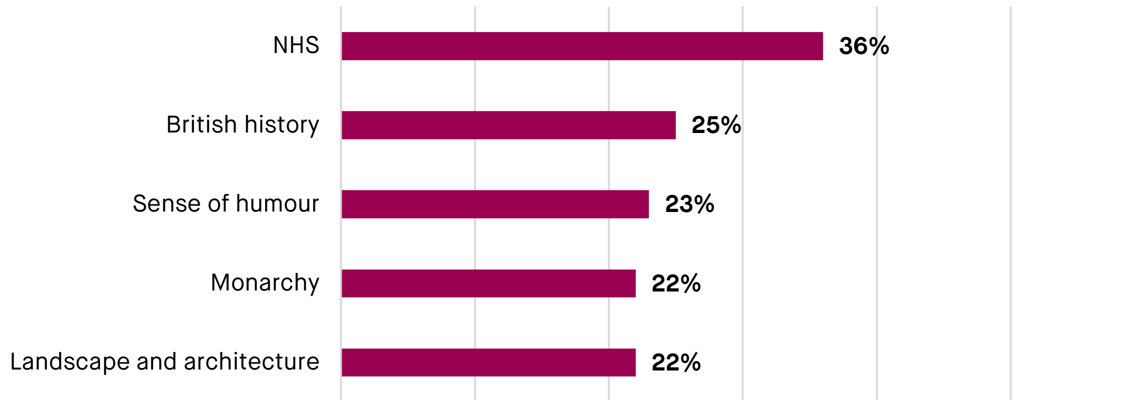
Figure 4: Extent to which citizens of the UK are proud to be British



Source: YouGov, 2020

The survey findings set out in Figure 5 highlight those elements of national life that British people report they're most proud of.

Figure 5: top five aspects of national life that British people are proud of

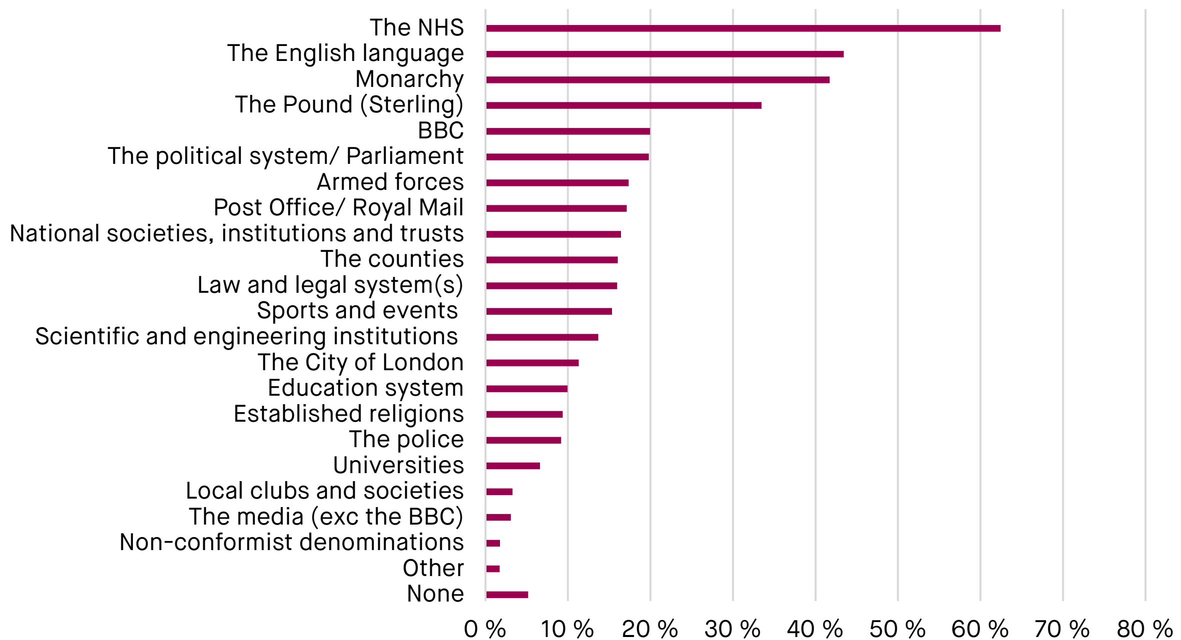


Source: Opinium, 2016

Institutional manifestations of British identity

When a representative sample of UK citizens were asked about how important to defining Britishness specific national and local institutions are, as Figure 6 illustrates, the NHS was the most popular answer (62%). This was followed by the English language (43%), the Monarchy (42%) and the currency (33%). As Figure 6 further illustrates, below the top four institutional manifestations of Britishness, was a long tail of British institutions including the BBC (20%), the political system and Parliament (20%) and the armed forces (17%), among others.

Figure 6: Institutions that are important in helping UK citizens define what being British means



Source: Opinium (2021)

It is notable that the law and the legal system(s) of the UK were cited by around 1 in 6 (16%) respondents. This suggests the rule of law (which the legal systems – in principle – embody and maintain) is not an institution at the forefront of the vast majority of UK citizens' minds when considering their national identity and how they understand it and define it in institutional forms.

Boosting British national identity in a country of "nested identities"

On the face of it, the main implication of the survey results presented in Figure 6 is that the law and the associated legal systems play a marginal role at best, in defining Britishness for most people, at least when the latter is thought about in institutional terms.

The scope for the rule of law to play a prominent role in revivifying British identity is further hindered by the large proportion of people in nations such as Scotland and Wales that have a weak sense of Britishness. [27]

However, scholars have identified ways in which an overarching national identity such as Britishness can be boosted, despite the challenges of a fragmented country with strong and distinct sub-identities, devolved government, pre-existing cultures that have emerged from long historical trajectories and separate legal jurisdictions and traditions among other "dividing" factors.

Box 1: how to sustain an overarching national identity in a country of "nested nations"

Scholars have suggested that there are ways that an overarching identity such as Britishness can be reinforced, even in the more challenging circumstances of a country consisting of "nested identities". In such countries, it has been observed that, the:[28]

> *"…recipe for successful nested nations involves more than political integration plus cultural difference…".*

That "recipe" for success has at least three key ingredients. They are:[29]

- *Cultural overlap* between the constituent nations. This does not mean there is an identical culture across England, Wales, Scotland and Northern Ireland for example, but it describes an acknowledgment of and emphasis on, the existence of significant "cultural convergence", such that people in each nation can "…*readily understand the other, there is a good deal of mutual borrowing, individuals can relocate themselves fairly readily from one to the other*…".[30]
- *Mutual economic advantage* between the four nations of the UK. The economic development of the UK, through the removal of internal impediments to commerce (as the 1707 Act of Union recognised) has helped foster a UK-wide internal market, that creates considerable economic value for England, Scotland, Wales and Northern Ireland. The UK's economic integration (i.e. interdependency) has been further reflected in the UK's recent Internal Market Act.[31]
- *Interwoven history*, between the relevant nations that has been frequent, extensive and seen intensive collaboration between the people from the constituent parts, which has "steered actions" and "influenced events" of local, regional, national and international importance, thus contributing to the historical trajectory of England, Scotland, Wales and Northern Ireland.

Others have suggested that the UK should emphasise the idea of a "British Dream", as a uniting factor.[32] This has been described by advocates as a society that:

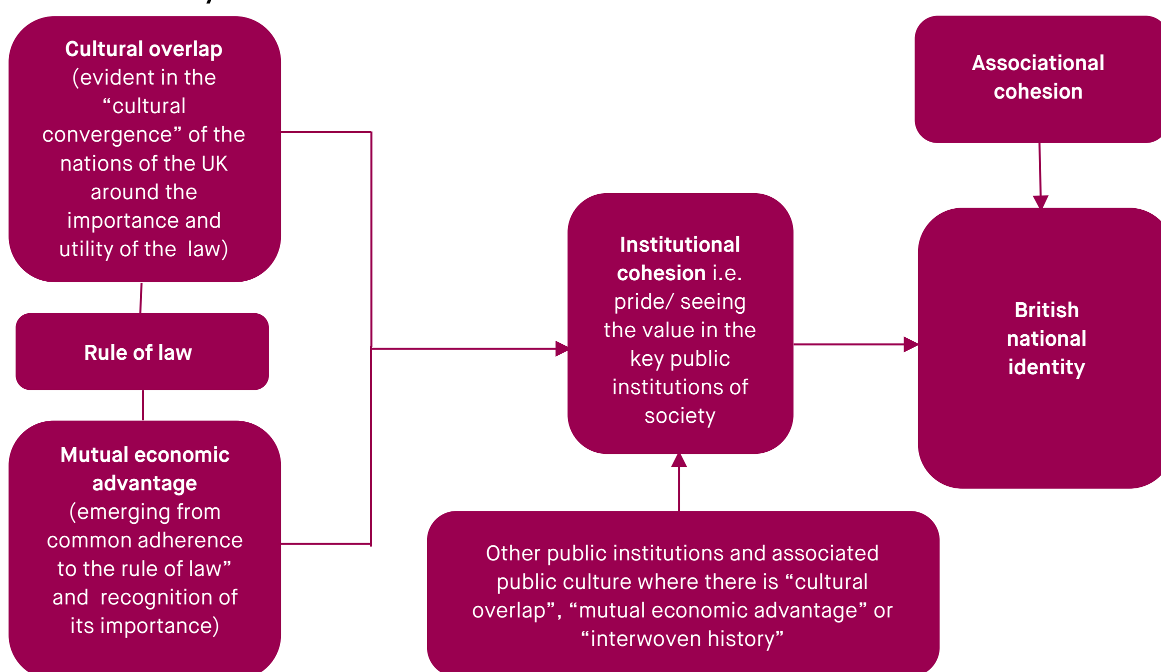
- People can feel proud to belong to.
- Institutionally and communally citizens strive to reflect the best of the country's history and achievements.
- It offers the opportunity of a good life to all,[33] with material progress a key component of that "good life".[34]

If the rule of law can be seen as an example of "cultural overlap", a source of "mutual economic advantage" or it can be demonstrated that it is a salient factor in the "interwoven history" of the peoples of the UK, then there is an opportunity for it to play a role in increasing "institutional cohesion" at the UK level and in turn boosting Britishness.

CHAPTER THREE – IDENTIFYING POSSIBLE CONNECTIONS BETWEEN THE RULE OF LAW AND A BRITISH NATIONAL IDENTITY

The schema outlined in Box 1 shows the mechanisms by which a country of "nested identities" such as the UK, might foster a stronger overarching unity. Further, if the rule of law can fulfil the role of being an example of "cultural overlap" or providing "mutual economic advantage", then it could contribute to increasing levels of UK-wide "institutional cohesion" (one of the two key components that sustains a national identity, along with "associational cohesion") and therefore have, over time, a positive (indirect) influence on strengthening Britishness. Diagram 1 shows the process by which the rule of law could contribute to bolstering British identity.

Diagram 1: the process by which the rule of law could contribute more to bolstering British national identity



The rule of law as an example of "cultural overlap"

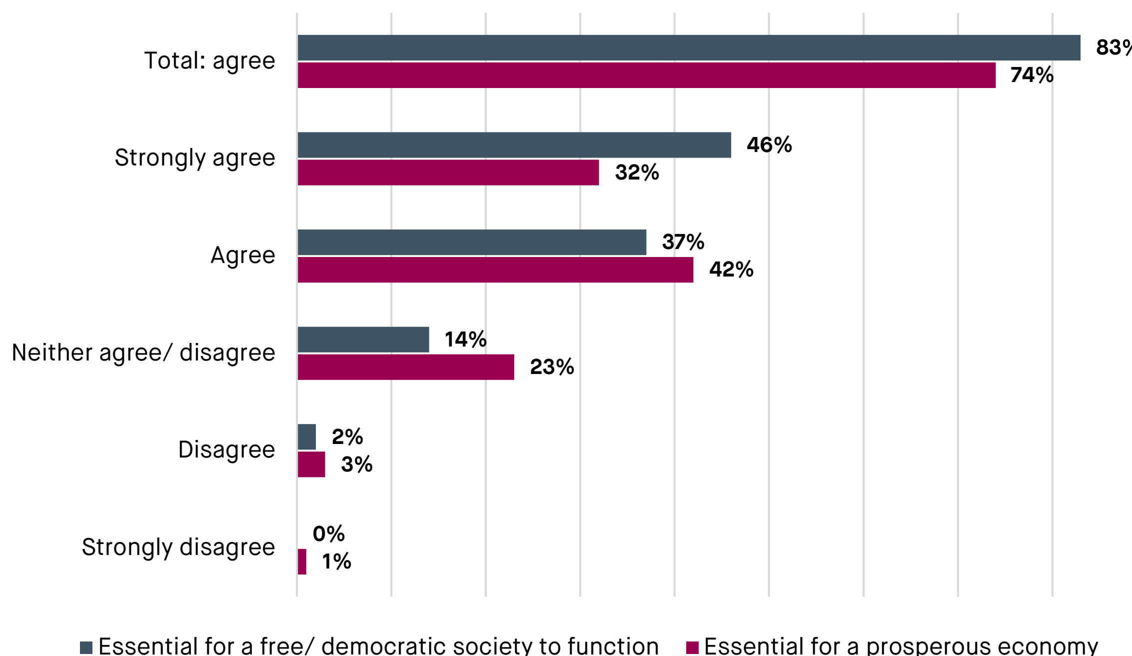
Evidence of high levels of public agreement that the rule of law is fundamental to British society

The lack of salience of the law and legal systems for many UK citizens, when thinking about what institutions are important in defining Britishness (see Figures 5 and 6), must be acknowledged by those thinking about whether the rule of law could be a more prominent contributor to British national identity. Nevertheless, as Figure 7 indicates, when UK citizens are asked specifically asked about the topic, there is substantial recognition of its importance.[i]

[i] For more detail on how specific and long-standing aspects of the English and Welsh (common law) legal system are seen as important to Britishness by citizens in England and Wales, see Annex Three.

Figure 7 shows that 83% of British citizens agreed that the rule of law is "essential" for a free and democratic society, while, 74% agreed that it is "essential" for a successful economy.

Figure 7: Importance of the rule of law to a democratic UK and a prosperous economy



Source: Opinium, 2021

The rule of law is an example of "cultural overlap"

The respective legal systems of the constituent nations of the UK have evolved from medieval beginnings to the sophisticated legal systems that matured during the industrial era.[ii] Further, the recognition, by the vast majority of UK citizens, of the importance of the rule of law to a free and democratic society (see Figure 7) is illustrative of "cultural overlap" over the principle of the rule of law between England and Wales, Scotland, and Northern Ireland. As pointed out in Box 1, "cultural overlap" is one of the routes through which a country of "nested identities" can retain and sustain an overarching national identity.

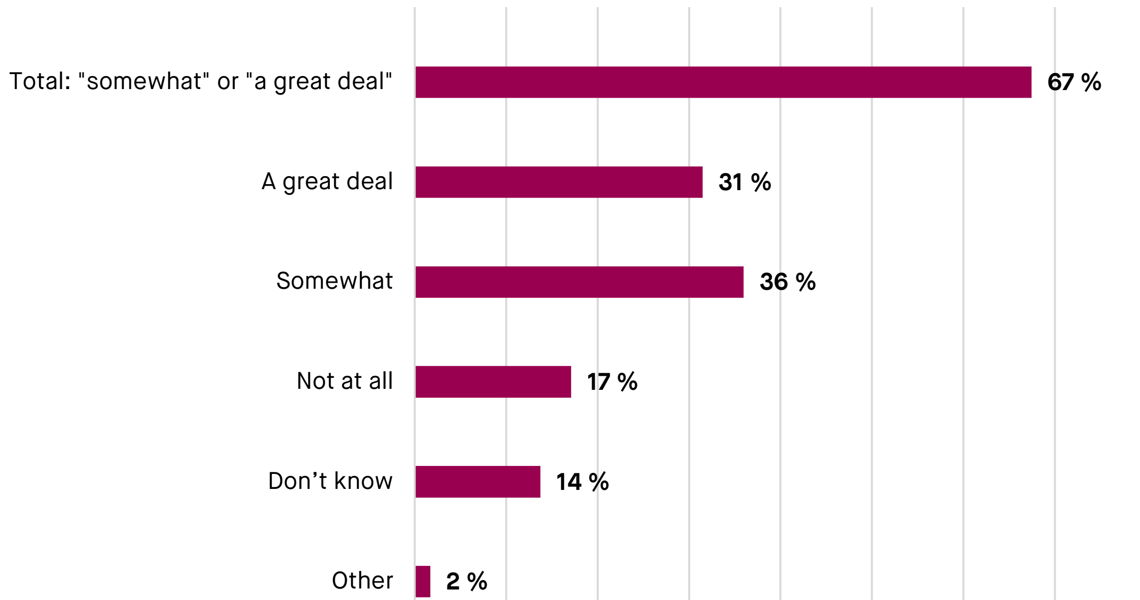
Further evidence that the rule of law could be a point of "cultural overlap"

In addition to the data revealed in Figure 7, there is a wider body of evidence which reinforces the argument that the rule of law and can and should be seen as an area of "cultural overlap" across the UK.

Figure 8, for example, points toward a significant proportion of UK citizens, when asked, caring if people in other countries do not see the UK as a place where the rule of law is a central organising principle of British society.

[ii] It should be noted that the foundations of the distinct English and Welsh and Scottish systems for example pre-date the emergence of the United Kingdom and so both systems remain distinct. For more on this, see Annex Two.

Figure 8: The extent to which British people care if rule of law was not considered a central organising principle of British society by people in other countries



Source: Opinium (2021)

As Figure 8 shows, when highlighted specifically – and the spectre of the external reputation of the UK for being a country based upon the rule of law is questioned – UK citizens demonstrate (67%) that they do care that the UK is a country seen as a county that adheres to the rule of law.

Older evidence highlighted by Dame Louise Casey in her 2016 report into social cohesion, also identified an existing stock of survey evidence that demonstrated that the law and adherence to it are vital components of community life in the UK and being a British citizen. Casey highlighted the consistency of findings about the importance of the law to membership of society and its cohesion:[35]

> *"Respect for the law has featured as a popular attribute in a variety of surveys on values and Britishness, including a 2015 ComRes poll in which it was ranked second for 'most important' British values; the 2014 British Social Attitudes Survey in which 85% thought it was an important attribute for being 'truly British'; an ICM poll in 2014 with 69% identifying it as a British value; and the 2008 Citizenship Survey, in which it was the most commonly chosen value (by 57% of respondents)".*

Casey's overview of the "state of the survey evidence", provides further evidence of the contention that the rule of law is an example of "cultural overlap" across the nations of the UK.

More recent survey data from the Law Society further reinforces the importance of the rule of law to the people of all of the nations of the UK. Polling commissioned by the Law Society and reported by its President, found that:[36]

> *"…94%…[of the public]…agreed that 'it is important for the UK to be seen as a country which upholds the law'".*

The rule of law as a source of "mutual economic advantage" for the UK

The rule of law's contribution to "mutual economic advantage"

The evidence from Figure 7 also indicates that the bulk of British people recognise the importance of the rule of law to the UK's prosperity ("mutual economic advantage"). Box 2 highlights how the rule of law makes an essential contribution to prosperity and consequently demonstrates why the rule of law (developed and upheld by the various legal systems of the UK) might be considered a common asset which has resulted in the "mutual economic advantage" that has accrued to the peoples of the UK over centuries.

Box 2: the centrality of the rule of law to prosperity

The rule of law is indispensable to a successful economy. Recent scholarship has identified the central role those legal institutions, and by extension the presence of the rule of law, play in long-run economic development outcomes. More specifically, the protection of private property and the preservation of incentives through a functioning legal framework are linked strongly with wealth creation, over the long-term.[37] [38] [39] [40]

Vital to the strength of the rule of law in a particular country is the quality of the legal institutions. Quality is linked to the levels of investment and innovation[41] that prevail in countries, which determine the rate of long-run per capita growth.[42]

In the UK, economists and legal scholars have suggested that the English common law and wider legal system (the UK's dominant legal system) has proven to be especially beneficial for facilitating commercial activity.[43] Baron Neuberger of Abbotsbury the former President of the Supreme Court of the UK, noted in an address in 2016, that:[44]

> *"The strength of the common law, attributable to its flexibility and practicality, is apparent from its popularity in choice of law clauses in international trade and financial agreements across the globe. A disproportionate number of international contracts choose common law, most frequently English law, as the law governing the parties' relationship, both procedurally and substantively. And they frequently select a common law jurisdiction, as their arbitration forum".*

Further, Baron Neuberger foresaw that the common law system is likely to be particularly advantageous in times of significant economic change, which many argue the 21st century is already proving to be:[45]

> *"The fact that the common law is flexibly developed by judges through real cases, rather than by reference to some academically constructed set of rules, is a particular strength in the 21st century…it is one of the great virtues of the common law that it can adapt itself to practical and commercial realities, which is particularly important in a world which is fast changing…".*

Sources: SMF (2021) and Neuberger (2016)

The importance of the rule of law to long-run economic prosperity (”mutual economic advantage”) implies that there could be more explicit emphasis on the inextricable link between the role of the law in the UK over decades and centuries and the country’s economic success across that same time period.

As with “cultural overlap” around the rule of law, such a focus could contribute to boosting “institutional cohesion” across the UK and, over time, help to further bolster the sense of Britishness within the UK’s constituent nations.

CHAPTER FOUR – SCOPE FOR A SINGLE UK-WIDE UNDERSTANDING OF THE RULE OF LAW

The complexity of the UK's "identity landscape" is mirrored in its constitutional arrangements, including its multiple legal systems.[iii] This complexity implies that any attempt to define the rule of law through the imposition, by the UK Parliament, of a detailed UK-wide definition is unlikely to work. Indeed, such an approach would be just as likely to be counterproductive.

Any successful attempt at identifying and achieving buy-in, to a UK-wide understanding of the rule of law would most likely have to take the form of in principle agreement which agreed that the rule of law is a "fundamental value" to all of the nations of the UK and therefore adherence to it should become a mutual commitment that is recognised at the UK-level.

Such a commitment would be best embodied in a short set of common tenets. However, these would ultimately only be meaningful to the extent that they manifest themselves in the efficacy and efficiency of the three legal systems of the UK and the beneficial outcomes they deliver for the citizens of the UK's constituent nations.

The difficulty in defining the rule of law

If the rule of law is to play a role in strengthening the UK's "institutional cohesion" and in turn Britishness, there is a need for some degree of agreement over what constitutes the rule of law. However, this topic has proven contentious within the common law legal tradition (see Table 5 in Annex 1). Not only has there been an on-going debate over the principle, but the domestic legal landscape has changed significantly since the end of the second world war, as a contributor to the expert roundtable convened by the SMF to inform this report highlighted:

> *"…back in the early 50s, when famously British lawyers were drafting European Convention on Human Rights…very few people writing about the English Constitution or the…British constitution in the early 50s, would have thought that we needed high level principles in our law, quite the opposite. It was the doctrine and practice of parliamentary sovereignty, the evolution of common law, which together with the very fundamental nature of the people of this country, themselves protected our liberties. And if you had any doubt about that, you only had to look at the fact that we've been on the right side of*

[iii] While the UK's exit from the EU has simplified the UK's constitutional arrangements somewhat, they nevertheless remain complicated. For example, Parliament is sovereign post Brexit, but recent decades has seen the development of an extensive system of administrative law (e.g. judicial review), the increasing prominence of international legal instruments such as the European Convention on Human Rights (ECHR) and the Northern Ireland Protocol (embedded in the UK – EU Trade and Cooperation Agreement, and the emergence of a doctrine of "constitutional statutes" in recent decades. Further, the constitutional position is complicated by the constraints of what is often described as "political possibility" and the reliance on conventions in many areas. In addition, the establishment and growth of devolution to Scotland, Wales and Northern Ireland (and more recently to part of England as well) as well as the long-standing existence of Scottish and Northern Irish legal jurisdictions and traditions, have multiplied the complexity. Together, this confluence of factors ensure the UK will continue to have a complex constitutional landscape.

> *the Second World War, and we've stood up to tyranny…the Constitution legally seem[ed] to work".*

The expert participant added that:

> *"…We now live in a world in which we have got these high-level principles introduced into our law…which is a common law system. But a popular understanding…amongst some politicians, of the Dicey-an tradition, [is that]…didn't do things like that. And then if you add to that, questions like the…expansion - without getting the into the merits of it - of administrative law…".*

Another participant made the point that the understanding of the rule of law is likely to vary (possibly quite dramatically) between different interest groups, classes and cohorts in society and that, as a result, there was unlikely to be much consensus over a single definition:

> *"…That's one type of…people: highly informed elite lawyers…if they are the man and the woman at the Dog and Duck, that's an entirely different thing. If they're…undergraduate students…that's a different thing again, so the other people matter…".*

In addition to the sociological challenges highlighted by roundtable attendees the UK contains multiple legal jurisdictions which need to be taken account of, as has been noted earlier in this report. Consequently, trying to find a degree of agreement over a mutually acceptable understanding of the rule of law across the various social cleavages described and the three legal jurisdictions and traditions of the UK, which can also accommodate the other "moving parts" of the UK constitutional settlement (see footnote IV), is going to prove an exceptionally challenging exercise.

For most people the rule of law is a practical matter

The complexities of trying to "land" upon an understanding of the rule of law that could be acceptable to the whole of the UK and act as a uniting force, do not stop at the legal and sociological. For example, it has already been highlighted that the rule of law can be important to the people of the UK for reputational reasons and, more practically, as the "hidden wiring" that enables the functioning of society i.e. the law sets the "rules of the game" for everyone to follow. The debate at the roundtable unpacked the more practical aspects to the rule of law and their importance further. It was argued by one participant that, in contrast to the scholarly and (legal) professional debates on the practical implications of having – or not having - the rule of law are what matter. They stated that:

> *"…the rule of law to a lot of people…It's being protected from harm…Therefore, rule of law means more police on the streets, tougher sentencing…protecting people from harm…for a lot of people…the rule of law is not necessarily what lawyers would regard as the whole of the rule of law…"*

The same contributor went on to add that:

> *"…if you're going to actually get the public to engage with the importance of the rule of law [you've] got to deal with issues which are important to them. That means certainly the protective side…it…means when they have a problem when their marriage breaks down, when somebody rips them off, if they're a small business…[or]…they've got a consumer complaint…if they've got a problem with their housing costs, and landlords are doing nothing about it".*

They finished by suggesting that, in order for the rule of law to be meaningful for the average citizen then the legal system needed to deliver solutions to individual and societal problems:

> *"…why is it taking x number of weeks for my claim ever to get a hearing in the county court? Very, very, very basic…Why is it…really hard for them…to access the means of redress, that's supposed to be there for them? If you can't get a legal aid lawyer to resolve a housing issue…in a 20 mile radius, if it takes you miles to get to a court to have a hearing…[or]…didn't see any coppers around…[or]…the local Magistrates Court has gone…[or]…Maybe there's someone who's committed an offense that they don't think got punished the way they think they should have done…".*

Another attendee concurred with these observations. They noted that, in research that they had been involved with, discussions of the law among the public were grounded in the day-to-day experiences of people:

> *"People were talking about how they found it very helpful to have consumer rights and the role of ombudsman came up very often in their sort of discussions about why rules are important".*

These insights are aligned with polling evidence reported by the Law Society, which found that:[46]

> *"…our research…revealed…Rather than seeing it as a matter of high principle the public very clearly sees the law in terms of 'the rules of the game'".*

The discussion at the roundtable that focussed upon the insight that rule of law is necessarily practical for most people and not about abstract principles, provides further insight for politicians and policymakers as to how the rule of law could play a role in increasing "institutional cohesion" across the UK and subsequently, over time, help to boost a sense of Britishness among the UK's citizenry. Getting the law and legal systems of the UK to work better for people and deliver more socially beneficial outcomes, would undoubtedly help improve levels of "institutional cohesion". However, the multiplicity of legal jurisdictions in the UK means that the vast majority of practical improvements needed to, for example, upgrade the performance of civil and criminal courts operating across the UK,[iv] will be dependent on the constituent jurisdictions identifying and implementing such improvements.

[iv] See more on the challenges facing the English and Welsh civil and criminal courts and English civil law, in particular the gaps in the latter, such that in some areas it is falling behind and failing to reflect trends in commercial activity and technology, in SMF's two previous reports: "*Law and the open economy*" and "*Future-proofing justice*".

Identifying a UK-wide understanding of the rule of law

The discussion at the expert roundtable covered other research that had been conducted in recent years, which also suggested that there was some scope for alighting upon a common understanding of the rule of law, albeit necessarily a comparatively "thin" one. For example, one participant argued that research they had been involved in indicated there were a number of factors that many of the public accepted were important for a free society and which had legal and political implications:

> *"…if we want to, as it were, rebrand the rule of law we actually need to take these different bits apart and…see how that accords with public opinion…".*

Consistency in the public's view of the broad outline of the meaning of the rule of law

The discussion at the expert roundtable suggested there might be sufficient basis for developing a "thin" UK-wide understanding of the rule of law. For example, one participant at the expert roundtable reported on other research that suggested a strong adherence to the equal protection of the individual by the law was still an important cultural touchstone for the British public.[v] They noted that:

> *"The public view, generally was they absolutely wanted the courts to protect minorities against majorities. That was the thing that they actually thought was really important".*

The same attendee added that the public broadly adhered to a traditional view of the division of authority between the courts and politics and consequently there was a good deal of support for the broad contours of the UK's existing political and legal arrangements:

> *"They [the public] were less keen on the courts second guessing what government ministers and…the executive, do…"*

Survey evidence from the Law Society highlighted similar sentiments amongst the British public about politics and the law and the proper domain of both:[47]

> *"…Everyone has a duty to follow the rules, and the public expects these rules to be properly applied to everyone…there is nothing…to suggest that the rule of law and politics should ever need to come into conflict. It matters not how the law is made, or what its content is, as long as it is properly enforced and followed by everyone"*

[v] This view is also reflected in recent Law Society polling, which found that 97% agreed that everyone should be treated equally under the law. Source: The rule of law: what does it really mean? | The Law Society

A way forward

A time for a return to Dicey

Consequently, it was argued by one roundtable contributor that, there might be some merit in a policy that aimed to make the rule of law a more salient organising principle for British national identity:

> *"…I think there's some value in saying…there [is] a story about the rule of law that would make sense of all this to the general public…".*

There was support for trying to make the rule of law a uniting principle from several other contributors to the expert roundtable. Echoing the insight that the rule of law is an example of "cultural overlap" between the nations of the UK, one noted that the seeding of the rule of law in this country took place a long time ago, and suggested that the historic roots were deep and therefore offered some prospect of the rule of law playing a role in strengthening British national identity:

> *"The cultural question is an incredibly deep and moral and historic one…in society…from the moral law of Christianity in this country…we have…built a set of legal institutional structures….we can't really have a conversation [at]…a bit higher level a bit deeper, without understanding that…[and]…there is a great sense I think…[about]…how our politicians should behave…what the nature of our law should be, and the reach of the law…".*

The participant added:

> *"…the fact that the social capital and the trust that people have…doesn't solely sit with the performance and the efficacy of a government of the day…[that is]…good…[because there]…has never has been a Halcyon day of moral politicians…But I'm saying…there is something to be said…[for]…the notion that…laws come from…notion[s] that underpin…British culture…".*

Another attendee described how they considered A V Dicey to be the obvious starting point for politicians, academics, the legal profession and others when thinking about what any widely acceptable understanding of the rule of law might look like, that could contribute to boosting the UK's "institutional cohesion" and in turn help strengthen Britishness across the whole country:

> *"…one way of giving real content to the claim that Britain is still able to contribute towards an understanding of the rule of law…has to be something fresh and original but derived in some way…[from]…the way we do things….[a]…specifically British contribution might be to look at the great theorist of the British Constitution, both of the rule of law and of parliamentary sovereignty: Dicey…who wrestled with precisely this problem of on the one hand, the constitutional theory that the parliament that is the majority party can legislate what it wants…but on the other hand, was also a very strong advocate of, of the rule of law…Dicey seems to me to be a[s] good [a] place to start as any other…".*

Box 3: the Dicey-an view of the rule of law

A V Dicey, was a barrister, Vinerian Chair of English Law at Oxford and Professor of Law at the London School of Economics. He is the most famous exponent of the "classical" understanding of the British constitution. His definition of the rule of law – a key part of his wider analysis of the functioning of the British political and legal systems – is generally considered to be a "thin" definition. Dicey built his understanding around five elements:[48]

- Absence of arbitrary power.
- Minimal scope for discretionary power, with the powers of the government clearly specified and predictable.
- No person punished except for a breach of the law, which has been proven in the ordinary courts of law.
- Equality of all before the law of the land.
- The constitution is merely ordinary law, with no "higher" laws because British freedoms were not sourced from constitutional documents. Rather, the British constitution reflected existing liberties borne of long standing inherited societal values and practices.

Source: Carroll, A. (2009)

Together, the discussion at the roundtable and the wider evidence base on the public's view of the rule of the law suggest that the traditional (i.e. Dicey-an) perspective predominates among the citizenry. As a result, the broad consensus at the roundtable seemed to be that the best hope for finding a publicly acceptable understanding of the rule of law most likely lay in the insights of Dicey.

An extensive communications and educational effort may be needed

As another participant noted, the process of finding such a consensus around a mutually acceptable understanding of the rule of law would, no doubt, require adaptations in terminology. The same attendee suggested that public don't tend to place the constitution and its procedures and the wider legal system into a category labelled the rule of law:

> *"…[the public]…would never, ever, ever use the expression, the rule of law to describe the things that were happening in their lives. However, many of the benefits that they saw in the existing constitution and democratic structures were manifestations of the rule of law".*

Such a state of affairs implies that a substantial communication and education effort maybe be needed to ensure that the public on the one hand and politicians, policymakers and the legal profession on the other, can have a constructive dialogue over the rule of law.

A role for education?

One way to make the rule of law a more prominent feature in British identity and enable it to play a bigger role in bolstering Britishness than it currently does, is by taking steps to deliberately strengthen the position of the rule of law as a point of "cultural overlap" among the English, Welsh, Scottish and Northern Irish. This was implied by one of the participants at the roundtable when they argued that:

> *"…The final point I wanted to make was about culture…[we need]…to support the development of…a rule of law culture, amongst people".*

A policy lever that could "be pulled" to help contribute to making the rule of law a stronger example of "cultural overlap" is education. There is precedence for education playing a more explicit role in trying to foster greater social cohesion. For example, in the early 2000s citizenship education was introduced into English schools. It was a compulsory subject.[49] The rule of law was a part of that subject's curriculum, according to one roundtable participant. However, policy changes and other factors have seen citizenship education downgraded. Under the Conservative – Liberal Democrat coalition government, it was largely displaced by requirements to teach "Fundamental British Values" (FBV).

Box 4: the teaching of citizenship

An analysis by a House of Lords committee in 2018 suggested that citizenship education was valuable. The final report argued that:[50]

> *"Shared British values are fundamental to the life of the country and should be promoted in their own right…".*

Its lead member Lord Hodgson of Astley Abbotts summed up the report's findings, stating that:[51]

> *"Citizenship education is our best chance to engage with people at an early age and encourage them to participate actively in all that it means to be a British citizen…Young people being educated in citizenship brings advantages to society as a whole…".*

Further, a longitudinal study into the teaching of citizenship indicated that it can, over time, deliver some tangible benefits for those who were taught it.[52]

However, as part of the reforms brought in by the Conservative – Liberal Democrat government between 2010 and 2015, the subject was made voluntary. Further, the Coalition brought in a requirement for schools to "instil" FBV in pupils, by integrating those values into appropriate lessons,[53] with some guidance about how to do this.[54] As one contributor to the expert roundtable argued about the change:

> *"…the most .clear example of a sense of, we're going to hit a stick [as] we try to drive…affection for the rule of law in England, was the revision to the Education Act, and the replacement of [compulsory citizenship lessons, with…so called spiritual,*

> *moral and social cultural teaching…in schools, which had four fundamental British values attached to it".*

The same attendee noted that the implementation of the teaching of the FBV's has been inconsistent and largely failed in its objectives, so far:

> *"…the [FBV]…[have] largely been implemented…over the course of the last seven years through the citizenship education curriculum…[however]…it has been patchy and piecemeal across the country…".*

The sentiments articulated by this roundtable participant echoed the findings of the 2018 House of Lords investigation into citizenship and civil engagement. The inquiry had found that:

> *"The government has allowed citizenship education in England to degrade to a parlous state. The decline of the subject must be addressed in its totality as a matter of urgency."*

Key reasons for this decline, the report argued, were the freedom of many schools, (such as academies) to avoid following the citizenship requirements and the low level of esteem afforded to the subject more broadly alongside a decline of suitably trained teachers.[55]

Sources: House of Lords (2018) and Department for Education

A warning about the possible downsides of utilising the rule of law for enhancing Britishness

One attendee of the expert roundtable was more sceptical that a focus on the rule of law would have a positive impact on the strength of Britishness across the UK. They argued that:

> *"…my own view is that…the rule of law as a political concept becomes very dangerous in the politics of identity within each part of the United Kingdom, because it will be…used [more] by populists…[than it]…will be by people who want to have proper checks and balances on power…".*

The sceptical view that the rule of law (or indeed, other aspects of British constitutional arrangements) can help generate higher levels of UK-wide "institutional cohesion" and in turn help "refresh" British identity is reinforced by the findings from one study that suggested Britishness is more likely to be revitalised through greater amounts of "associational cohesion", rather than "institutional cohesion".[56] In other words, efforts to improve "associational cohesion" (usually outside of the public realm i.e. in the private realm) should be the focus of any policy and educational effort to boost Britishness. Where there is stronger "associational cohesion" there may then be opportunities for building up "institutional cohesion".

Some of the risk identified by the contributor might be managed if any attempt to coalesce around a common understanding of the rule of law across the four nations of the UK, is primarily focused upon those aspects of the rule of law in Britain:

- Where the "cultural overlap" is most pronounced.[vi] [vii]
- That have been important in helping facilitate the "mutual economic advantage" of the Union.[viii]

Such an approach points to the development of a "thin" (i.e. high level) outline of the rule of law at the UK-level. One that is respectful of and aligned with the legal traditions and the legal systems that exist within the UK. Further it deliberately avoids the many pitfalls that inevitably come with trying to identify a common understanding of the rule of law that is too detailed e.g. ending up with a set of tenets that are more rooted in one legal tradition over another.

[vi] These include the evolution of broadly legitimate and coherent bodies of law and comparatively effective (albeit imperfectly so) legal institutions, within the UK's constituent nations.

[vii] See more on the historical legal development of England and Wales and Scotland in particular in Annex Two. There is extra detail in Annex Three on the ongoing popularity, amongst the people of England and Wales, of some of the most salient characteristics of the English and Welsh common law system.

[viii] For example, this would include the development and persistence of low corruption legal institutions, impartial and legally robust adjudication of cases and relatively commerce friendly laws that have regulated and enabled intra-UK trading activity and domestic capital accumulation.

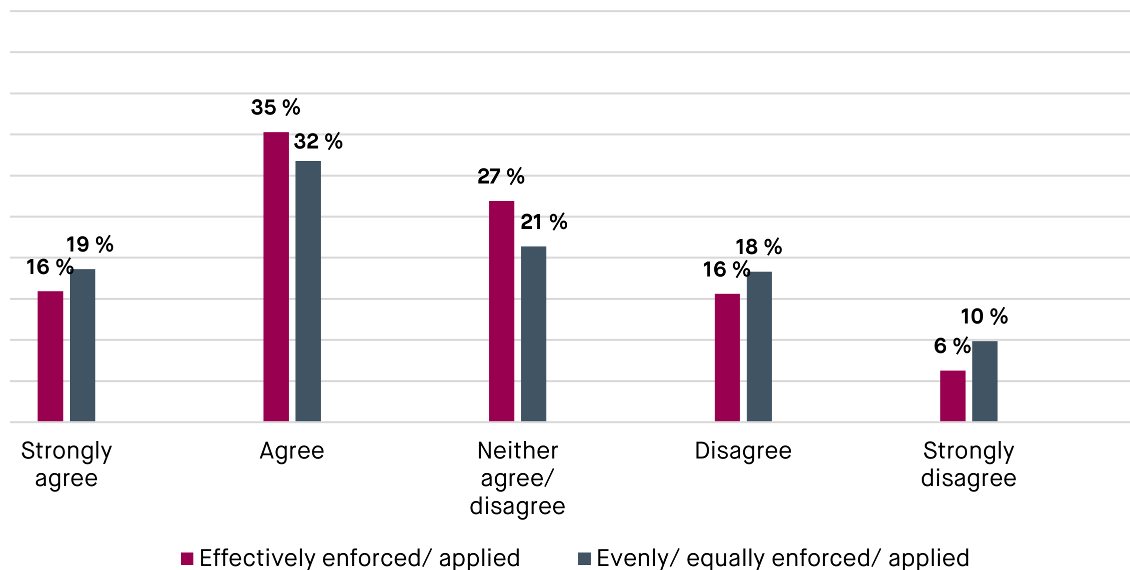
CHAPTER FIVE – THE RULE OF LAW AT RISK

A bare majority believe the law is enforced equally and effectively in the UK

Large minorities of British citizens do not consider the law to be equally applied or effectively enforced in the UK

A number of the central tenets of the rule of law, compatible with all understandings of the principle (see Table 5 in Annex 1), are at risk in the UK. For example, equality under the law and therefore its equal application is fundamental to any understanding of the rule of law. For the British public, it is an essential principle for any legal system to embody.[57] However, as Figure 9 shows, a bare majority (51%) of the British population consider that the law in the UK is applied equally across all individuals and classes. Further, the same proportion (51%) agree that the law is effectively enforced.

Figure 9: Efficacy and fairness with which the law is enforced/ applied across the UK



Source: Opinium, 2021

These findings are reflective of the results of other research on the law and legal system of the UK's dominant jurisdiction, that of England and Wales. Many of the problems of the civil and criminal courts and the deficiencies in the corpus of civil English law (as they pertain to commerce and technology) are described in the previous two reports in this three-report series: "*The Law and Open Economy*" and "*Future-proofing Justice*" (see Box 5 for more on these reports).[58] [59]

Problems in the civil court system

There is a considerable "civil justice gap" in England and Wales in particular, suffered by individuals and families.[60] Further, the scale of the detriment weighing on small and medium-sized businesses is also substantial, because of legal problems and the failures of the civil court system as a route for solving them in an efficient way.[61] The English and Welsh civil justice system (which includes the civil courts) ranks 20th in international comparisons (see Table 4). The civil courts in England and Wales are failing, in many instances, to fulfil their essential role in supporting:[62]

> *"…social order and economic activity; and…[acting as a]…protective function… in relation to the rights of citizens and business vis-a-vis other citizens and businesses…".*

Challenges in the criminal courts

Equally injurious to the notion of the rule of law are the long running difficulties of the criminal courts. They have proven unable to consistently process cases swiftly and ensure that justice is delivered in a timely manner. The English and Welsh criminal justice system (which includes the criminal courts) ranks 16th in international comparisons (see Table 4). Consequently, they are not playing the central societal role that they should be i.e. securing the safety of the public and property and rapidly acquitting those falsely accused of crime.[63]

Among the public only an obviously beneficial legal system will deliver widespread buy-in to the rule of law

As one expert roundtable attendee argued that, for the rule of law to have any deep purchase with the British people, it – ultimately – has to deliver positive practical outcomes for citizens (there is more detail on this point in Chapter Three):

> *"What we don't talk about enough, I think, is the idea that…[the rule of law]…should be a social good, more than purely the philosophic abstract".*

The failings of the English and Welsh civil and criminal courts in particular, make it unlikely that the public will be persuaded that the rule of law can currently play a more prominent role in revivifying Britishness. This is for the simple reason that the "yardstick" by which most people tend to judge the presence and utility of the rule of law, is not being met. In such circumstances, the rule of law may come to be seen by many, if it is not already, as irrelevant to their lives. The chances of the rule of law helping increase "institutional cohesion" under such conditions is likely to be close to zero.

Another contributor suggested that a major failure has been, to the extent there has been a focus on the rule of law by politicians and policymakers, that the bulk of the civil court policy effort of the past twenty years or more has been aimed at international (often commercial) rather than domestic audiences. In particular, they argued that policy had been skewed towards maintaining the UK's global commercial legal advantages. Within the financial constraints that the civil court system in particular has faced over many decades, this international emphasis has been at the expense of ensuring the courts provide accessible routes for British people to resolve their problems justly and efficiently:

> *"…it [the rule of law] can often be seen as an export rather than as a tool for working out issues domestically…I also think that it is often a selling point…to promote the role of the UK in the international justice sector…HMCTS (the courts and tribunals service), the Ministry of Justice, the minister and others…use the technological innovations as a means of keeping London on the map as the seats of international arbitration, and for London to be the choice for that in commercial contracts. It seems to be one of the most consistent threads of the UK's policy around the justice sector and its administration".*

The results of these asymmetries, the same attendee suggested, have been clear to all in the way that the COVID-19 pandemic and its aftermath have brought the domestic courts "to their knees":

> *"….there are some real points of difference within the justice sector as to why this [the international commercial focus by politicians and policymakers]….should be a priority at all…during the pandemic…there was great suffering and pain and a growing backlog in the…courts…".*

Current obstacles to court reform compounding the structural barriers

Our previous report "*Future-proofing Justice*" identified a range of barriers to successful court reform in both the civil and criminal spheres. These included, among others, the absence of a long-term strategic approach to the courts at the highest levels, insufficient understanding of and therefore effective policy, the complexity of the interrelationships between different parts of (and those involved in) the court systems and failing to avoid the temptation to go for short term "easy answers" that just "paper over cracks" rather than longer-term solutions. Currently, these structural impediments are being compounded by a number of more immediate difficulties facing the courts. These include a deteriorating court estate unsuitable for dealing with cases efficiently,[64] a shortage of judges in the criminal and civil systems,[65] [66] junior barristers leaving the bar (impacting the pipeline of future judges as well as representation), a 110,000-case build-up in the family courts[67] and a 75,000 backlog in the Crown Court.[68] Further, there is little sign of these more immediate challenges being tackled effectively. For example, the backlog in the Crown Court was at 60,692 cases in mid-2021, and the Ministry of Justice estimated that by the end of 2024, there may still be 52,000 cases waiting to be heard.[69]

Dealing with the shorter-term issues and planning to transform the civil and criminal courts is likely to be made doubly difficult by the current context of an economic slowdown and the planned public sector retrenchment.[70] However, politicians and policymakers will have to weigh these short and medium-term economic considerations against some of the long-term individual and societal gains that could be enjoyed as a result of taking the right long-term decisions now to deliver more efficient and effective civil and criminal court systems. These substantive benefits include a significantly improved court systems helping strengthen the rule of law and in turn contributing to deeper UK-wide "institutional cohesion" and in turn helping strengthen Britishness. Further, as Chapters Six, Seven and Eight, such a farsighted approach would have positive international repercussions, too.

Challenges to the rule of law beyond the court systems

Another participant in the roundtable discussion argued that the failings did not stop at the long-standing negligence towards the civil and criminal courts systems, or the failures to update the relevant parts of the corpus of civil law around commerce and technology. They suggested that there are a slew of other problems which "cast a shadow" over claims about the strength of the UK's adherence to the rule of law. These included the UK's reputation for being a laundry for "dirty money":[71] [72]

> *"…London is the legal money laundering centre for the entire world…I think this [is a] problem of the erosion of…the idea of a rule of law as a workable concept, as a constraint, as checks and balances…".*

CHAPTER SIX – THE GROWTH OF "SOFT POWER"

What is "soft power"?

One of the ways countries have influence in international affairs is through utilising their stock of so called "soft power". As a contributor to the roundtable noted:

> *"…talking about soft power, it's one of those things that's quite…amorphous…it means lots of different things to different people".*

Despite definitional difficulties it has come to be seen as a key weapon in a country's international relations armoury. [73] [74] The original meaning of "soft power" was set out by scholar Joseph Nye in the late 1980s (see Box 5).

Box 5: defining "soft power"

For Joseph Nye "soft power" is the ability of one entity (i.e. a country) to influence the thinking, actions and goals of others through persuasion or attraction.[75] Nye observed that, many of the tools of "soft power" are outside the direct control of governments.[76] Further, "soft power" tends to be a long-term instrument of influence.[77] The people, practices and institutions that are the purveyors and projectors of "soft power" are not all equally effective. Further, that effectiveness may wax and wane over time.

The House of Lords described "soft power" in the following way:[78]

> *"…'soft power' involves getting what one wants by influencing other countries (via their governments and publics) to want the same thing, through the forces of attraction, persuasion and co-option…".*

One analysis of "soft power" observed:[79]

> *"Soft power eschews the traditional foreign policy implements of carrot and stick, relying instead on the attractiveness of a nation's institutions, culture, politics and foreign policy, to shape the preferences of others…".*

Researchers have identified five broad categories of "soft power".[80] These are:

- Culture.
- Diplomacy.
- Education.
- Business and innovation.
- Government (and associated institutions).

Sources: Hughes, R. (2021) and House of Lords (2014).

Why "soft power" has become more salient

"Soft power" is not new, it has always played a role in international relations. Nevertheless, it has grown in prominence in recent decades as a tool for use in foreign affairs. A 2014 House of Lords investigation into the UK's "soft power ("*Persuasion and Power in the Modern World*") emphasised the centrality of technology and cross-border communities of shared interests as key factors in its rise. The report argued that:

> *"…greater international interconnectedness is changing…how nations relate to each other: the role of diplomats and the meaning of diplomacy. Thanks to hyper-connectivity, citizens and pressure groups can instantly and to an unprecedented degree communicate across national, cultural and…linguistic borders, sharing opinions and information about each other's societies. Contact between nations had historically been largely elite-to-elite…but international contact opened to the masses through cinema and broadcasting in the 20th century, and has now entered a phase dominated by people-to-people contact through the internet and mass air travel".*

As a result of these trends, the report highlighted:

> *"…The importance of diplomats specifically as the primary conduits…is therefore decreasing as non-governmental connections proliferate…".*

One analysis has suggested there are at least four reasons for the growth in the importance of "soft power":

- The spread of global power among a wider group of countries, with the relative decline of western countries compared, for example, to countries in Asia.[81]
- The erosion of long-standing structures of "hard power" such as nation states, relative to other private actors with interests in international affairs.[82]
- The internationalisation of elites,[83] societies and economies has increased the interconnectedness of countries and their peoples, which has expanded the number of avenues through which private and public networks have an influence.
- The urbanisation of large swathes of the populations in many countries. This trend has had (and likely to continue to have) implications for the spread of ideas, information and technologies, including innovation and the propagation of political movements.[84]

CHAPTER SEVEN – THE UK'S "SOFT POWER" IS SUBSTANTIAL

The UK is consistently ranked highly in international "soft power" indices

The UK has been consistently rated highly in international indices that measure "soft power". Table 1 shows the UK's rating across a number of such indices.

Table 1: UK rankings in various international "soft power" indices

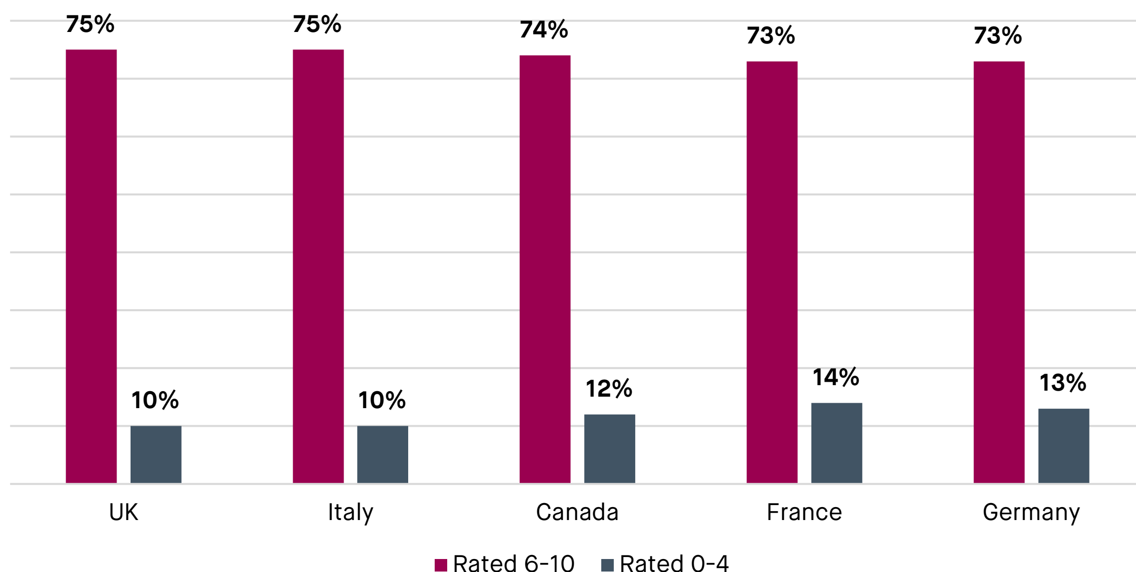
	Institute of Government: "the New Persuaders" (2010)		Portland: The Soft Power 30 (2019)		Anholt-Ipsos Nation Brands Index (2021)		Brand Finance: Global Soft Power Index (2022)
1	France and UK	1	France	1	Germany	1	USA
2	-	2	UK	2	Canada	2	UK
3	USA	3	Germany	3	Japan	3	Germany
4	Germany	4	Sweden	4	Italy	4	China
5	Switzerland	5	USA	5	UK	5	Japan

Sources: Institute of Government (2010); Brand Finance (2022); Portland (2019); Ipsos-Mori (2021)

Across a multiplicity of "soft power" indexes, the UK consistently ranks in the top five, and is often positioned in the top two countries for "soft power" assets.

The British Council's "*Perceptions of the UK abroad 2021*" survey confirms the popularity of the UK.[85] Its survey of tens of thousands of people in G20 countries found that the UK and Italy are considered (jointly) the most "attractive" countries, overall.

Figure 10: top 5 countries ranked for "attractiveness" among people in the G20, 2021



Source: Ipsos Mori (2021)

Figure 10 shows that, in the British Council commissioned survey, three-quarters of respondents selected a rating for the UK of between 6 and 10, which indicated some degree of "attractiveness". A comparatively small 1 in 10 rated the UK between 0 and 4, explicitly demonstrating they saw the UK as "unattractive".

The findings presented above (Table 1 and Figure 10) are consistent with the picture of the UK's "soft power" described by the House of Lords in their "*Persuasion and Power in the Modern World*" report. It argued that the UK was relatively well-endowed with "soft power" assets:

> *"At its best, the…[UK}…possesses a world-beating array of assets. It is seen variously as being on the right side of modern history; possessing benevolence; representing a force for good; being culturally attractive and a source of innovation, higher learning and human development; playing the role of a useful, well-connected nation; and positioning itself as an outward-looking and welcoming country with strong, identifiable values and a commitment to the rule of law".*

The UK's soft power is more than the sum of its parts

The House of Lords observed that the wide range of "soft power" assets that the UK has at its disposal, add-up to a totality of "soft power" that is greater than the sum of the individual component parts:[86]

> *"The country's thick cobweb of long-standing, productive ties enables…[its]…attributes to add up to more than the sum of their parts. For instance, UK universities support commercial science, British scientific prestige brings in talent and investment, national museums contribute to international development, and the BBC gives support to museums. Existing ties across the Commonwealth lay the ground for the overseas activities of UK business, culture and sporting institutions".*

The positive impact of the UK's "soft power"

In an illustration of the influence that "soft power" can have, in its research the British Council found that, for example, people in other countries that reported that they "trusted" the UK's institutions (a factor closely linked to a country's "soft power" attributes such as adherence to the rule of law) were twice as likely to want to "engage" with the UK in the future, compared to those people who reported "distrusting" the UK's institutions.[87]

Further, the British Council described – in evidence submitted to the UK Parliament – how the UK's help is sought by many countries, as a result of the UK's history and reputation:[88]

> *"The freedoms and security we take for granted are hugely attractive…Other countries look to the UK for advice and support on how to strengthen their civic institutions and build a safer, more prosperous future"*

As well as increasing good will, levels of international engagement and influence over geo-political and development choices made by other countries, there are also more direct domestic economic benefits that accrue from the UK's stock of "soft power". The British Council for example, have observed that the UK's considerable "soft

power" is likely to prove to be an economic advantage as the international economy develops in the coming decades:[89]

> *"The UK's soft power is…helping to give it an edge over its rivals. As other countries' economies develop, the UK will find the international competition for FDI and trade will become more intense…the UK's soft power…will be key to success in this increasingly crowded market".*

Reasons behind the UK's "soft power" success

The UK has a wide range of "soft power" assets

There are a slew of reasons for the substantial quantity of international "soft power" at the UK's disposal. These include: the English language, the UK's history, art, architecture and literature, and other aspects of the country's heritage such as the Monarchy and stable political system.[90]

Beyond the long-standing attributes listed above, the UK's popular culture and media output are also consumed in great quantities across the globe.[91] Britain's influence on sport is also unparalleled. Not only was the UK the progenitor of many of the most watched and played sports around the world, but "cultural exports" such as the Premier League have hundreds of millions of avid followers across many countries.[92]

The UK is influential in commerce, too. There are numerous world-leading UK-based companies. It plays a central role in setting important global commercial standards and the City is frequently cited as a world leading international financial centre, with a key role in allocating capital around the world.[93] Most pertinent to this report, English law and legal jurisdiction has a prominent status as a result of its stability, reliability, transparency and commerce-friendly nature. Some have suggested its importance is such, that it can be considered as something akin to an "international public good".[94]

Additionally, the UK has made extensive contributions to science and engineering over many centuries.[95] Further, Britain is home to numerous world leading educational establishments, such that the children of many dignitaries from around the world come to the UK to be educated at them.[96]

The importance of a narrative to a country's "soft power"

Key to "soft power" projection and achieving the kinds of results that the UK is able to, is the nature of the "narrative" about the UK, that:

- The citizens of the UK believe about themselves and the country
- People in other countries perceive about Britain.

In particular, a narrative can help galvanise the efforts of the "transmitters" (i.e. the relevant people and institutions) of soft power,[97] as the House of Lords noted in their 2014 report:

> *"A national narrative…play[s] a crucial part in bringing together and inspiring the contributions made by a country's soft power actors…".*

Any narrative about a country must be embedded in facts i.e. they must accurately reflect a country's history, circumstances and stock of "soft power" assets. If the narrative and the reality begin to diverge, in such a situation a country will eventually see the way it is perceived change, both domestically and, crucially for its international power and influence, abroad too. In turn, the narrative about it will alter and there are likely to be knock-on consequences for their "soft power". When the narrative is reflecting improvements, the consequences will likely be positive. However, when those changes are due to a deterioration in one or more aspects of a country's stock of "soft power" assets, the consequences will, in time, be negative ones.

The rule of law is a key factor in the UK's "soft power"

The rule of law is an important component of the UK's "national narrative"

As is acknowledged in the previous section, the best way to cement in place a positive "national narrative" is for it to reflect the state of affairs that pertains in that country. Currently, the rule of law plays a significant role in the construction and maintenance of the UK's "national narrative", as was observed by Dr Cristina Archetti, in her evidence to the House of Lords inquiry into UK "soft power":[98]

> *"The 'basic values of the UK brand', such as the rule of law and respect for human rights, constitute a national narrative and 'provide a dynamic framework to loosely (but firmly) guide all national actors' discourse and behaviour'...[further]...the Government have 'a role in upholding such [a] dynamic framework'".*

The salience of the rule of law for the UK is further reflected in data published by the British Council which, as a result of international survey evidence among citizens of G20 countries, has identified the qualities people in such countries most frequently associated with the UK (Table 2).

Table 2: top 6 most popular qualities of the UK, reported by citizens of G20 countries, 2016

Ranking	Quality	Proportion of G20 agreeing
1	World leading universities and academic research	70%
2	World leading arts, cultural institutions and attractions	67%
3	UK has "global power"	66%
4	Respect the rule of law	63%
5	World leading sports teams and events	61%
6	Values individual liberty	60%

Source: British Council (2018)

The British Council has further emphasised in its publications the importance, alongside a number of qualities strongly associated with trust in Britain, of the UK being regarded by people in other countries as a place with a "free and fair" (e.g. devoid of corruption and political interference) justice system, which are key indicators of the presence of the rule of law in a country:[99]

> *"…the UK was perceived as open and welcoming, with a free and fair justice system and world-leading arts and culture, and with a government that treats everyone in the country fairly…[and] works constructively with others around the world".*

The UK ranks highly for trust in its institutions including the rule of law

International polling for the British Council supports the contention that there is substantial amounts of trust among people from other countries, in the UK's institutions (Table 3). One key element of the latter is adherence to the rule of law.

Table 3: Trust levels in the institutions of G20 countries among people from other countries 2020

	Ranking	Trust	Distrust
Canada	1	56%	15%
UK	1	56%	15%
Germany	3	54%	17%
Japan	4	51%	21%
Australia	5	50%	17%

Source: Ipsos-Mori (2020)

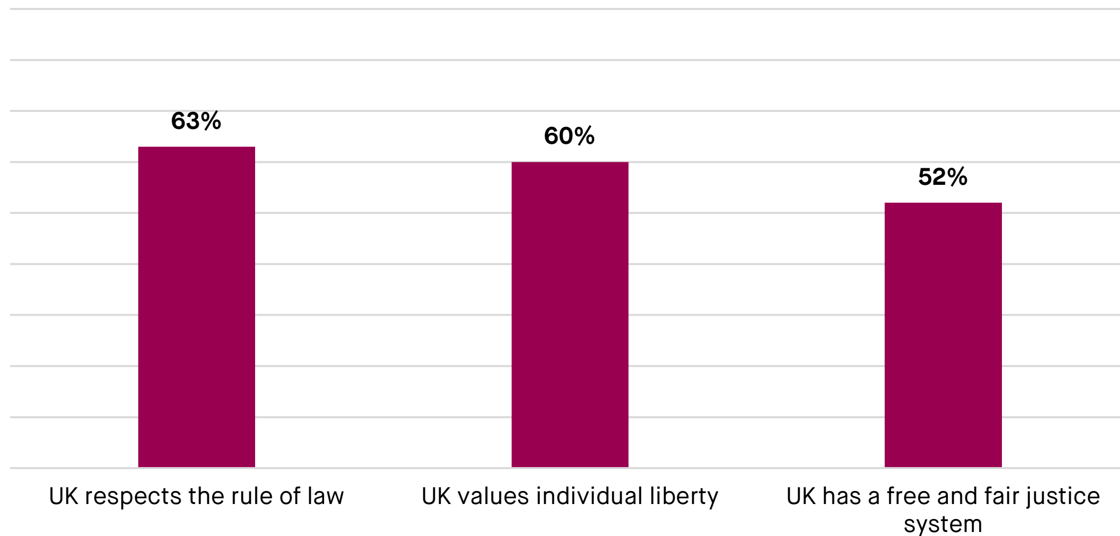
This high trust feeds through into the UK's high overall "attractiveness" ranking (see Figure 10). Further emphasising the importance of quality institutions to the UK's stock of "soft power".

The British Council findings around the importance of the rule of law feeding through into high levels of institutional trust were echoed by many of those taking part in the expert roundtable. One contributor for example, noted that:

> *"…[soft power]…is…a complex picture of lots of different forces working together in collaboration…[the] rule of law is…an important part of it".*

A more specific focus on the legal institutional polling results from the British Council's 2016 international survey data (Figure 11) shows the proportion of respondents in other G20 countries agreeing that the UK is a country that adheres to the rule of law, values individual liberty and that consider the UK to have a "free and fair" justice system. Across the first two categories in particular, around six in ten people in other G20 countries agreed with these propositions indicating that these remain well entrenched perceptions at the moment, among people in other countries.

Figure 11: proportions of people in G20 countries who agree that the rule of law, valuing individual liberty and a free and fair justice system are qualities of the UK, 2016



Source: British Council (2018)

A number of participants in the expert roundtable echoed the sentiment that is broadly reflected in the British Council data (Tables 2 and 3 and Figure 11). One argued that:

> *"…In context of the rule of law…the UK is a very trusted country, and its institutions, including legal institutions, judiciary, policing…are our strongest suits….[it]…is one of reasons why the UK is so attractive".*

A different contributor concurred, arguing that, in their view, perceptions of the UK's strong obedience to the rule of law is closely associated with a wider sense among many in other countries that the UK is a broadly successful society:

> *"…we're a stable country, we're a functioning country, you might not always seem like that, but to other people looking inwards, actually, the UK is a stable part of the firmament of the world…it's seen as…[an upholder of]…the rule of law…it is actually really seen as a kind of a bastion, if you like: the rule of law, it seems to be doing the right thing".*

A separate roundtable participant added their thoughts on why English law in particular has a strong reputation among people in other countries. They suggested it was because it is a body of law that offers a range of practical benefits to those who use it, especially businesses:

> *"…people all over the world still have tremendous residual affection for the English law, in the same way that they find the English language an incredibly useful tool. And we underestimate its soft power at our peril".*

Emerging signs that the UK may see a decline in its reputation as an adherent to the rule of law

Notably, as Figure 11 shows, much lower 52% of people in G20 countries (albeit still a majority) agreed that the UK had a "free and fair justice system". This is a similar percentage to the proportion of UK citizens who agreed that the law in Britain was "effectively enforced" and "evenly/ equally applied" (see Figure 9). It is possible that people in other countries are beginning to see what many in the UK have known for a while (and are described in reports such as "*Future-proofing justice*"),[100] namely that the UK's civil and criminal justice systems are not as world leading as they might be.

As has been described above, the rule of law is an important element in the UK's "soft power" arsenal and the UK is widely respected or its adherence to it is. However, the rule of law is only meaningful where it is embodied in effective law and legal institutions. Early indications that the publics of other countries are beginning to notice that the civil and criminal legal systems (certainly in the dominant English and Welsh jurisdiction) are not functioning as well as they might, pose a risk to the UK's "soft power" because of the prominence of the rule of law to the UK's "national narrative" and therefore perceptions of the UK's success as a country and the strength of the UK's influence.

CHAPTER EIGHT – RISKS TO UK "SOFT POWER" FROM A POORLY PERFORMING LEGAL SYSTEM

The rule of law risk to the UK's current stock of "soft power"

Some of the biggest risks to the UK's current stock of "soft power", and in turn the UK's international influence and ability to act effectively on the international stage, can be found in the challenges bedevilling the UK's dominant (i.e. the English and Welsh) legal system.

Deficiencies in the English and Welsh legal system

In the two previous reports, in this three-report series, the SMF explored some emerging as well as other long-standing problems with both the English and Welsh civil and criminal courts. One of the reports also touched upon some of the deficiencies in the body of English civil law, especially as it pertains to governing commercial activity and technology. Box 5 provides a brief outline of those two reports.

Box 5: *Law and the open economy* and *Future-proofing justice* reports

The SMF's "*Law and the Open Economy*" report highlighted how England and Wales's system of common law, associated civil courts and other international focused dispute resolution offering, as well as a competitive legal services industry, have generated considerable economic benefit for the UK.[101] However, it also outlined how the corpus of English private law was falling behind technological changes and failing to reflect developments in business. Therefore, gaps were emerging which would make it less attractive as the "law of choice" for international commerce and likely to inhibit future domestic economic growth. The report noted that an area of persistent failure was in the provision of an efficient and effective system of civil courts that the SME community could easily access and utilise to settle disputes and obtain redress.

In "*Future-proofing Justice*", the parlous state of the civil courts and criminal courts in England and Wales was highlighted in more depth.[102] Beyond the current Covid-related back-log there are a number of systemic failings in the civil and criminal courts. The report notes that the problems with the former contribute to the large "civil justice gap" in England and Wales in particular. The difficulties with the latter result in criminal courts that are failing in their societal role to adjudicate efficiently and effectively on the guilt or innocence of accused criminals and swiftly deliver acquittals and convictions where appropriate. The report also explored the shortcomings of the current court modernisation effort, including the likely delivery shortfall on the programmes original objectives. More specifically:

- It produced survey data on the public's appetite for the application of technology to the delivery of justice and in particular the attitudes towards the use of AI in the courts.
- The report discussed what effective structural reform of the courts might involve if the full opportunity provided by new technologies and their application to the re-organisation of the courts was seized.
- It touched upon the lack of long-term planning and effective oversight of reform, variable rigour and depth in legal research which it suggested hampers the development of good long-term legal policy reform and argued that politician and policymakers have poor track record of learning from the reform successes of other countries.

Sources: SMF (2021) and SMF (2022)

The problems with the civil and criminal courts highlighted in the two earlier reports in this trilogy ("*Law and the Open Economy*" and "*Future-proofing Justice*") are reflected in the UK's comparatively low rankings in the latest World Justice Project's Rule of Law Index. The World Justice Project's data across a number of pertinent categories relevant to the rule of law is reproduced in Table 4.

Table 4: UK's relative ranking in the Rule of Law Index, 2021

Rule of law		Fundamental rights		Order and Security		Civil justice		Criminal justice	
1	Denmark	1	Denmark	1	Ireland	1	Denmark	1	Norway
2	Finland	2	Finland	2	Luxembourg	2	Norway	2	Finland
3	Sweden	3	Sweden	3	Singapore	3	Germany	3	Denmark
4	Norway	4	Austria	4	Norway	4	Netherlands	4	Austria
5	Germany	5	Germany	5	Hong Kong	5	Sweden	5	Sweden
Common law jurisdictions outside the top 5 and ranking higher than the UK									
7	New Zealand	10	Ireland	14	Canada	8	Singapore	7	Singapore
10	Australia	11	New Zealand	21	New Zealand	10	New Zealand	10	New Zealand
13	Ireland	13	Canada	23	Australia	17	Australia	11	Canada
16	United Kingdom	14	United Kingdom	29	United Kingdom	18	Ireland	13	Ireland
-	-	-	-	-	-	20	United Kingdom	14	Australia
-	-	-	-	-	-	-	-	16	United Kingdom

Source: World Justice Project (2021)

It is telling that the UK does not appear in the top ten in any of the Rule of Law Index's categories highlighted in Table 4. The UK ranks 16th in the overall "Rule of Law" category. In the area of "Civil justice" in particular, the UK just makes it into the top twenty. The UK ranks 16th for "Criminal justice" and in the category of "Order and Security" the UK is marginally inside the top thirty countries. The only conclusion to be drawn from the Index is that the UK is not a stand-out country.

Further, given the UK's international reputation as a country with trusted institutions and adherence to the rule of law – echoed in the British Council data presented in Figures 10 and 11 and Tables 2 and 3) – it would be reasonable to expect the UK to be in and around the top five across all of the categories listed in Table 4.

The importance of the UK's institutions and the rule of law in particular to the country's stock of "soft power", suggests that the consequences of not repairing the English and Welsh legal system and updating English law where appropriate (as described in "*Law and the Open Economy*" and "*Future-proofing Justice*") are likely to be, over time, significant and negative for the UK's international reputation and influence. Not least because, the longer the problems persist the more likely it is that perceptions will have time to change and bed-in among more people. Reversing such shift, once it has occurred at scale, will be very difficult.

The likely consequences of a divergence between perception and reality

The importance of a broad symmetry between the "facts on the ground" and the "national narrative" was emphasised by the House of Lords investigation into the UK's soft power. The report observed that:[103]

> *"Though soft power is an elusive commodity that defies being coerced to specific ends…the Government must not be complacent…though…soft power takes time and effort to accrue…a few poor decisions can undermine it. 'Health within is health without'…there are stronger links between domestic and foreign policy than at any time in the past".*

A contributor to the roundtable concurred with the House of Lords description of the precarious nature of some of the UK's "soft power" assets and the need for proactive efforts to sustain them if the UK is not to see them decline and suffer the consequences that follows from that:

> *"…[we]…do need to kind of be aware, and really protect what we have…".*

Another expert roundtable participant argued that they personally were seeing signs of problems emerging among legal elites in other countries, around the UK's reputation for being a country that adheres to the rule of law. They described how:

> *"…when I've travelled…[recently]…to three or four countries, I've met Bar leaders from around the world, and discussed a lot about Britain…And it is undoubtedly the case that across the world, people are losing confidence in our willingness to adhere to our international obligations…and that is doing us real damage to our reputation as a country".*

Any emerging doubts among people in other countries about the UK's affiliation with principles like the rule of law can only be made worse by growing evidence of the failings in the civil and criminal courts in England and Wales (the UK's dominant legal system) in particular. As the accumulating evidence about the failings of the civil and criminal court systems grows, and those problems are reflected in sub-par rankings in international indices, it seems probable that the perceptions of people abroad (which to date is largely positive about the strength of the rule of law in the UK) will start to change. To pick up on the words of one of the participants in the expert roundtable for too long, politicians, policymakers and others have not been careful enough about protecting and nurturing the rule of law (and those factors that underpin it) which is putting this important "soft power" asset at risk and will continue to do so until the problems are dealt with.

CHAPTER NINE – RECOMMENDATIONS

The rule of law and its role in bolstering British national identity

National identity is a complex picture in the UK and making the rule of law a foundation on which to help revivify British national identity faces considerable obstacles:

- British identity for many is balanced against other older "nested identities". Consequently, in Scotland for example, a majority of UK citizens in that part of the country appear to have relatively weak sense of Britishness.
- When UK citizens are asked about institutional manifestations of Britishness, only 16% consider the law and legal systems of the UK to be so.
- The existence of multiple legal systems and traditions within the UK increases the level of difficulty associated with making the rule of law a unifying factor that can boost the UK's "institutional cohesion" and in turn play a more prominent part in British identity.[ix]

However, despite the obstacles, there are countervailing reasons for thinking that the rule of law could play a role in strengthening Britishness through increasing the "institutional cohesion" of the UK:

- When asked more directly about the rule of law, the vast majority of the British population do see it as central to a democratic society and a prosperous country.
- The prospect of the UK not being seen as a country that adheres to the rule of law by people in other countries, is of concern to a large proportion of British citizens.
- A number of pieces of older research, cited by Dame Louise Casey for example, in her work on social cohesion, indicate that fealty to the law is a recurrent element in British people's idea of what it means to be a "good citizen" and more recent survey evidence from the Law Society suggests that being thought of as a society that adheres to the rule of law is important for significant numbers of the UK population.

[ix] The evidence from the expert discussion at the roundtable was clear that most people can "buy into" the idea of the rule of law when they see that the law delivers clear practical benefits to them, their families and communities. It is only in such circumstances that the law is likely to help increase "institutional cohesion". For that in turn to boost Britishness, the rule of law will need to be seen as an example of "cultural overlap" as part of a process of "cultural convergence" among the peoples of the UK. This is particularly difficult when the practical impact of the law is reliant on the constituent legal systems of the UK to deliver them rather than UK-wide structures.

Scholars have identified that where there is “cultural overlap” and “mutual economic advantage”, the difficulties presented by the fact that the UK is a country of “nested identities” can be ameliorated. The rule of law is an example of “cultural overlap” and has helped generate “mutual economic advantage” for all the nations of the UK. Therefore, as Diagram 1 indicates, the rule of law seems to be a factor that can contribute to the strengthening of the UK’s “institutional cohesion” and in turn bolster an overarching sense of Britishness among the peoples of the UK.

While acknowledging the challenges, this was a conclusion that the expert roundtable also came to. More specifically, it was suggested in the roundtable discussion that there could be a way forward with a “thin” understanding of the rule of law that takes inspiration from the work of A V Dicey, which the peoples of the UK could coalesce around and that could be developed into a UK-level mutual commitment.

The brief survey of existing as well as the new evidence presented in this report suggests that widespread obedience to the “rules of the game” (i.e. the law), equal application of the law and access to the legal system are vital components for the people of Britain of citizenship.

Further, for the rule of law to be meaningful and not just a latitude, for most people it needs to have a positive material impact and deliver practical benefits for individuals and society. Consequently, these elements will be crucial ingredients in any mutually agreeable understanding of the rule of law at the UK-level.

The insights gathered in this report should help set the parameters for any attempt by politicians, policymakers, the legal profession and others to identify an understanding of the rule of law that could command widespread fealty across the UK and subsequently generate an increase in the UK’s levels of “institutional cohesion” and ultimately, act as a booster to British identity.

Recommendation: develop a UK-wide understanding of the rule of law that all of the nations of the UK can coalesce around

The Government should begin a consultation process to identify a UK-wide understanding of the rule of law. The parameters for developing any high-level outline should be narrow and based upon clear evidence of the public's preferences for the balance between politics, policy and the law, such as those highlighted in this report.

A "thin" description of the rule of law, that respects the parameters described above, should be focused upon a handful of key high-level tenets, which should include:

- *Access* – all citizens should be able to access the legal system(s) and utilise the laws (where appropriate) of the nations of the UK.
- *Clarity* – the division of responsibilities between politics and policymaking in the UK on the one hand and the legal system(s) of Britain on the other, should be clear.
- *Equality* – every citizen should be treated equally by the law and legal systems of the UK.
- *Fidelity* – the bodies of law and the legal systems of the UK should remain faithful to and continue to reflect their core principles and traditions.
- *Security* – the legal systems of the UK should deliver security (i.e. personal safety, property protection and defences against exercises of arbitrary power) for all citizens.

Recommendation: reinvigorate citizenship teaching in British schools

Citizenship teaching has declined markedly in English schools as noted by the House of Lords in their 2018 report "*The Ties that Bind*". Further, citizenship as a subject suffered from a number of deficiencies as the House of Lords inquiry noted, despite some evidence that it was delivering several positive benefits. In addition, there is little evidence to suggest that the alternative, the promotion of the FBV's (democracy, the rule of law, individual liberty and mutual respect and tolerance), has proven to be superior and helped boost civil engagement and a sense of Britishness.

Consequently, it is time to revive citizenship in schools with an explicit objective of helping to help nurture and consolidate people's sense of Britishness. However, rather than eliminating the four FBV's, they should form a key part of the citizenship curriculum, as recommended by the 2018 House of Lords committee on Citizenship and Civic Engagement.[104] Folding them into citizenship teaching is the most obvious way schools can fulfil their obligations around the FBVs and minimise the inevitable disruption of more changes to the teaching requirements on schools.[105] Such a reform will require the curriculum to be revised.[106]

Further, the proposed revitalisation of citizenship teaching with a central focus on the rule of law) needs to be made compulsory for all English secondary schools, including academies and free schools. With large numbers of the former and a growing number of the latter, excluding them will result in thousands of pupils not receiving citizenship education. That would defeat the objective of helping to embed a stronger sense of Britishness across the whole country.

To make a difference and contribute to reinvigorating a shared sense of Britishness across the entirety of the UK, the UK government should look to mandate a core of citizenship teaching across the education systems of all four UK nations.

To ensure citizenship can become and remain a key part of the school curriculum, a number of the recommendations of the 2018 House of Lords report need to be taken forward, e.g. incentives for training as a citizenship teacher in order to boost numbers, among others.[107]

Curriculum reform should go further in order to embed a deeper understanding and respect for the rule of law among upcoming generations. Legal history should be included in the history syllabus and in turn the teaching of history should be made a compulsory subject at both primary and secondary levels, at least in England. This would anticipate and complement the rule of law teaching in citizenship classes in secondary schools by providing essential context to what pupils learn in their citizenship classes by providing them with an understanding of how the rule of law developed and the what the particularities are of the English and Welsh system of common law.

Steps to help tackle the rule of law threat to the stock of UK "soft power" assets

This report has shown that the UK has a large stock of "soft power" assets. Further, the rule of law (and the corpus of law and legal institutions that underpin it) have a prominent place among that stock of assets. However, the reputation of the UK as an assiduous adherent to the rule of law is at risk because:

- Many citizens find it impossible to access and benefit from the UK's civil justice systems. In England and Wales in particular, this has contributed to a substantial "civil justice gap", resulting in many people unable to avail themselves of the civil courts system for example, to help resolve their legal problems.
- The UK's dominant system of civil law (English civil law) is, in some areas, falling behind economic and technological developments and, as a result, the UK risks losing ground to competitor jurisdictions and unnecessarily hindering future economic growth.
- The criminal courts are failing to deliver justice efficiently and effectively and therefore are falling short in their contribution to the security of citizens and their property. At the same time, the inefficiency of the criminal courts is leading them to neglect their other key function, namely, to protect the falsely accused by, for example, dealing with and concluding cases swiftly.

The connection between solving the domestic rule of law challenge and dealing with the threats to the UK's "soft power"

The best way to mitigate the threats to the UK's stock of "soft power" is to ensure that the rule of law is bolstered by tackling the problems briefly outlined in this report and in more detail in the previous two reports in this series: "*Law and the Open Economy*" and "*Future-proofing Justice*". Such efforts would negate the risk of international perceptions of the UK's adherence to the rule of law turning negative and in turn obviate the threat to the high opinion that many people in other countries have of the UK, which is in-part based on factors such as trust in the UK's institutions.

The benefits of effective actions to tackle the problems in the civil and criminal courts are likely to go beyond merely preventing a decline in an important "soft power" asset. Success could ultimately boost the UK's international standing by increasing the proportion of people in foreign countries who see the UK as a leading adherent to the rule of law. Therefore, reform measures that helped move Britain into the top five of the World Justice Project's Rule of Law Index rankings could give the UK an edge over some of the rivals the UK vies with in international "soft power" indices.

Recommendation: reduce the "civil justice gap" by improving access to the civil courts for individuals, families and businesses through making them world leading by 2030

Boosting "institutional cohesion" at the UK-level means making the rule of law meaningful for the bulk of the people, by ensuring that the civil law and civil courts across the UK but in England and Wales in particular, deliver tangible benefits to individuals and society.

Making sure the rule of law has a central place in the UK's stock of "soft power" and the country continues to be seen as a place with "trusted public institutions" by people in other countries, also requires civil courts that function efficiently and effectively, such that the rule of law is a meaningful concept and not just an aspiration.

Achieving such ends will require a more coherent and long-term approach to the civil court system, so that access to justice is within the reach of everyone who has a legal problem. Whilst the present financial circumstances and a host of short-term challenges (e.g. post-pandemic backlogs and insufficient judges, etc) make reform more difficult, nevertheless, the importance of the rule of law is such that the Government should prioritise repairing the civil courts, with the aim of making them world leading by 2030.

This will require a new comprehensive strategy for modernising the civil courts when the current efforts end. SMF's previous publications "*Law and the open economy*" and "*Future-proofing justice*" discuss how this might be done in more detail.[108] [109]

The current court modernisation effort needs to be completed by the end of 2023, the structural reforms proposed by Lord Briggs of Westbourne in his 2016 "Civil Courts structure review" also implemented by the end of 2023. Once achieved, preparations and planning for new a programme of reform ought to begin. The aim should be to have – by 2030 – civil courts accessible by everyone who needs them (i.e. that are affordable and deliver justice swiftly) by developing and implementing a reform strategy that is:

- Future-facing.
- Based upon a robust body of evidence.
- Built upon proven approaches, through the application of key lessons learnt from successful examples of other court system transformations and models of dispute resolution.
- Have a central role for the right technologies, which can help deliver the changes that are needed in the structures, management and operational processes of the civil court system.

Recommendation: transform the efficacy and efficiency of the criminal courts, such that they are world leading by 2030

Increasing "institutional cohesion" through strengthening the mutual understanding of the rule of law across the peoples of the UK requires making the rule of law more obviously beneficial, on a day-to-day basis, for ordinary citizens. This means that the key elements of e.g. the legal system of England and Wales, such as the criminal courts, need to deliver outcomes which improve lives.

In addition, safeguarding the rule of law's key position in the UK's stock of "soft power" such that Britain continues to be considered a country with "trusted public institutions" by people in other countries, similarly requires criminal courts that guarantee the delivery of substantial societal benefits to maintain the "national narrative" that the UK is a country that adheres to the rule of law. Only in such circumstances will positive perceptions persist.

Reaching such a position will require a more coherent and long-term approach to the criminal courts in England and Wales in particular, so that they play a full role in providing the security that citizens expect while protecting the individual from wrongful convictions, that is also prized.

Essential to a more consistent and long-term approach to the criminal courts is a comprehensive strategy to make the criminal courts world leading by 2030. The SMF report "*Future-proofing justice*" discusses – in more detail – what such an approach might involve.[110] This will not be easy, given the current difficulties (e.g. financial constraints, post-pandemic backlogs and insufficient judges, etc). However, the fundamental importance of the rule is such that the Government should prioritise fixing the criminal courts.

The "repair job" will require the current "troubled" modernisation of the criminal courts to be completed by the end of 2023 and the full implementation of the efficiency measures set out by Sir Brian Leveson in his 2015 report "Review of Efficiency in Criminal Proceedings". Once both have been achieved, preparation and planning for new a programme of transformation needs to begin. The aim should be to have – by 2030 – criminal courts that deliver justice fairly and as swiftly as the best in the world, ensuring that the innocent are acquitted and the guilty quickly dealt with. As with civil court reform, the strategy for change should be:

- Future-facing.
- Based upon robust evidence about workable reform.
- Built upon proven approaches, through the application of key lessons learnt from examples of court system transformations in other comparable countries in particular, that have proven to be effective.
- Have a central role for the right technologies, which can help deliver the transformations in the structures, management and processes of the criminal court system that are needed.

ANNEX ONE – NUMEROUS DEFINITIONS OF THE RULE OF LAW

Anglophone understandings of the rule of law

Table 5: different conceptualisations of the rule of law on the common law tradition

Source	Definition
Lord Bingham	Former Lord Chief Justice Tom Bingham outlined a series of principles which he believed constitute the meaning of the rule of law in his 2010 book "The Rule of Law". These were: [111] *"…the law must be accessible and so far as possible intelligible, clear and predictable; questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation; ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly for the purpose for which they were conferred, without exceeding the limits of such powers; the law must afford adequate protection of fundamental human rights; means must be provided for resolving, without prohibitive cost or inordinate dela, bona fide civil disputes which parties themselves are unable to resolve; adjudicative procedures provided by the state should be fair…".*
A V Dicey	Dicey, was a barrister, Vinerian Chair of English Law at Oxford and Professor of Law at the London school of Economics (LSE). He is perhaps the most well-known proponent of the "classical" understanding of the British constitution. His definition of the rule of law in the UK has fewer components than Lord Bingham's. Dicey's understanding of the rule of law is considered the archetypical "thin" definition:[112] • Absence of arbitrary power. • Constraints on discretionary power, with the powers of the government clearly specified and predictable. • No person punished except for a breach of the law, which has been proven in the ordinary courts of law. • Equality of all individuals and classes before the law of the land. • The constitution is merely ordinary law, with no "higher" laws because the freedoms in Britain were not sourced from constitutional documents, rather, the British constitution reflects existing liberties borne of fundamental inherited societal values and practices.

Joseph Raz	Israeli legal scholar Joseph Raz was Professor of Law at Columbia University and Kings College London. He took a similar "thin" view of the meaning of the rule of law to Dicey. He suggested that the rule of law requires:[113] *"…laws to rest on legal norms that are general in character, relatively clear, certain, public, prospective and stable, as well as recognising the equality of subjects before the law".*
E P Thompson	The Marxist historian E P Thompson offered a definition of the rule of law, based upon his historical analysis of class relations through English history. He argued that:[114] *"The rule of law…concerns the conduct of social life, and the regulation of conflicts, according to rules…which are exactly defined and have palpable material evidences – which rules attain towards consensual assent and are subject to interrogation and reform".* He added that the 'rule of law' is only meaningful when grounded in a "material" (tangible, familiar and meaningful) context, i.e. the law:[115] *"…must always be historically, culturally, and, in general, nationally specific".*

Sources: Bingham, T (2010); Carroll, A (2009); Cole, D H (2001) and Douglas-Scott, S (2017)

The rule of law varies considerably across different legal cultures

The definitions of the rule of law outlined in Table 5 are from Anglophone sources, with the originators of them operating within the common law tradition. However, only 35% of the world's population live in common law jurisdictions.[116] The dominant legal tradition across the globe is that of the civil law. The latter has its origins in Roman law.[x]

Box 6 briefly summarises some of the principle differences between the traditional common law understanding of the rule of law and the way the rule of law is understood in the civil law tradition.

[x] The civil law tradition is not homogenous. For example, the Napoleonic Code variant originated in and is still used in France as well as Belgium and many of the Mediterranean countries such as Spain and Italy and much of Latin America. Whereas the Roman-Germanic variant is used in Germany, Switzerland, the Netherlands and Turkey among others. Source: Wood, P R. (2008). Maps of World Financial Law.

Box 6: the rule of law in the common law and civil law traditions

In a SMF convened expert roundtable in July 2021 – that informed the SMF report "*Law and the open economy*" – one contributor laid out a number of key differences in the understanding of the rule of law between the common and civil law traditions. They described how:[117]

> *"…there is not just one concept of the rule of law in modern society… One is the rule of law, that is the traditional British conception that law is supreme…that governmental powers are limited, and law should be applied equally. Rule through law is a related concept… and the state rules and it rules through law. The state is supposed to follow its own law, but the state is the creator of the law, and the state is regarded as coming first. That's a very different cultural view. From that stems a lot of, you could say, subtle, but very important differences…".*

Baron Neuberger, former President of the UK supreme Court, made observations in a speech in 2016 on the differences between the common law and civil law traditions, too. He noted that:[118]

> *"…the common lawyer, collecting and using individual cases, seeing what works and what does not work and developing the law on an incremental, case by case, basis…the civil lawyer, propagating relatively detailed and intricate, principle-based codes, which can be logically, but relatively rigidly, applied to all disputes and circumstances".*

He added that:[119]

> *"…Apart from the common law's inherent flexibility, there is another reason for its practicality when compared with the civilian systems. Unlike most…civilian system colleagues, hardly any common law judges are career judges: they have not spent their whole professional life since University in a judicial cocoon. Most of them will have been successful, professional lawyers with direct, deep and memorable experience of the problems, whether commercial, family, criminal or other, which individuals in the real world have to face. The late entry judiciary which the common law systems enjoy valuably reinforces the practicality attributable to the inherent flexibility of the common law".*

Sources: SMF (2021); Neuberger (2016)

ANNEX TWO – THE TRADITION OF LAW IN ENGLAND AND WALES AND SCOTLAND

The challenges of different legal histories and systems within the UK

Different legal systems preserved despite political union

As this report has described, the UK is a state of "nested identities". The multi-national nature of the UK is reflected in the presence of three separate legal systems and legal traditions within the Kingdom. England and Wales is the dominant jurisdiction in the UK. Scotland and Northern Ireland are the other two.

The Scottish legal system has distinct origins to those of English and Welsh law and Northern Irish. It is its own unique corpus, bringing strong Roman law influences together with some elements that are similar to those found in common law systems.[120] Further, its existence has likely contributed to Scotland's distinctive sense of itself.[121] [122]

England and Wales have a distinct legal identity too, which has similarly had a central role in defining Englishness over many centuries. One historian has suggested that its lineage pre-dates the seminal Magna Carta and indeed, the Norman Conquest of the mid-11th century. They noted that:[123]

> *"…the English kings had developed…rudimentary written record[s] as early as the eighth century and centralised law-making, tax-gathering, and coinage by the ninth…when Alfred gathered his laws together, he recognised them as standing in a line of succession stretching back from Aethelbert of Kent…Patrick Wormald reckons that by the tenth century the law was internally consistent, politically coherent and intruding on people's lives…".*

The same historian further highlighted that:[124]

> *"By the fourteenth century the common law was becoming autonomous with its own academic schools, legal texts, and courts, and claiming to rely for the greater part of the king's peace on the customs and practices of the people…".*

A legal historian has argued that:[125]

> *"The English common law has made a long and eventful journey from first gestation in Anglo-Saxon England, through its coming to birth in Plantagenet times, to its full flourishing from the sixteenth century…its growth has been organic, and shaped by conflicts and wars…aided by the perpetuation of myths, the…interpretation of precedents, and by sheer necessity…it is one of the great legal systems of the world, the greatest when it comes to the preservation of liberty is concerned….and is so ingrained in the very fabric of English life…".*

What are widely considered key tenets of the common law tradition by many historians and legal scholars, appear to be enduringly popular legal principles with English and Welsh people.[126] [127] When English and Welsh people were surveyed specifically about the most prominent ones and the extent to which they contribute to Britishness, there was a high degree of support for them. For example, more than eight in ten English and

Welsh respondents said that an independent judiciary, freedom to do what a citizen likes unless expressly prohibited by law and equality before the law "contribute a great deal" or "contribute somewhat" to their idea of Britishness. See Annex Three for more detail on the survey results.

Despite the union of crowns in the early 17th century and political union in the early 18th century, the continued existence of multiple jurisdictions and the absence of a system of "supreme law"[xi] has likely made it more difficult for the UK to develop extensive "institutional cohesion", which in turn has hindered the scope for the rule of law to act as a unifying factor.

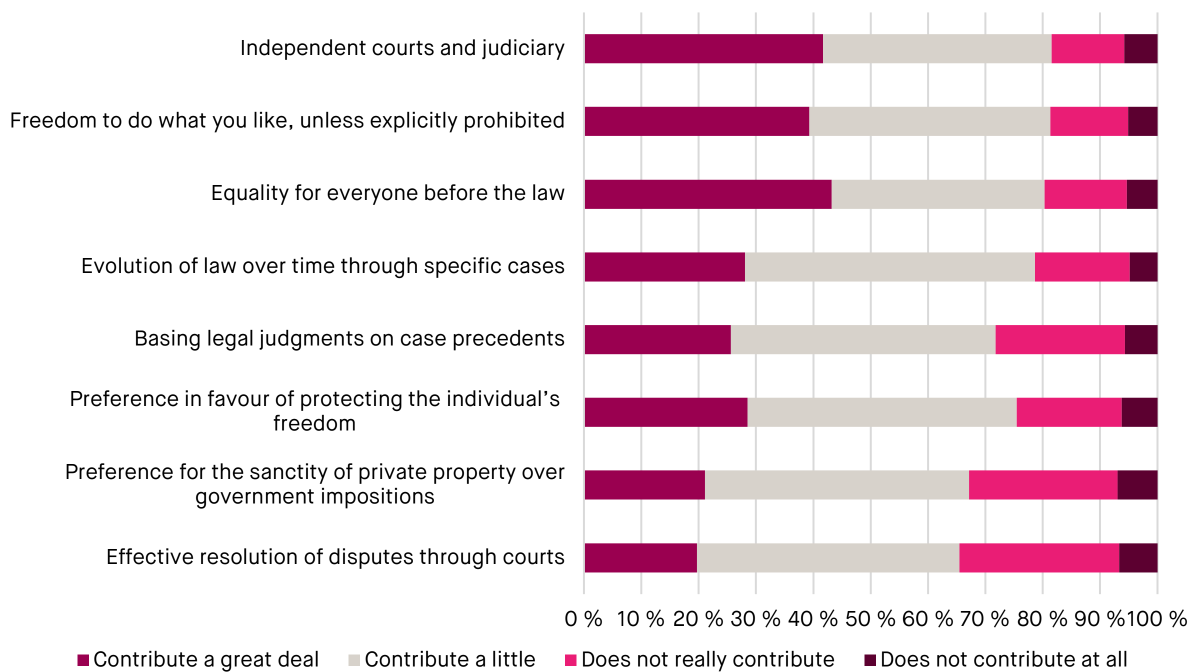
In addition to the challenges inherent in the existence of the three different legal systems within the UK, in the long-term another may arise as a result of the divergence of Welsh laws from English ones, in those areas under the control of the Senedd. Over time, the likelihood is that a de facto, (partially) separate to that of England, Welsh jurisdiction will emerge.

[xi] The UK's constitution contains a limited degree of legal unity. For example, the UK Supreme Court is the final court of appeal for Scottish civil cases, although not for criminal cases. Source: The Jurisdiction of the Supreme Court of the United Kingdom in Scottish Appeals

ANNEX THREE – ENGLISH AND WELSH SUPPORT FOR COMMON LAW TRADITIONS

Figure 12 shows the extent to which some of the key tenets (that legal historians and practitioners have identified as part of the inherent character) of the English common law and legal system, are important to conceptions of Britishness among English and Welsh people.

Figure 12: key tenets of the English common law system and their contribution to Britishness, among English and Welsh UK citizens



Source: Opinium (2021)

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[127] This is a perspective that A V Dicey would also recognize, as he notes in his "Introduction to the Study of the Law of the Constitution. See Table in Annex 1.