

UK IN A
CHANGING
EUROPE



CONSTITUTION AND GOVERNANCE IN THE UK



FOREWORD

Brexit is — formally — done; the coronavirus pandemic is receding; and ‘partygate’ has been replaced on the front pages by the tragedy unfolding in Ukraine. Nevertheless, all three have had, and continue to have, a profound impact on the UK’s constitution and governance, on how we as a country function.

The past six years have seen significant upheaval, and this seems like an appropriate moment to try and take stock. How has the role of Parliament changed? What of the relationship between politics and the courts or of the state of the rule of law? Is the ministerial code fit for purpose?

In an attempt to address these and many other questions, this report draws together a collection of leading scholars. In keeping with the mission of UK in a Changing Europe, they have all provided short, accessible contributions outlining what the best research tells us.

My heartfelt gratitude to all those who have contributed, not least for their willingness to tolerate repeated rounds of edits and comments with great efficiency and good humour.

Within the UK in a Changing Europe team itself, thanks as always to Jill Rutter not only for contributing but also for her tireless efficiency when it came to editing and commenting on the other contributions. Alison Howson and John-Paul Salter again showcased their proofreading abilities, this time going through a mammoth report in record time. Tom Mansfield took care of design and production of the finished version.

Last but not least, my thanks to Sarah Overton for liaising with authors, providing detailed comments and generally keeping the process on track. Sarah will soon be leaving us for pastures new, so I’d also like to take this opportunity to thank her and let her know she will be sadly missed.

I think what follows provides a comprehensive analysis of the state of the constitution and governance in the UK today. I hope you will agree that it is an interesting and informative contribution to the debate.

29 March 2022

Anand Menon
Director, UK in a Changing Europe

INTRODUCTION

Anand Menon, Jill Rutter and Sarah Overton

The UK constitution and system of governance have recently been subjected to unprecedented strain. Brexit and Covid-19, in conjunction with the governing style adopted by the Johnson administration, have raised profound questions as to whether the norms and conventions that form the basis of the UK's uncoded constitution are still fit for purpose.

Indeed, the UK itself — as a union of four nations — has come under increased strain. Partly, this was a result of Brexit, which catalysed a new set of pressures on the UK's internal governance arrangements. A devolution settlement designed within the context of EU membership has been challenged by EU exit. Tensions have been compounded by the different votes in the four nations. Scotland and Northern Ireland have been (as many there would see it) lumbered with a Brexit their voters rejected. Meanwhile, the Northern Ireland Protocol remains controversial. With independence back on the agenda in Scotland, and Northern Ireland left with a leaderless executive, there is new uncertainty over future governance.

The devolved governments accuse Westminster of using Brexit to mount a power (Internal Market Act) and money (Shared Prosperity Fund) grab that undermines devolution. On top of this, the challenges posed by Covid-19 and the responses it engendered underlined differences in approaches between the four governments and also highlighted the financial dependence of three of them on the borrowing powers of Westminster. It also provided England's mayors with a platform, as they became prominent — and sometimes challenging — spokespeople for their regions. It remains to be seen what the decentralisation which is a central part of the government's Levelling Up agenda will mean in practice.

Meanwhile, powers at the centre seem to be shifting too. The restoration of parliamentary sovereignty was a rallying cry for many Brexiters. Yet government has asked Parliament to pass major pieces of legislation, giving it sweeping new powers, with minimal scrutiny. Indeed, the government has proven generally reluctant to subject itself to scrutiny, whether from Parliament or indeed the courts.

The courts have found themselves in the crosshairs, as ministers have sought to curb what they see as judicial overreach with re-examination of both judicial review and the operation of the Human Rights Act. We have yet to see how either of these conclude, but they have been given renewed impetus with the change of Lord Chancellor. Meanwhile, although leaving the jurisdiction of the European Court of Justice was a Brexit aim, and one the government succeeded in delivering for Great Britain if not Northern Ireland, the UK's new relationship with the EU means it is not entirely freed of influence from EU law.

Within the executive itself, while the Prime Minister has not suffered from the kinds of extreme disunity that characterised the Cabinets of his predecessor. This has been achieved by selecting only the most loyal, raising questions about the appropriate balance between loyalty and competence. At the same time, the unprecedented challenges posed by Brexit and Covid-19 have strained ministerial relations with the civil service, while ministers' own behaviour has cast into sharp relief a standards regime that has the Prime Minister himself at the apex.

Yet for all the ambitious rhetoric about reform of the state, the major protagonists of Civil Service reform — Michael Gove and Dominic Cummings — have moved on and out, and the agenda seems to be drifting. Meanwhile, questions of integrity have been raised by the way in which the centre has tried to assert its grip over the Whitehall machine — whether through the management of special advisers to interventions over appointments to key public bodies. Yet for all the changes brought in, it remains far from clear that the Prime Minister has settled on structure, personnel or processes enabling him to govern effectively.

The last seven years have raised questions about the robustness and adequacy of the UK's constitutional restraints. The UK has a political constitution. It relies ultimately on the voters to decide whether they are prepared to sanction how a government behaves, including when it falls short of the expectations embodied in evolving conventions and norms. But do these arrangements need a stronger legal basis? Is Westminster parliamentary sovereignty fit for purpose in a devolved United Kingdom? There are proposals to put some ad hoc arrangements, for example around ministerial standards or public appointments, onto a statutory basis. It would be a much bigger project to produce a full-blown written constitution that could balance power between people and Parliament, government and Parliament, Westminster and the devolved institutions, judges and politicians. Such a project would require a lengthy process with no guarantees that a consensus could be built to overcome the fractures that are all too evident.

Finally, there is the question of the future of elections and the political parties themselves. The government is taking back the power to determine the date of elections, after a decade of the Fixed-term Parliaments Act, and its Election Bill seeks to bring the independent Electoral Commission's strategy and policy under government control. Meanwhile political party funding, dealt a significant blow during the pandemic, is likely to experience more biased scrutiny under the Election Bill's proposals.

These are the issues that are brought together in this report, in which 41 leading scholars assess the impacts of Brexit, Covid-19 and the Johnson government on our constitution and system of governance. They discuss whether these arrangements, that have evolved over decades if not centuries, are sufficiently robust and fit for the purpose of governing a diverse and complex UK. At a minimum, we hope it provides a basis for what will be an ongoing discussion.

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This report was completed on 4 March 2022

PARLIAMENT

GOVERNMENT-PARLIAMENT RELATIONS

Meg Russell

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

The relationship between the executive and Parliament lies at the very core of the UK constitution. The government is accountable to Parliament, and crucially depends on the House of Commons' confidence to remain in office. The principle of parliamentary sovereignty makes Parliament the 'senior partner' in the relationship, and in the constitution overall — though, paradoxically, the government is often viewed as dominant.

The Brexit process generated a uniquely confrontational relationship between government and Parliament, for several reasons. First, the referendum decision mandated the government to pursue Brexit, although a clear majority in Parliament had previously opposed it. Second, Theresa May's 2017 snap general election resulted in a minority government, for which Westminster was ill-prepared and ill-equipped. Third, the governing Conservative Party was deeply divided on Brexit. This trio of factors created a parliamentary '[perfect storm](#)'.

Theresa May inclined naturally to a closed style of policy making, which did not embrace parliamentary scrutiny. Her lack of a stable parliamentary majority further encouraged her to try and shut Parliament out. Within the Conservative parliamentary party, different factions operated increasingly openly — most obviously the pro-hard-Brexit European Research Group (ERG). Like parties within a party, such groups developed their own internal communications and whipping systems. The sheer complexity of Brexit also meant Parliament was often excluded. Much of the detailed Brexit implementation relied on 'secondary legislation', whereby ministers are delegated power to pursue policy with little parliamentary input.

Boris Johnson's arrival in the premiership boosted all these tendencies. Johnson sought to shut down Parliament via a lengthy [prorogation](#), later overturned in the Supreme Court. Despite [being one of the rebels](#) who had scuppered May's Brexit deal, he fought the 2019 election on a [manifesto](#) that accused Parliament of 'thwarting the democratic decision of the British people'. Having gained an 80-seat majority, his [Withdrawal Agreement Bill](#) was rushed through stripped of the previous requirements for parliamentary scrutiny of the subsequent negotiations. Ultimately, his 85-page European Union (Future Relationship) Bill received [just one day's debate](#) in Parliament.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

Far from parliamentary politics returning to normal after the trauma of the Brexit years, the unexpected pandemic provided new opportunities for ministers to operate without the usual levels of parliamentary oversight. The need for emergency measures and policy flexibility to deal with the unfolding crisis led to further hastily-agreed legislation, and an [extraordinary reliance](#) on ministerial delegated powers. Legal restrictions were introduced with little consultation, often coming into effect [before Parliament had debated them](#). Throughout much of the pandemic, Parliament itself did not operate normally, with the great majority of members participating virtually, and the practice of party whips [casting mass proxy votes](#) largely going unnoticed.

All of this played havoc with the usual patterns of government-Parliament accountability. Westminster was not alone in facing such challenges during the pandemic, and the risk of executives accruing unhealthy levels of power with respect to legislatures was noted in countries [around the world](#). However, following on from Brexit, and in the wake of a very recent general election, the impact at Westminster was profound.

Conservative MPs' exclusion from Covid-19 policy produced significant anger and frustration and the spawning of [new backbench groups](#). Most obviously, the Covid Recovery Group (CRG) learned from its predecessor the ERG and shared many of the same protagonists. It had some success in [persuading ministers](#) to bring major policy changes to Parliament for approval and coordinated some [substantial rebellions](#). Other groups, such as the Northern Research Group (NRG), have drawn in newly elected MPs from the so-called 'Red Wall', and likewise been prepared to challenge the government. With MPs' lengthy physical absence from Westminster, whips have struggled to form relationships of the usual kind with members, and MPs have remained strangers to each other far more than is commonly the case. This all adds up to a fragmented and unpredictable environment.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Boris Johnson may be a more jovial and socially adept politician than Theresa May, but he is even less inclined to open, consultative policy making, and clearly views the usual requirements for parliamentary and wider scrutiny as an unwelcome chore. Famously described in [one of his school reports](#) as believing he should be 'free of the network of obligation that binds everyone else', he is naturally disdainful of rules and has demonstrated this repeatedly since arriving in office: from failing to sack a minister found to have [broken the ministerial](#)

[code](#), to seeking to [flout international law](#), or appointing members to the House of Lords who have [failed an independent regulator's propriety test](#). This all sits awkwardly, to say the least, in a system where the government is accountable to Parliament, and the Prime Minister depends for his job on his MPs.

Although there is often an outward impression that Parliament does the government's bidding, it is actually [very far from a 'rubberstamp'](#). Government policy conventionally succeeds in part thanks to significant behind-the-scenes consultation with backbench MPs, including via the party whips. Johnson shows little sign of accepting this reality and has pushed Conservative backbenchers' tolerance to its limits. The usual pattern of mutual communication and trust has substantially broken down. On the Brexit-related Internal Market Bill he faced down opposition from [several former party leaders](#), as well as the [resignation](#) of the government's chief lawyer. On the [National Insurance increase](#), ostensibly designed to resolve the long-term social care crisis, he announced a controversial new policy, then demanded that MPs vote it through in a single day one week later — allowing for barely any debate. These MPs, who were so blatantly bounced, subsequently expressed considerable ['buyers' remorse'](#) — which is a neat advertisement for why parliamentary scrutiny is necessary.

Of course, Johnson's disdain for rules hit the headlines dramatically over the alleged [Downing Street parties](#) during lockdown — driving buyers' remorse among Conservative MPs over his premiership itself. This places Johnson at the mercy of the fractious and frustrated parliamentary party that he helped to create. And it will leave a very difficult legacy for his successor.

PARLIAMENT AND LEGISLATION

Ruth Fox and Brigid Fowler

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

The UK now has greater autonomy to make its own laws as it sees fit. Most interest is directed towards the substance of the UK's new policy regimes, but the process by which the UK legislates is also under the spotlight.

One issue arising is the emergence of delegated legislation — regulations in the form of Statutory Instruments (SIs) — at the centre of often contentious political debates (a feature shared by the Brexit process and the pandemic). Delegated legislation will remain the principal legislative vehicle for delivering the government's agenda in critical post-Brexit policy areas. New acts for immigration, the environment, agriculture, fisheries and customs are replete with delegated powers. The same applies to further bills yet to reach the statute book, including on borders and subsidies. Trade agreements will also require implementation partly via SIs, as will plans for regulatory reform.

Given the [inadequacies of the SI scrutiny process](#), parliamentarians will struggle to discharge effective oversight of major changes in these areas.

However, some Brexit-era powers are also set to expire. In particular, the main delegated power in the EU (Withdrawal) Act 2018 (EU(W)A) — to legislate by regulations under section 8 to address 'deficiencies' in retained EU law — expires on 31 December 2022, two years after the end of the post-Brexit transition period. Whether the government seeks to secure an equivalent, replacement, power in some new or amended piece of primary legislation, or instead considers that it can achieve its legislative objectives without it, will make a significant difference to the way in which post-Brexit law is enacted.

The fate of the section 8 power may well become entangled in the wider question of the status and amendment of retained EU law. After Lord Frost [announced](#) a review of retained EU law in September 2021, the government [confirmed](#) at the end of January 2022 that it would use a piece of primary legislation — the 'Brexit Freedoms Bill' — to make retained EU law easier to amend or repeal. The suggestions from Lord Frost and Suella Braverman, the Attorney General, that this law has less or no democratic legitimacy than law initiated in the UK, and that it might be amended through some form of accelerated scrutiny process, raises concerns about possible further legal uncertainty and the continuing marginalisation of Parliament.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

At Westminster, as in many other legislatures, the emergency nature of the pandemic [eroded](#) parliamentary controls over legislation and money.

Parliament was marginalised by Ministers' habitual use of 'urgent' powers, predominantly those in the Public Health (Control of Disease) Act 1984. [Twenty percent](#) of the 555 pandemic-related SIs laid before Parliament by the end of 2020 used the 'urgent' power procedure, which requires only retrospective parliamentary approval.

But ministerial abuse of the concept of 'urgency' in the laying of regulations, and the government's cavalier approach to their scrutiny, prompted a backlash among its own backbenchers. This culminated in a government with an 80-strong majority having in December 2021 to rely on Opposition votes to deliver vaccine passports, at the time a crucial plank in its pandemic management policy. Having previously taken advantage of the speed and convenience afforded them by urgent powers, ministers would now face a degree of political jeopardy from within their own party ranks, if they needed to exercise them in future.

The pandemic also exacerbated Parliament's traditional weakness regarding control over public spending. Normally, a Contingencies Fund Bill uncontroversially provides a contingency limit of two per cent of public spending without prior parliamentary approval. The limit was raised to an extraordinary 50% by the Contingencies Fund Act 2020, and in 2021 only lowered to 12%. Via the Contingencies Fund Bill for 2022-23, it remains to be seen whether the limit is returned to two per cent or whether ministers try to retain the financial flexibility they acquired during the crisis.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Even away from Brexit and Covid-19, the accretion of power to the executive has been a strong theme of the government's legislative activity, in terms of both substance and process. For example, the Dissolution and Calling of Parliament Bill proposes to reinstate prime ministerial control over early dissolution. The Elections Bill and the draft Online Safety Bill propose to establish considerable scope for ministerial direction of the work of the relevant regulators, the Electoral Commission and OFCOM, respectively.

Ministers seem little concerned that the broad powers they claim for themselves will remain on the statute book for use by governments of a different political complexion in future.

MPs, including on the government benches, have also complained about rushed legislation based on inadequate evidence. For example, the Health and Social Care Levy Bill received just one day's scrutiny in each House, only six days after the policy it enacted had been announced. The Public Administration and Constitutional Affairs Committee — chaired by a Conservative MP — [said](#) the evidence base for the Elections Bill was so poor the measure should be paused.

The government's legislative approach has led to [record numbers](#) of defeats in the House of Lords. Although ministers have sought to portray these as defiance of the elected House, they often build on, or provide a platform for, opposition by MPs.

The effect of the government's legislative approach on its relations with its own backbenchers is set to be critically important in 2022. Accumulated unhappiness on his backbenches certainly provided Boris Johnson with little protection from the crisis that was engulfing his premiership at the beginning of the year. Relations with backbenchers might always have been strained, given the political complexities of the post-2019 parliamentary Conservative party — part-home-counties, part-‘Red-Wall’. Whether the government persists with its poor legislative and parliamentary management and its aversion to oversight will be critical to the future legislative as well as political landscape.

SELECT COMMITTEES

Arabella Lang and Lee Marsons

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

After Brexit, select committees will continue to play an important role in scrutinising how the government handles the UK's relationship with the EU as well as developments within the EU. Both the Withdrawal Agreement and the Trade and Cooperation Agreement have complex governance arrangements that give important powers to the government, and some EU rule changes still apply to Northern Ireland and therefore affect trade between Northern Ireland and Great Britain.

The House of Lords [adapted](#) its committee structure for these challenges, closing its large EU Committee and creating a new European Affairs Committee with a sub-committee on the Northern Ireland Protocol. But for the House of Commons, the government's view is that no new structures are needed — and its control of the Commons means this view prevails.

During the negotiations, the Commons Committee on the Future Relationship with the EU (CFREU) and its predecessor oversaw the Brexit processes and took evidence on their complexities and trade-offs. But the Leader of the House [refused](#) this temporary committee's [request for an extension](#), and its members [disagreed](#) over whether to recommend a new European Affairs Committee, so oversight defaulted to the European Scrutiny Committee even though its remit is out of date. Now that responsibility for UK-EU relations has returned to the Foreign Secretary, however, the [Foreign Affairs Committee](#) could take a role. Detailed scrutiny falls to individual departmental select committees, and although some, including the Northern Ireland Affairs Committee, continue to prioritise Brexit-related work, in general they struggle to be sufficiently [expert, systematic or joined up](#).

Many Brexit issues have complex implications for the devolved nations. Again, the Lords responded nimbly, setting up a dedicated [Common Frameworks Scrutiny Committee](#). In the Commons, although the Welsh Affairs Committee can now [invite members of any Senedd committee](#) to its meetings, there is no equivalent for Scotland or Northern Ireland. The newly reconstituted [Interparliamentary Forum](#), which informally brings together committee chairs and members from the four UK legislatures, may help to provide a more consistent approach to improving transparency and accountability.

A new challenge for select committees is [scrutiny of treaties](#) on matters like trade that were previously handled for the UK by the EU. The new Lords [International Agreements Committee](#) is developing expertise and influence in this area. Commons committees — principally the International Trade Committee — have also begun scrutinising some treaties, though less systematically. But without better transparency and a parliamentary consent requirement, [scrutiny is extremely constrained](#).

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The pandemic substantially changed the [daily operation](#) of select committees, forcing them to conduct their proceedings almost entirely virtually. In May 2021, the House of Lords Constitution Committee [argued](#) that, although there were substantial problems in the Chamber, virtual select committees had worked comparatively effectively by allowing witnesses across the UK and abroad to give evidence remotely. They concluded that this should be the norm. The Speaker of the Commons has also [indicated](#) that he is content for virtual committee proceedings to be permanent.

Several new select committees were created with critical remits, including the Lords [Covid-19 Committee](#), appointed in May 2021 to consider the long-term implications of the pandemic. In the Commons, the majority of select committees have [launched inquiries](#) into how the pandemic has affected policy. Of particular importance are the Public Administration and Constitutional Affairs Committee's [inquiry](#) into the government's response to Covid-19, and a [joint inquiry](#) by the Health and Science and Technology Committees into the lessons to be learned from the pandemic.

Other committees continued to produce compelling and widely cited reports, including on major bills and constitutional issues, such as the Delegated Powers and Regulatory Reform Committee report [Democracy Denied?](#)

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Although some important government backbench critics chair select committees, including Tobias Ellwood elected in January 2020 as chair of the Defence Committee, several events have highlighted committees' perennial struggle with government for independence, respect and impact.

In May 2020, the government announced Sir Bernard Jenkin, a government backbencher, as its [preferred candidate](#) to chair the Commons Liaison Committee, which scrutinises the Prime Minister. This flouted the convention that the Commons appointed an opposition MP as its chair, and was part of a pattern of

increasing government influence over sites of independent scrutiny, including the [attempt to appoint](#) Chris Grayling as chair of the Intelligence and Security Committee.

Equally, there are concerns about whether ministers show adequate respect for the select committees. In July 2021, for example, the Lords Covid-19 Committee published a [report](#) criticising the Secretary of State for Digital, Culture, Media and Sport (DCMS) Oliver Dowden for a lack of serious engagement with an earlier report. In December 2021 the Commons International Trade Committee also [complained](#) to the new Secretary of State for International Trade about her engagement with them, and in October 2019, the Prime Minister himself [cancelled three appearances](#) at short notice before the Liaison Committee.

Some recent public appointments have highlighted that at times the government is unconcerned with following select committee recommendations. In January 2021, the Home Affairs Committee [declined to support](#) David Neal's appointment as Independent Chief Inspector of Borders and Immigration, finding that he had insufficient experience of immigration law and practice. He was nevertheless appointed by the Home Secretary. Similarly, despite the convention that the government would appoint the DCMS Committee's preferred candidate as Information Commissioner, the Secretary of State nominated an alternative candidate. Although the Committee [approved the appointment](#) in September 2021, it expressed its regret.

Although Brexit and Covid-19 both led to some notable innovations, such as a new treaty scrutiny committee and remote hearings, the effectiveness of committees has been curtailed in important respects by a range of government actions. There are many ways the system could be strengthened, for example to increase [accountability](#) for committees' own work, or to [shift their focus](#) from fulfilling tasks to achieving outcomes. But most reforms, at least in the Commons, would require both independent-minded MPs and a government that values scrutiny to enact them.

WESTMINSTER AND EXTERNAL RELATIONS WITH THE EUROPEAN UNION

Hannah Dowling and Alexander Horne*

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Before Brexit, the UK Parliament engaged with the EU in a number of ways, including via select committees. In the House of Commons, the longstanding European Scrutiny Committee (ESC) examined EU documents, whereas the Committee on Exiting the EU was set up in 2016 and continued, as the Committee on the Future Relationship with the EU, until it was wound up in January 2021. In the House of Lords, the European Union Committee and its sub-committees conducted document-based scrutiny and thematic inquiries.

Both Houses maintained the National Parliament Office in Brussels and members would frequently visit Brussels and Strasbourg. UK representatives would also attend EU interparliamentary conferences, such as the [Conference of Parliamentary Committees for Union Affairs](#) (COSAC).

The ESC and the new Lords European Affairs Committee need to adapt following the end of the transition period. The committees continue to scrutinise EU documents that fall within the scope of the Northern Ireland Protocol, the Lords through its Protocol sub-committee. The committees will need to find new ways of monitoring wider developments in EU law, not least in order to scrutinise the effect of any regulatory divergence between the UK and the EU.

The [final report](#) of the Committee on the Future Relationship with the European Union in January 2021 highlighted the fact that Parliament would need to continue to conduct effective scrutiny of the UK-EU relationship including the operation of the bodies established to manage it. In order to do this effectively, the UK government will need to provide Parliament with timely, relevant information about the work of the Joint Committee, Partnership Council and specialised committees established under the agreements with the EU.

* This article is written in their personal capacities.

Scrutiny will also be a priority for the devolved legislatures, and structures need to be set up to enable coordination between parliamentary committees in Westminster and their devolved counterparts. The Interparliamentary Forum, [which held its first meeting on 25 February](#), will be an important vehicle for this work.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

Pandemic restrictions reduced the ability of select committees to travel to Brussels, making it more difficult to maintain a network of contacts there. However, there has been greater use of UK-based contacts. Ambassador Vale de Almeida [gave evidence](#) to the new European Affairs Committee in June 2021, and the European Parliament Office in London promotes good relations between the UK and European member state parliaments.

Both Houses maintain a National Parliament Office in Brussels at the invitation of the Secretary General of the European Parliament, and the Joint Committee on the Draft Online Safety Bill and the Northern Ireland Affairs Committee both conducted Brussels visits in autumn 2021.

The Covid-19 pandemic has resulted in a number of interparliamentary conferences being conducted virtually, including the COSAC conference. Following Brexit, the UK Parliament has attended the COSAC conferences as an observer at the invitation of the presidency. Such conferences are useful for building relationships and sharing best practices, but the former is hampered when they have to be virtual.

WHAT PRACTICAL STEPS CAN BE TAKEN TO INCREASE CO-OPERATION GOING FORWARD?

Article 11 of the [Trade and Cooperation Agreement](#) provides for a UK-EU Parliamentary Partnership Assembly (PPA) ‘consisting of Members of the European Parliament and of Members of the Parliament of the United Kingdom, as a forum to exchange views on the partnership’. The PPA may request information from the Partnership Council, which oversees the implementation of the TCA, shall be informed of its decisions and recommendations and may make recommendations to the Partnership Council.

As noted in the House of Lords Commission’s [report](#), the ‘less formal aspects of the PPA’ also have potential to be of great value. Indeed, the [final report](#) of the European Union Select Committee argued that ‘the initial goal of the Assembly should be to help rebuild relationships between the UK and the EU and strengthen channels of communication between the two Parliaments.’

Good progress has been made towards establishing the PPA. Both Houses passed motions in December 2021 taking note of the provision in Article 11 and agreed that a delegation from the UK Parliament consisting of 35 members, drawn from both Houses, should participate. Membership of the delegation was announced by [written ministerial statement](#) on 26 January 2022.

On the EU side, the European parliament agreed in its [resolution](#) of 5 October 2021 to establish a delegation and [named](#) its members on 18 October 2021. The constitutive meeting took place in December 2021, and the first plenary meeting of the PPA is expected in 2022. The PPA plenary is likely to meet twice a year, whereas a bureau, consisting of a co-chair and two vice-chairs from both delegations, may meet more frequently. If the European Parliament agrees, it is also anticipated that observers from the devolved legislatures will be invited.

The UK and the EU will need to cooperate on a number of important issues, such as trade, security and climate change. The parliamentary dimension of the relationship can provide an important channel in building relationships, and the new PPA may provide a valuable structure in this regard. Cooperation between the UK and the European parliament can also help both sides to conduct meaningful scrutiny and hold their respective executives to account.

Irrespective of the precise structures in place, Parliament faces a number of significant tests going forward: to scrutinise EU legislation that may affect the UK, either directly via the Protocol or indirectly through changes to the EU regulatory framework, for example, which might affect UK companies exporting goods and services to the EU; to ensure that initiatives proposed via the Joint Committee and Partnership Council are examined adequately; and, to ensure that any inter-institutional mechanisms launched can be used effectively to exert UK influence, gain access to information and build relationships.

If it can meet these challenges, then Parliament may, once again, prove that it has an important part to play in maintaining good relations with the EU.

MINISTERIAL RESPONSIBILITY

Ben Yong

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

The history of Brexit has not been characterised by clear thinking on organisational or ministerial responsibilities. Little has changed under the Johnson government.

The [closure](#) of the Department for Exiting the European Union (DExEU) in January 2020 was unsurprising. Established to lead Brexit negotiations with the EU, its history had been fraught, with two of its three Secretaries of State resigning in its four short years, and its various functions being outsourced to other Whitehall departments. David Frost, a former diplomat and special adviser to Johnson, was then appointed, after its closure, as Chief Negotiator of Task Force Europe (a unit located in the Cabinet Office).

The manner of Frost's appointment was typical of British government: practical and unconcerned with constitutional niceties, Frost was initially appointed as a special adviser then, later, given a peerage, so that he could be appointed as minister of state and Cabinet minister. Commentators were critical, pointing out that someone who would shape the ongoing on and future UK-EU relationship should be subject to adequate scrutiny both in [the Commons](#) and [the Lords](#). Concerns about accountability were legitimate. Frost was largely responsible for negotiating the Brexit Withdrawal Agreement and the EU-UK Trade and Cooperation Agreement. In government, Frost had a broad portfolio and was responsible for the UK relationship with the EU after Brexit, as well as implementing Brexit domestically.

Frost has now [resigned](#), and Johnson has [transferred](#) responsibility for the UK's relationship with the EU to the Foreign, Commonwealth and Development Office (FCDO) under the new Foreign Secretary, Liz Truss, while the domestic aspects of Brexit appear to be staying in the Cabinet Office.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The pandemic posed a major policy challenge across British government. Perhaps inevitably, there have also been major policy failures, and what is striking has been the resistance of ministers in Johnson's cabinet to admit any responsibility

for these. In 2020, for instance, Gavin Williamson, as Education Secretary, was forced to make [a number](#) of U-turns in relation to A-level exam results. He did not accept any responsibility for the uncertainty this created, and instead, education officials — the Department for Education's permanent secretary and the Chief Executive of Ofqual — stepped down. Williamson is to receive a knighthood.

But it has primarily been the personal behaviour of senior government figures, and their apparent indifference or inability to follow their own Covid-19 rules (and guidance) that has captured public attention. Dominic Cummings, Johnson's former Chief Strategic Adviser, caused outrage after it was revealed he had [travelled](#) to Durham in March 2020 — when the restrictions were at their most stringent. Cummings refused to admit any culpability; and Johnson backed him. Cummings later [resigned](#) because of infighting within Downing Street and has since become a vociferous critic of Johnson. In June 2021, the then Health Secretary, Matt Hancock, [quit](#) after breaching social distance guidance by having an affair with a colleague. In December 2021, Downing Street's press secretary, Allegra Stratton, [resigned](#) when a video of her joking about Christmas parties having taken place at No 10 the previous year was released. Since then, however, there have been further reports of multiple 'gatherings' having taken place at Downing Street during 2020-1, when lockdown rules prohibited them. An [interim report](#) by senior civil servant Sue Gray has listed 16 such 'events', 12 of which are being investigated by the Metropolitan Police. Gray found 'failures of leadership and judgement' and wrote that some of the behaviour 'difficult to justify'. Despite this, Boris Johnson has expressed limited or no responsibility for these gatherings, preferring rather to bluster and confabulate. He has announced reforms to the operation of No 10, including making Steve Barclay MP, Minister for the Cabinet Office, Chief of Staff for No 10 — a post which has traditionally gone to a political appointee or a civil servant — further muddying the waters of accountability. The 'partygate' issue continues to hang over the Prime Minister: the final official report now waits for the completion of the Met investigation.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Accusations of violating propriety beset every government, but the Johnson government has been tarred with allegations of venality, overshadowing any policy successes it might have. In addition to various advisers and ministers breaching or potentially breaching Covid-19 rules, there have also been notable cases involving the ministerial code. Of these, the most egregious involved Priti Patel, the current Home Secretary. In late 2020, the then independent adviser on ministerial interests, Sir Alex Allan, found that Patel [had bullied staff](#), contrary to

the ministerial code. In an unprecedented move, Johnson disagreed with Allan and held that Patel had not breached the code. Allan [resigned](#), and [later recommended](#) that the independent adviser be given greater autonomy from the Prime Minister.

In December 2021, the Electoral Commission [fined](#) the Conservative Party £17,800 for ‘failing to accurately report a donation’ for the refurbishment of No 10. The new independent adviser, Lord Geidt, had [cleared](#) Johnson of any wrongdoing back in May 2021, although noted that Johnson had ‘acted unwisely’. Following the Electoral Commission’s action, Geidt held that Johnson had not broken the ministerial code but [complained](#) that the way he had learned of the new information ‘demonstrated insufficient regard or respect for the role of Independent Adviser’.

The ongoing displays of impropriety and the casual indifference towards political forms of accountability have led some to advocate revising the ministerial code and giving it statutory status — amongst others, the [Institute for Government](#) and the [Committee on Standards in Public Life](#). Such proposals seem unlikely to succeed under the Johnson government. But regardless of the ministerial code’s status, it is in part a set of prudential rules for governing. It exists to signal that those in government can be trusted with the power of the state; that along with everyone else, they will follow the rule of law. The code’s rules can be broken, but there are consequences: the more rules are disregarded by officeholders, the less respect they are owed, and the less legitimacy their decisions will have. The Johnson government is rediscovering this: it has lost its lead over Labour in various polls, and the consensus is that this is mostly due to Johnson’s chaotic leadership. But the larger concern must be that Johnson’s indifference for basic rules of governance will affect British government generally, and its harmful impact will be felt long after Johnson leaves.

THE HOUSE OF LORDS

Philip Norton

A combination of the departure of the UK from membership of the EU and the impact of Covid-19 has had a major impact on the structures and operation of the House of Lords. The House, whose work is shaped by its relationship to the elected House, has also worked within the context of a government under Boris Johnson enjoying an 80-seat parliamentary majority.

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

For the House of Lords, the new relationship with the EU has affected its committee structure in particular. During the UK's membership of the EU, the Lords devoted considerable resources to scrutinizing EU developments and documents. The European Union Committee, working through several sub-committees (the number varied from five to seven), was the most well-resourced committee of the House. The work of the committee complemented rather than competed with that of the House of Commons.

With the UK's withdrawal from the EU, the House used the opportunity to review its whole committee structure. At the end of March 2021, the EU Committee and its sub-committees came to an end, and five new committees were appointed, including a European Affairs Committee. Chaired by the crossbench peer (and former chair of the EU Committee) Lord Kinnoul, it was appointed to consider matters relating to the UK's relationship with the EU and the European Economic Area. The Committee appointed a sub-committee on the Northern Ireland Protocol. EU withdrawal has also created the conditions for common frameworks agreed between the UK government and its devolved counterparts to cover areas previously covered by EU law, such as the environment. There are now more than 30 active framework policy areas. The House in September 2020 appointed a special (that is, temporary) Common Frameworks Scrutiny Committee, chaired by Labour's Baroness Andrews (and including four senior lawyers drawn from different parts of the UK), to scrutinise and consider matters relating to common frameworks. The Committee was re-appointed for the 2021-22 session. Both the European Affairs Committee and the Common Frameworks Scrutiny Committee have been notably active in undertaking inquiries.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The Covid-19 pandemic created a unique situation for both Houses, the Lords quickly moving to a hybrid mode, with most members contributing remotely. This had a substantial impact on how the House went about its business, and most especially how members communicated with one another. The opportunity for informal contact, for raising issues spontaneously (interventions were not permitted) and for enabling ministers to gauge the mood of the House was lost, to the detriment of the House. Peers had to sign up in advance not only for set-piece debates (already established practice) but also to ask supplementary questions at Question Time. More peers contributed, but in the context of significant time constraints, leading to series of very short statements, with no interruptions, rather than considered debate.

The committees of the House, however, were able to continue to meet, albeit virtually, and conduct inquiries with extensive evidence-taking, including hearing from witnesses who may otherwise have not been able to attend in person. Between April 2020 and March 2021, the committees published 81 reports. A special committee was appointed to consider the long-term implications of Covid-19 and the Constitution Committee investigated the constitutional implications of the pandemic.

Although the committees continued to be productive, there was a knock-on consequence when the House reverted to meeting physically. The demands by government on the timetable of the House to get its business done meant that committee reports scheduled for debate formed a growing queue; by the end of 2021, there were 21 committee reports awaiting a slot for a debate. Although most reports that had been published had received a government response within the recommended two months, not all had, including the Constitution Committee's report on Revision of the Cabinet Manual.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

The House fulfilled its role of complementing the Commons, undertaking tasks — especially detailed legislative scrutiny — that MPs may not have had the time or political will to fulfil. However, there were two challenges with constitutional implications facing the House.

The first focused on the House itself. Peers have been pressing for some time for a reduction in the size of the House. Peers voted without a division in 2016 that the House was too large and that steps should be taken to reduce its number. The Lord Speaker (Lord Fowler) established a committee under former Treasury

official Lord Burns to come up with recommendations. Although peers can retire under the terms of the House of Lords Reform Act 2014 — and more than 100 have done so since then — the inflow of new peers continues to swell the size of the House. Although Theresa May as Prime Minister indicated a willingness to be prudent in the number of new creations (though not formally committing herself to part of the formula developed by the Burns Committee of ‘two out, one in’), there has been no such commitment by her successor, who has been criticised for the number of peers he has nominated as well as by some media for some of those, especially party donors, who have been nominated.

The other implications are fundamental to the working of the political system. The government has been challenged for acquiring major powers with limited parliamentary scrutiny and utilising its parliamentary majority to push against other organs of the state. This criticism has been developed in robust reports from two committees of the House: the [Delegated Powers and Regulatory Reform Committee](#) and the [Secondary Legislation Committee](#). Published at the same time, they warn of attempts by recent governments to adopt procedures designed to bypass Parliament, with a growing trend to employ skeleton bills and a lack of effective parliamentary scrutiny of the extensive use of delegated legislation. Brexit and the effects of the pandemic have not caused, but they have exacerbated, these trends. The committees called for the balance of power to be reset afresh. The government is not likely to be too keen to see its powers constrained. The challenge to the Lords is to craft a more muscular system of parliamentary scrutiny.

CABINET AND MINISTERS

CABINET, GOVERNMENT AND NO 10

Patrick Diamond

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

It was widely believed that the return of Boris Johnson's government with a decisive mandate in December 2019 would heal the Cabinet divisions over Europe that had plagued Theresa May's tenure as Prime Minister. The government now had a Brexit policy, subsequently enshrined in the Trade and Cooperation Agreement (TCA). Since then, Johnson's majority and dominance of the Conservative party has meant that he has been able to shape the Cabinet in his image, creating a muscular No 10 operation that sought to ensure the PM's writ ran across Whitehall. A major reshuffle carried out in September 2021 affirmed that only those committed to Johnson's vision of a new relationship with the EU would progress. The PM ostensibly restored discipline and collective responsibility to Cabinet government.

Nonetheless, the process of unravelling the UK's long-standing institutional and regulatory ties to the EU has led to ongoing tensions at the apex of the British state. The Cabinet is far from united on the shape of the new UK-EU relationship. The Conservative party's divisions have in the past bordered on the pathological and show little sign yet of abating despite Brexit's finality. The decision to pursue regulatory dealignment from the Single Market led to tensions with business that were uncomfortable for Conservative politicians. In his resignation letter, Lord Frost hinted that the post-Brexit vision of the UK as a, 'lightly regulated, low tax, entrepreneurial economy' was being [squandered](#) by rising taxes, government regulation and higher public spending.

The ongoing dilemmas posed by the negotiation of the Northern Ireland Protocol stoked further dispute. While some ministers acknowledged the need for pragmatism, others insisted a border in the Irish sea offended the basic principles of the Conservative and Unionist party. There were ominous signs that Cabinet unity was fraying as the realities of Brexit became starker. Johnson's desire to maintain Cabinet unity meant he had been slow to dismiss incompetent ministers who supported him, notably the accident-prone former Secretary of State for Education, Gavin Williamson.

Meanwhile, tensions with the civil service did not abate. Few officials had much direct experience of EU negotiations. They were easy targets when the

UK government's negotiations ran into difficulty. The high-profile departure of permanent secretaries added to the mood of crisis. During May's tenure, officials struggled to identify policies that could appease rival Cabinet factions. When discord escalated, the civil service found itself caught in a vicious pincer movement between Parliament and the executive. The scars ran deep. In this climate, it proved difficult to place the new relationship with the EU on a stable footing.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The Cabinet have been further split over Covid restrictions. The Chancellor, Rishi Sunak, was opposed to measures that might have negative economic consequences, whereas ministers including Liz Truss and Grant Shapps sought to reflect [backbench opposition](#) to 'coercive controls'. Sajid Javid, the Health Secretary, and Michael Gove, the Secretary of State for Levelling-Up, argued in favour of restrictions. Johnson was forced to allow Cabinet debates to play out rather than imposing his view as strong PMs would previously have done. A Cabinet meeting in November 2021 to discuss parliamentary standards in the light of the Owen Paterson affair was reputed to have lasted over five hours. By now Johnson was being compared to his hapless predecessor, Sir Edward Heath.

The Public Administration and Constitutional Affairs Committee raised further concerns about the oversight of decision making during the pandemic. In September 2020, four decision-making groups of ministers and officials had been established covering healthcare; the public sector; economic and business issues; and international matters. These were subsequently [replaced](#) by two Committees (Covid-19 Strategy and Covid-19 Operations) and a Cabinet Office secretariat. A 'quad' of senior ministers continued to meet informally but its role in Covid-19 policy was oblique. The Cabinet Office was attempting to fulfil its age-old function of policy coordination in the face of conflicting Whitehall departments.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

The Johnson administration's approach to governing has been through two distinctive phases. At the outset, Johnson's team had a distinctive vision for reforming British government. The state machinery was judged to be slow-moving and cumbersome. No 10 fought to appoint more 'wild card' advisers. Cummings believed the centre of government ought to be run in a style akin to a Silicon Valley start-up where 'only the paranoid survive'. There were efforts to assert greater control over the Treasury, merging the No 10 Policy Unit with the Chancellor's team, while controlling departments through the political network of special advisers.

Nevertheless, Cummings' abrasive style and controversy during the first lockdown led to his departure in December 2020. A second phase of governing was initiated in which Johnson turned to experienced Whitehall insiders to manage his No 10 operation. Simon Case had already been installed as Cabinet Secretary, while Dan Rosenfeld was appointed as Downing Street Chief of Staff. More combative rhetoric was abandoned. Johnson's governing style relied on the centralisation of decision making.

Even so, Johnson's team soon discovered that the centre of government has limited influence given the presence of powerful, functionally driven Whitehall departments. UK central government has been portrayed as 'an accumulation of departments' with a 'polo mint' hole in the centre. There were efforts to establish new committees and processes, but No 10 struggled to embed a stable structure. In April 2021, it was announced that the Delivery Unit would be re-established, marking the return of centralised performance management. Yet Johnson faced the problem that as Downing Street expanded, it was at greater risk of becoming [divided](#) between rival factions.

Brexit and the Covid-19 pandemic were asymmetric shocks reshaping the landscape of British government. Johnson could scarcely have foreseen the scale of the governing challenges he would face, and increasingly resorted to de facto centralisation in No 10. Yet power resides with departments, arms-length agencies and devolved governments outside the centre's direct control. The Prime Minister lacked the tools to achieve his priorities in a more disaggregated UK state.

MINISTERIAL BEHAVIOUR AND STANDARDS

Catherine Haddon and Tim Durrant

During the Johnson premiership, [ethics and standards in government](#) went from being a sideshow to an existential issue, posing serious questions about the adequacy of the UK government's approach to upholding ministerial standards. Currently, the system relies on conventions rather than statute and on the 'good behaviour' of those in power. Key documents on standards and constitutional norms — the [Cabinet Manual](#) and the [ministerial code](#) — are effectively documents of the government and can therefore be changed at the behest of the Prime Minister.

Although Johnson's premiership has underlined some of the weaknesses of the current system, it has also demonstrated the importance of standards to good government. [Conservative poll numbers](#) and [Johnson's own ratings](#) have plummeted after months of scandalous revelations and, while the war in Ukraine has meant attention is elsewhere, there are still questions about the long-term strength of Johnson's premiership, which makes it harder for him to achieve his priorities.

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

From the earliest days of his premiership, questions arose about how far Johnson's government were willing to push constitutional norms and conventions — particularly in how far policy or electoral ends were prioritised over the consequences of getting Brexit done. Efforts to demonstrate, in the words of his former adviser [Lee Cain](#), that the government had 'tried everything' to get Brexit done saw the government [briefing](#) that it might be willing to break the law to resist calling for an extension to the Brexit deadline, followed by the [attempt](#) to prorogue Parliament, which was [rejected](#) by the Supreme Court. These cases, and the successful general election that followed, reinforced the Johnson playbook of brazening out controversies and media storms.

Brexit also affected Johnson's approach to managing his ministers, and his wider team, which also had an impact on how he dealt with standards in his government. Johnson valued loyalty and sometimes appeared to place that above other concerns. His Cabinet were [chosen](#) on the basis of their commitment to Brexit and to him. His falling out with, and the resignation of, his first adviser on the ministerial code, [Sir Alex Allan](#), came about after Johnson rejected [Allan's](#)

[conclusions](#) on whether Priti Patel's behaviour towards staff breached the ministerial code. Johnson could have accepted the conclusion, but [decided](#) he wanted Patel to remain on his terms.

Johnson's decision to bring in Dominic Cummings — who, rightly or wrongly, was seen as being key to the problems of ethics in the first year of Johnson's premiership — was rooted in the belief Cummings would complete the job he had started at Vote Leave. But the Prime Minister [chose](#) to back Cummings when, in the summer of 2020, the latter was accused of breaking lockdown rules in his trip to Barnard Castle. This controversy set in train the narrative that would dominate questions of ministerial and prime ministerial behaviour and standards for the next year and a half.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

Covid-19 provided a whole new set of standards applied that ministers now needed to abide by. It was not just about abiding by the ministerial code in normal times; Covid-19 upped the salience of rules and the consequences of breaking them. Not only could the public be fined, or worse, for breaches, but the penalties for public figures found to be hypocritical in their actions were severe. When it came to Covid-19, the idea that the rules did not apply to someone like the Prime Minister was less viable.

The UK saw a number of scandals in which public figures were found to have breached Covid rules. [Professor Neil Ferguson](#), [journalists](#), Dominic Cummings, [Matt Hancock](#) and, finally, the Prime Minister [himself](#), all found themselves at the centre of considerable public outcry.

Even where processes for enforcing behaviour were found to be weak, moral lines in the sand remained in the collective minds of public and media.

The pandemic also changed the dynamic in the Conservative party. Lockdowns and Covid-19 policy increasingly became [another faultline](#) undermining the core Brexit support that Johnson had initially been able to rely on when under fire for other issues, such as behaviour and standards.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Issues of behaviour and standards have long circled Boris Johnson, from accusations of [racist language](#) and [untruths](#) during his time as a journalist, to [gaffes and scandals](#) during his time as Foreign Secretary under Theresa May. His victory in the 2019 general election, however, left him apparently unrivalled. Yet the heaping of scandals and his government's response to them — from Barnard

Castle to Matt Hancock to Owen Paterson to ‘partygate’ — are what led his party to question his suitability as Prime Minister. When the government rowed back on fighting [Paterson’s suspension](#) from the Commons, backbenchers who had loyally supported Johnson were [angry](#) that they had been made to look foolish.

When he became Prime Minister, Johnson issued an updated version of the [ministerial code](#), in which he wrote, ‘we must uphold the very highest standards of propriety’. But the story of his premiership has been repeated failures to do so. In many cases, when a story broke Johnson would initially double down and brush aside concerns — for instance, stating that he considered the matter closed when the Hancock affair first broke. That line did not hold for long, and Hancock resigned within days. Similarly, Johnson was forced to row back on his initial support for Paterson after a public outcry. The misjudgements on how the public would react, which saw criticism grow for both the individual in question and the Prime Minister, saw Johnson lose support during 2021 from Conservatives.

The series of scandals and, particularly, No 10’s approach to handling them, have gone from something many felt was priced into Johnson premiership, to a price that his MPs appeared less willing to pay. But more fundamentally, they may also have put paid to a system of standards that has for too long relied on the honourability of individuals and the willingness of those in power to abide by them.

MINISTERIAL AND CIVIL SERVICE RELATIONS

Tony Travers

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Britain's departure from the EU proved to be a major test of the relationship between ministers and civil servants. The governments of Theresa May and Boris Johnson were committed to getting Brexit done, but the processes of achieving a parliamentary majority for a particular version of Brexit and subsequently of negotiating the UK's final split from the bloc were highly contentious. The civil service found itself in the middle of a five-year long, politically rancorous, process while ministers sought to implement a policy, which had not been thought through or described in advance of the June 2016 referendum. It was evident that some pro-Brexit ministers [believed officials were closet Remainers](#), who wished to thwart the delivery of the policy.

The Cabinet Secretary under Theresa May, Sir Jeremy Heywood, [said Brexit was](#) 'probably the biggest and most complex challenge' in the civil service's peacetime history. Officials had to undertake scenario planning for a range of (often radical) outcomes, prepare legislation, create new post-EU institutions and to work across Whitehall boundaries to deliver the policy. [As Bronwen Maddox concluded](#): 'Brexit raised the question of what it really means for impartial civil servants to 'serve the government of the day', particularly when the government is riven by factions or cannot command the confidence of Parliament'.

The end of the transition period was not the end of Brexit. Ministers and civil servants are still wrangling with the EU and/or individual member states about, among other things, the jurisdiction of the European Court of Justice in Northern Ireland, fishing rights and the regulation of financial services.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The Brexit struggle lives on and will do for many years. But as the pandemic, the condition of the NHS, the economy, inflation, 'levelling-up', labour shortages, education and more traditional policy issues have come to the fore, Brexit-related stresses of the period from June 2016 to December 2020 have largely receded. The relationship between ministers and their officials appears to have normalised, particularly as the pandemic-related emergency made ministers reliant on the solid bureaucratic expertise for which the UK civil service is renowned.

The pandemic was a more serious threat to the country and the government's capacity than anything seen since the Second World War. Civil service expertise was required in spheres as diverse as managing bond issuance, the development of a furlough scheme, deployment of emergency powers, data collection, liaising with local government, supporting businesses, delivering a mass vaccination programme and, most importantly, mediating the relationship between scientists and ministers.

There is no way the UK's Covid-19 response could have been managed without the solid capabilities of the civil service. Although it is inevitable that future inquiries and studies will reveal tensions between officials and ministers about due process, the presentation of data, methods of procurement, quality control of protective equipment and working from home, it is unlikely that there will be [extensive criticism](#) of the capacity of the civil service to deliver in relation to ministerial requirements. Equally, it appears likely that officials will conclude that after the travails of Brexit, the pandemic will have played a role in reminding ministers of the importance of functional and permanent government machinery.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Boris Johnson's chief advisor in the period from July 2019 to November 2020, Dominic Cummings, had [strong views](#) about the civil service's capacity. Cummings regarded the concept of a permanent civil service as 'an idea for history books' and proposed the abolition of the role of permanent secretary. He believed the wrong people were promoted, and that science and business were undermined by official attitudes. Instead, Cummings famously wanted to bring in 'weirdos and misfits' to work on policy in Downing Street.

Beyond the 'emergency' policy approaches required by Covid-19 and Brexit, evidence suggests the Johnson government is not particularly concerned with the delivery of an organised, carefully planned programme for government. Policies to deliver reform to adult social care, devolution/levelling up, transport improvements in the North of England, rail investment plans, planning reform and a post-Brexit economic policy have all remained, at best, work in progress.

There is little evidence of a coherent approach to policy making across the whole of government. As one leading journalist observed, many Conservative MPs had not supported Johnson not because of his approach to government or policy but for other reasons. They were [prepared](#) to put up with 'the chaos and drama he brings in exchange for electoral success'.

Finally, one of the most unusual events during the Johnson government (so far), which will potentially have long-term consequences for the relations between

ministers and civil servants, is the inquiry led by Sue Gray (Second Permanent Secretary at the Cabinet Office) into No 10's alleged lockdown breaches. The inquiry's terms of reference were 'to establish 'a general understanding of the nature' of gatherings that took place and whether any 'individual disciplinary action' should be taken'.

Gray's inquiry followed one initiated by Simon Case, the Cabinet Secretary, which had to be aborted when it was reported that a party/gathering had taken place in his office. Both the Gray and Case inquiries put senior officials in the position of investigating the elected politicians they work for and to whom they were to report the findings of the inquiry. The Prime Minister would then decide what, if any, action should be taken.

According to a senior researcher at the [Institute for Government](#) this was 'a deeply invidious position for the civil service to find itself in ... However independent and brave Gray herself may be, it is very uncomfortable for the civil service to have to conduct an investigation that touches on the actions of the prime minister'. A similar dilemma for Cabinet Secretary Simon Case was [highlighted](#) by Jill Rutter.

In conclusion, Brexit has not gone away as an influence on the relationship between ministers and civil servants, though it may become more of a feature once the effect of the pandemic recedes. The unique style of leadership of the Johnson government, more than anything else, will be the key determinant of changes in this relationship in the medium term.

SPECIAL ADVISERS

Andrew Blick

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Special advisers are temporary civil servants, appointed at the discretion of individual ministers, subject to the approval of the Prime Minister. They are exempt from the usual Civil Service rules that require objectivity and impartiality and work at the intersection between the official and party-political worlds. Given this, they are often involved with the most sensitive and sometimes turbulent aspects of government. This was particularly true of Brexit.

One of the purposes of special advisers post-referendum was to provide a counterweight to a perceived pro-EU bias among civil servants. Some special advisers were chosen because of their perceived reliability on Brexit. Raoul Ruparel, a special adviser to David Davis at the Department for Exiting the EU (DExEU) and then to Theresa May at No 10, was previously director of the Open Europe thinktank. Reflecting on why [Davis recruited him](#), he [commented that](#) he was 'probably someone who had enough of a background on EU policy and the EU and Brexit but didn't openly campaign for Remain and wasn't seen as too much of a Remain advocate'.

But special advisers do not comprise a single, coherent force. The influence exerted over Brexit policy by Fiona Hill and Nick Timothy, Joint Chiefs of Staff to May, for instance, was a source of resentment and division across government, including among other special advisers. But these aides could also play a part in seeking to bring about greater government unity. After the departure of Hill and Timothy, Gavin Barwell became Chief of Staff at No 10. He was central to the 'huge operation' by the May government to broker the Chequers agreement internally and sell it externally.

From the point of view of Leave supporters, or at least those who reluctantly felt they now needed to bring it about, permanent Whitehall staff might not be the ideal group of people to rely on for this. David (now Lord) Frost was a special adviser to Boris Johnson as Foreign Secretary and later Prime Minister. Johnson made him chief negotiator with the EU before and after Brexit had taken place, subsequently raising him to the peerage and then making him a minister. Frost [told](#) UK in a Changing Europe 'I think it is reasonable to say ... that the Civil Service is drawn from particular groups in society, and those groups, the polling evidence suggests, tended to vote Remain rather than Leave.'

Frost noted, however, that ‘I found very few cases where people let that interfere in what they were doing day-to-day. I wouldn’t say it never happened, but I think, professionally, the organisation has stood up really pretty well to the pressures’. Yet there is evidence of pronounced discomfort among career officials regarding aspects of the post-Brexit approach to which Frost contributed, in particular the willingness to renege upon aspects of the Northern Ireland Protocol, which triggered the resignation of Jonathan Jones, permanent secretary to the Government Legal Department, in September 2020.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The pandemic saw ministers reach for support of various kinds from beyond the permanent Civil Service — with mixed results. It also witnessed the continued ascent and fall of one of the most well-known and notorious special advisers in UK political history — Dominic Cummings.

By the onset of the Covid-19 emergency, Cummings had become a source of controversy. He was an open critic of the way in which the Civil Service functioned, seeking to bring about a major reorganisation of Whitehall. He had previously attempted, for instance, to replace all Treasury special advisers with individuals of his own choosing, resulting in Sajid Javid’s resignation as Chancellor of the Exchequer.

In the adversarial atmosphere to which Cummings had contributed, senior permanent civil servants left office on [an unprecedented scale](#). Cummings’ subsequent testimony, though we should treat it with caution, suggests that he had a central role in decision-making with respect to the government’s Covid-19 response. He has subsequently criticised the Prime Minister and others as being responsible for an approach that was amateurish and ineffective.

Cummings’ alleged violation of lockdown rules in late March 2020 became the subject of possibly the most serious public scandal with which he was associated while in post. He was eventually forced out of office in November 2020, his divisive style evidently generating problems — including within the prime-ministerial entourage — that exceeded his perceived value to Johnson. His effort to establish a mission control base at No 10 for the whole of government was then abandoned.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT’S APPROACH TO GOVERNING HAD?

Prime ministers and other ministers have significant discretion regarding who they recruit as special advisers, and in the way in which they deploy them. Johnson came to No 10 in a period of pronounced political turbulence generated

by Brexit. Divisions had undermined the capacity of the Conservative Party to govern and impacted severely on its public credibility and popularity. Johnson became leader and Prime Minister on the basis that he would force through UK departure from the EU in a way that maximised UK post-Brexit autonomy, and appeal to a diverse group of voters supportive of this end. Special advisers were key to these goals. Alongside Cummings, Nikki Da Costa, No 10 director of legislative affairs, for instance, was closely involved in the 2019 attempt to prorogue Parliament; whereas former Policy Unit head, Munira Mirza has been linked to the pursuit of the so-called 'culture war', seen as a means of energising target voters.

Politicians can use special advisers to help them make a particular imprint. In the case of Johnson, special advisers have been central to some of the defining features of his premiership, including policies, such as Brexit and the Trade and Cooperation Agreement, and the scandals to which Johnson became prone, such as various Cummings episodes and events surrounding the Allegra Stratton resignation of late 2021.

Future prime ministers and governments might choose to operate differently to Johnson. But the continued use of special advisers in some form seems assured for the foreseeable future.



CIVIL SERVICE

MACHINERY OF GOVERNMENT

Jill Rutter

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Theresa May established two new government departments in the wake of the EU referendum: one, the Department for International Trade, remains, chalking up new trade agreements; the other — the Department for Exiting the EU — was abolished on 31 January 2020 when the UK formally ceased to be a member state.

The future relationship negotiations were handled from No 10 by a team under Chief Negotiator, Lord Frost. Meanwhile, Michael Gove chaired the Brexit Operations Committee of the Cabinet Office, preparing for the end of transition and the implementation of the new relationship. The UK presence in Brussels ceased to be a representation, headed by the UK Permanent Representative to the EU, and became the UK Mission to the EU, headed by our Ambassador. The post was downgraded, and the delegation downsized.

The Prime Minister might claim Brexit is 'done', but there is still work to be done. In February 2021, Lord Frost was elevated to a Minister of State in the Cabinet Office and put in charge of EU relations. He presided over a Europe team, headed by a Director General, which oversees the management of the Trade and Cooperation Agreement and the Withdrawal Agreement, with a new Brexit Opportunities Unit — another DG headed unit — and the Border and Protocol Delivery Group all reporting to him. Although the Prime Minister still chairs the Global Britain (Strategy) Committee, in effect the renamed EU Exit (Strategy) Committee, Frost rather than Gove chaired the Operations Committee. But in December 2021, he quit citing policy differences, which triggered a machinery of government change. Relations with the EU moved into the Foreign, Commonwealth and Development Office, to be overseen by Liz Truss, with the rest of the Frost empire staying in the Cabinet Office and now reporting to Jacob Rees Mogg, as Minister for Brexit Opportunities and Government Efficiency in the Cabinet.

Brexit has also meant changes within Whitehall departments and arm's-length bodies. Perhaps the biggest change is in Department for Environment, Food and Rural Affairs (DEFRA), which has gone from being an EU-focussed department, with very little domestic legislation, to one with a big domestic legislative programme.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

Although the government managed to find processes and people to manage Brexit, responding to the pandemic shone uncomfortable light on the workings of Whitehall. The government adopted some of the ways of working from Brexit into its pandemic handling — not least the structure of committees to oversee the Covid-19 response. But ministers felt the response of the government machine was flat-footed and exposed longstanding weaknesses. They sought to bypass conventional processes and brought in trusted outsiders to run flagship programmes. One worked well — the Vaccine Task Force, under the leadership of venture capitalist Kate Bingham. But the Test and Trace programme, established under another external appointee, Dido Harding, was troubled from the start. Ministers reorganised arm's-length bodies, and decided they needed bigger powers of direction over the NHS.

Personal relations between ministers and civil servants frayed with frequent blame games over flaws in the government response, and there were high profile departures throughout 2020 — not least when Cabinet Secretary Lord Sedwill was asked to step aside to be replaced by Simon Case, already working on Covid-19 in the Cabinet Office. In the Department for Education, the Secretary of State, Gavin Williamson, survived a year longer after the fiasco of the 2020 exam results than his Permanent Secretary or the chief regulator.

We will have to wait for the promised public inquiry, due to start in 2022, for a definitive verdict.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

The government has yet to 'govern in peacetime'. Its pre-election phase was dominated by Brexit; post-election by Covid-19.

A continuing theme throughout Johnson's time in charge has been attempts to get a grip on the organisation of No 10 — and through it to assert more effective control over the rest of government. Dominic Cummings, as Chief Strategic Adviser, tried to do this through the network of special advisers, the creation of a joint adviser unit with the Treasury (which provoked the resignation of the then Chancellor) and the establishment of an integrated 'mission control' of No 10 and the Cabinet Office to push the Prime Minister's agenda. But Cummings left and his changes were unwound under the new Chief of Staff, former civil servant, Dan Rosenfield.

The Prime Minister re-established a delivery unit on the Tony Blair model to take forward his domestic priorities: education, jobs and skills, health and social

care, levelling up and net zero. But the biggest shake-up has come in the wake of the ‘update’ on gatherings during lockdown. A Cabinet Minister, Steve Barclay, has taken over as Chief of Staff after Rosenfield departed, and Samantha Jones, a former health service executive, who had been working on health and social care integration, has become the interim No 10 Permanent Secretary and is drawing up a blueprint to convert the Prime Minister’s Office into a new government department, the Office of the Prime Minister, potentially taking over some of the Cabinet Office functions.

In 2020, the merger was announced of the Foreign Office and the Department for International Development — undoing the change implemented in 1997 and reflecting the conventional preference of Conservative governments. This was implemented alongside a massive cut to international aid with little transition planning, which appeared to contribute to a plummeting of morale, and is still very much a work in progress. The Foreign Office now has unchallenged oversight of European relations as well — so potentially holds bigger sway in Whitehall than it has for many years.

Meanwhile, to give impetus to his domestic agenda, the Prime Minister added ‘levelling up’ to the name of the housing and local government department, putting Michael Gove in charge, but intriguingly also allowing him to take with him his Cabinet office responsibilities for intergovernmental relations — an odd combination in a department, which has traditionally had predominantly England only responsibilities.

So, two years on from his election victory, the Prime Minister is still trying to find structures and processes that will enable him to show that his government can govern as well as campaign.

CIVIL SERVICE REFORM

Martin Smith, David Richards and Sam Warner*

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

The Conservative government's reform of the Civil Service has been complicated by the Brexit process. After 2016, the initial view of [some Conservatives](#) was that civil servants were inherently '[Remainers](#)', and Whitehall hostility was harming the process. [David Davis](#) regarded the Brexit process as hindered by senior civil servants, who voted Remain and 'did not want to play' with the Treasury and Cabinet Office, as notable sites of inertia. Elsewhere, [Liam Fox](#) has spoken of a deep antipathy in the Civil Service toward disengaging from the EU. Subsequently, some have argued that the civil service lacked the '[skills and numbers](#)' to implement Brexit satisfactorily. For example, Whitehall was seen as being under-resourced in trade expertise and, elsewhere, in the detailed new processes to implement a border with the EU. Moreover, the Civil Service was seen as failing to understand the implications for Northern Ireland and the [impact](#) of Brexit on the devolved nations.

These perceptions had two important consequences. First, an increased reliance on special advisers, with Lord Frost regarded as the 'arch' special adviser leading the negotiations with a free rein over a range of subjects. Second, on the scale of civil service reform required, related to a broader critique of the civil service developed over the last decade by senior Conservatives.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

Alongside Brexit, the pandemic response has subsumed the Johnson government and revealed both the strengths and weaknesses of the Civil Service. The pandemic presented a range of challenges to Whitehall's normal operating procedures. Given the highly centralised nature of UK governance, the government and Whitehall were potentially well-positioned to offer a coherent and joined-up approach to the complex, often competing, nationwide challenges that Covid-19 presented.

The decision to create a [UK Vaccine Taskforce](#) led by Kate Bingham, able to operate across departments and outside Whitehall norms, proved an effective

* This piece draws on research from the [Public Expenditure Planning and Control in Complex Times](#) project funded by [The Nuffield Foundation](#).

mechanism to both the purchase and delivery of vaccines. Similarly, in April 2020 the Treasury's [job retention / furlough scheme](#) was regarded as a rapidly-constructed, effective means to support both businesses and individual livelihoods.

Other elements of the pandemic response and the role Whitehall played revealed significant shortcomings. The first major report into the pandemic by the [Health and Social Care and Science and Technology Committee](#) revealed a recurring set of interconnected themes: centrism, groupthink, British exceptionalism, lack of coherence and cooperation, failings in joined-up government, inadequate contingency planning, and issues of confidentiality, transparency and accountability.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Impetus for change by the Johnson government, driven both by Brexit and the pandemic, built on earlier thinking by Conservative critics of the Civil Service. In 2013, [Francis Maude](#) as the minister in charge of reform, argued for a 'smaller, flatter, faster' civil service. [Dominic Cummings](#), as the PM's Chief Strategic Adviser, predicted a 'hard rain was going to fall' on the Civil Service and proposed radical reforms to bring in different thinkers to shake up Whitehall. These themes were echoed by [Michael Gove](#) in 2020 when, as Cabinet Office Minister, he argued for systemic, bottom-up reform.

Despite these calls for change, reform has been limited. Early on, the Johnson government argued for an efficiency drive, notwithstanding the unprecedented [austerity drive](#) previously implemented across Whitehall after 2010. A 'Covid-19-effect' subsequently saw full-time equivalent civil servants rise to 472,700 by December 2021, representing [a 22% increase since 2016](#). Additionally, the impact of efficiency rounds by previous governments has ironically led to a [growing reliance](#) on expensive, outside consultancy firms to fill gaps. Critics argue this has contributed to recent policy failures, while ['infantilising'](#) the Civil Service.

Elsewhere, there has been some push to move [half of Whitehall out of SW1](#), but [critics argue](#) this is little more than regional window-dressing and lacks any meaningful transfer of powers from central government.

The Johnson government, as with its predecessors, has seen a continuation of an ad hoc [reform process](#), involving re-orientating officials away from their traditional role as policy advisors, relying more on political appointees instead. At the same time, its approach to minister-civil servant relations has centred on what is now an old fashioned 'personalism'. There has been a series of high-profile, often rancorous, departures of top officials. Seven Permanent

Secretaries have departed, notably including: the alleged sacking of Mark Sedwill as Cabinet Secretary; Phillip Putnam from the Home Office (who sued for unfair dismissal); Richard Heaton from the Ministry of Justice; and Simon MacDonald being asked to step down from the Foreign Office preceding a contentious merger with the International Development Office. Relations have been further strained by high-profile revelations of illegal parties across Whitehall, and notably No 10, during a period of national lockdown. The [Cabinet Secretary, Simon Case](#), has been embroiled in this affair, which has not just damaged the reputation of the political class, but also that of [the Civil Service](#).

The effect has been to place unprecedented strain on the long-standing ‘[minister-civil servant bargain](#)’ with accusations, potentially premature, that the ‘[Whitehall model](#)’ is in terminal decline with ‘the Civil Service ... [transformed](#) from guardians of the public realm to agents of the market state’. Both the [ministerial](#) and [civil service codes of conduct](#) provide rules and norms that are [open to interpretation](#) with the Prime Minister effectively the ultimate arbitrator of the rules for the former and the Cabinet Secretary the latter. This form of self-regulation, often referred to as the ‘[good chap theory of government](#)’, allowed a Cabinet Secretary, William Armstrong, in the 1970s [to claim](#) without irony that ‘... being answerable to oneself was the greatest taskmaster ... I am accountable to my own ideal of a civil servant’. In 2022, the trouble for Johnson is the reputation surrounding his own ethical code reveals the inadequacy of this approach.

ARM'S-LENGTH BODIES

Christel Koop and Martin Lodge

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Brexit and the 'repatriation' of some areas of regulation have put the design and operation of arm's-length bodies back into the spotlight. This has meant adding new fields of activity to existing bodies (such as in competition law and aviation) and establishing new agencies, such as the Trade Remedies Authority and the Office for Environmental Protection.

Such machinery-of-government changes matter for the broader dynamics of British governance. Firstly, before the referendum, UK regulators had been very successful in putting their stamp on EU regulation and, by extension, [the regulatory landscape](#) worldwide. Brexit meant losing this influence. The UK government [is still developing](#) its approach to 'regulatory diplomacy' on the international stage. Yet, this is unlikely to bring equal success in shaping regulatory substance.

Any future UK divergence from the EU's regulatory framework risks triggering conflict over the 'level playing field provisions' in the [EU-UK Trade and Cooperation Agreement](#) (TCA). This matters for regulators such as the Financial Conduct Authority, the Food Standards Agency and the Competition and Markets Authority, as the government aims to put them in charge of the regulation that is currently still part of (primary) [retained EU law](#). The expansion of competences will challenge regulatory capacity, both in terms of expertise and staffing shortages. It will also result in inevitable tensions between agencies and central government as there are trade-offs between delivering demonstrable 'Brexit dividends', establishing smooth EU-UK regulatory relations, addressing regulatory stakeholder concerns and, for regulatory bodies, the complexities of territorial politics over 're-acquired' policy areas.

The government's recent [proposal](#) for a new regulatory landscape for financial services reveals a preference for central political oversight through the power of general guidance. Regulatory agencies can propose new rules, but ministerial departments will have new codified oversight powers to ensure that 'broader government economic and social policy priorities' are considered. Regardless of its merits, the proposal is likely to put further pressure on the relationship between government and regulators.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The pandemic highlighted many of the dominant themes that characterise the UK government's overall approach towards arm's-length bodies. Three themes stood out. A central theme was blame shifting to arm's-length bodies, an example of which was the announcement to create the UK Health Security Agency to replace Public Health England, which had been blamed for, among many things, the initial abandonment of 'Track and Trace', procurement and data mishandling. Another example was the [fallout](#) over the 'malign algorithm' that was used to award school qualifications in 2020 and caused political embarrassment leading to the departure of both the chief executive of exams regulator Ofqual (Sally Collier) and, subsequently, its chair (Roger Taylor). By contrast, the government (misleadingly) ['credit-claimed'](#) the speedy approval of the Pfizer/BioNTech vaccine by medicine regulator MHRA as a 'Brexit dividend'.

The second theme was the repeated redrawing of administrative boundaries by government to assert control and allocate political blame, beyond the creation of the UK Health Security Agency. For example, building on pre-pandemic moves towards closer cooperation, the merger of the operational NHS England with the regulator NHS Improvement/Monitor was not just a sign of reduced regulatory oversight, but also of reasserted political direction.

The third theme was the use of appointments of various 'fixers' who were widely regarded as rather close to the Conservative government and critical of Civil Service protocol, such as venture capitalist Kate Bingham, who headed the vaccine task-force, and Baroness Harding, who led the rather unsuccessful NHS Test and Trace programme.

Taken together, however, the pandemic did not transform relationships between central government and arm's-length bodies, but followed the broader dynamics associated with the Johnson government.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

The governing style of Boris Johnson has put a different type of pressure on arm's-length arrangements. The past year has seen dissatisfaction among senior politicians spilling over into explicit attempts to dismantle arrangements, especially those seen as part of a 'culture war' and those affecting procedure and personal conduct.

In the politicisation of appointments, the search for the new chair of communications regulator Ofcom was most noteworthy. The refusal of the interview panel to bow to the government's wish to appoint Paul Dacre might

be seen as confirmation of the resilience of arm's-length arrangements. Yet, the government's decision to rerun the search process, and change the selection criteria, mostly shows an overpowering desire to fill top positions in arm's-length bodies with loyalists. Dacre's own [reflections](#) on the process further illustrate the political dissatisfaction with the system.

Concerns about the integrity of appointment processes also emerged in relation to the Charity Commission — with the Secretary of State [seemingly voicing](#) a preference for an 'anti-woke' candidate portfolio — and the search for a new chair of the higher education regulator, the Office for Students, which ultimately led to a [warning](#) from the then Commissioner for Public Appointments.

Yet, it is in the field of 'regulation inside government' that arm's-length arrangements have caused most concerted political resistance. The Electoral Commission in particular has been [criticised](#) by senior Tory politicians for its investigations into spending by the Vote Leave campaign and the refurbishment of the Prime Minister's Downing Street flat. Under the government's [proposed new legislation](#) the Commission's powers would be curbed significantly.

Changing the regulatory framework was also the government's [preferred option](#) when the independent Parliamentary Commissioner for Standards concluded that Conservative MP Owen Paterson had breached lobbying rules. An initial proposal was (provisionally) [withdrawn](#) only after widespread 'Tory sleaze' allegations.

As the Independent Adviser on Ministerial Interests does not take binding decisions, it has been easier for government to neglect its findings. In 2020, the Prime Minister indeed dismissed the concerns of Sir Alex Allan about breaches of the ministerial code by Priti Patel. Allan [resigned in response](#).

The Johnson government is certainly not the first to intervene in codified arm's-length arrangements. Yet, both the frequency of the interventions and the unambiguous rejection of the arrangements are unprecedented.

PUBLIC APPOINTMENTS

Lisa James

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

The UK's public appointments system is a perennial topic of controversy, and recent years have been no exception. Despite the impacts of Brexit and the pandemic, the most serious concerns have focused on the Johnson government's attitude to public appointments; critics, including independent regulators, have raised increasing concerns about the government's apparent willingness to subvert the appointments process to appoint its allies to key roles.

Brexit entailed the creation of a raft of new public bodies, as the UK took on regulatory functions previously reserved to the EU. These included a new Office for Environmental Protection, the Trade Remedies Authority and the Independent Monitoring Authority which oversees EU citizens' rights in the UK after Brexit. That in turn generated a series of new public appointments. These were generally uncontroversial — though it was notable that a [former Conservative MEP](#) was appointed chair of the Independent Monitoring Authority.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

Whereas the impact of Brexit was limited, that of the Covid-19 pandemic was far greater on the process of public appointments. The challenges of moving processes online — although generally a relatively smooth process — [delayed appointments](#) during 2020. This added to a longstanding (and ongoing) problem with the speed of appointment processes, which is widely agreed to be the result of slow decision making in government, and has at times left public bodies without leaders for lengthy periods of time.

In one particularly egregious case, the UK's innovation funding agency was left without a permanent CEO [for over three years](#). Likewise, the Competition and Markets Authority — facing an increasing workload after taking on [new post-Brexit responsibilities](#) — has been without a permanent chair since Andrew Tyrie [stepped down](#) in September 2020.

The fallout over pandemic policy disputes also resulted in moves; perhaps most notably, both the [CEO](#) and [Chair](#) of Ofqual resigned in the wake of the 2020 exams scandal — the latter after a [public row](#) with the Department for Education over where responsibility lay.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Wider — and more worrying — concerns have been raised about the Johnson government's general approach to public appointments.

Particular alarm was caused in 2020, when the government [made it known](#) that its preferred candidates for the chairs of Ofcom and the BBC respectively were the controversial former Daily Mail editor Paul Dacre, and former Telegraph editor Lord (Charles) Moore. Both were close to the government, having been staunch Brexit supporters. Both were also fierce critics of the BBC, and their announcement as presumptive favourites — coming before the competitions had even launched — looked to many like an attempt to subvert fair process in the service of appointing people who could help to further a 'culture wars' agenda. Drawing on these and other examples, the former [Commissioner for Public Appointments](#), Peter Riddell, argued in his [valedictory speech](#) that although all governments are within their rights to appoint qualified sympathisers, the Johnson government has been increasingly willing to risk the appointment system's integrity to place its political allies into key public roles. Ultimately neither Moore (who did not apply) nor Dacre (who eventually withdrew, after a lengthy process) were appointed. However, in other areas the government has appointed sympathisers to key positions — not least William Shawcross to succeed Riddell as Commissioner for Public Appointments, and Gisela Stuart to head the Civil Service Commission. It has also blocked the appointment of people suspected of being unsympathetic, including recently the [proposed new head](#) of the UK's economic and social research funding body.

Another tactic highlighted by Riddell and other observers is that of '[packing](#)' appointment panels with political allies. This has led Riddell to intervene [publicly](#) — as in the case of the competition to find the new Chair of the Office for Students — and [privately](#).

A third issue is the use of unregulated appointments (those not overseen by the Commissioner). Unregulated appointments are not necessarily concerning, but a [lack of transparency](#) means that it is almost impossible to monitor their usage, and there is some evidence that they are increasingly being used to appoint political allies to [key Whitehall governance roles](#), including the boards of government departments.

In this context, it is unsurprising that some have argued for reforms to the public appointments system. As it currently stands, the UK's system relies heavily on the efficacy of public censure to deter poor ministerial behaviour. Ministers can, for example, appoint candidates who have been rejected by an interview panel so long as they are willing to explain their decision publicly. In one sense, the failed

attempt to appoint Paul Dacre as chair of Ofcom showed this system working as it should. Despite identifying him early on as the preferred candidate for the role, ministers held back from appointing Dacre when the interview panel ruled him out, presumably fearing the political cost. Although they replaced the panel and [reran](#) the competition — seemingly in an attempt to have Dacre ruled appointable the next time around — Dacre then [dropped out](#) of the running. But this case was perfectly suited to generate public scrutiny: a role at the heart of the media sector, with a candidate both well-known and highly controversial amongst both the journalistic and political communities. Not every case will attract the same level of attention.

Hence, the Committee on Standards in Public Life (CSPL) [recently concluded](#) that ‘it is unlikely that a system so dependent on personal responsibility will be sustainable in the long term’. Both CSPL and Riddell have put forward recommendations to strengthen the public appointments system: Riddell has [suggested](#) that ministers’ power to appoint candidates rejected by a panel should simply be revoked, to remove future temptation; CSPL has argued that parliament’s ability to hold ministers to account should be strengthened. Both have argued for reforms to safeguard the Commissioner’s role, with CSPL calling for it to be given the security of a statutory footing.

But the decision about any such reforms [rests](#) with the government. Ministers’ powers will be curtailed only with their agreement — suggesting that we should expect to see public appointments in the headlines for some time to come.

PUBLIC SERVICE RESILIENCE

Thomas Elston

Resilience, the ability to maintain functioning during sudden and severe adversity, is a critical requirement of public services. Brexit and Covid-19 tested government's resilience, and necessitated some undesirable trade-offs.

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

With Brexit, Whitehall's resilience was tested not simply by the volume or pace of work required, challenging as these were; but by the need to devise policy in a context of multiple, inter-connected uncertainties. Uncertainties about the May government's ultimate policy objectives, for example, or the EU's red lines and likely unity; about the political feasibility of different proposals — in cabinet, Parliament and beyond; about the probable effects on the Union, businesses, the economy, and the labour market; and about the viability of what the government termed 'Brexit opportunities.' Compounding this, under-appreciation at the time of the referendum of the full extent of UK-EU dependency in policy and legislation, and the consequences of managing its dismantlement, meant that much of government confronted Brexit in an [underprepared state](#). The result, as the then Cabinet Secretary [acknowledged](#), was 'the biggest and most complex challenge the Civil Service has faced in our peacetime history.'

Bureaucracies thrive on certainty and predictability. When adversity removes these, governments must rapidly acquire new resources and/or make difficult trade-offs in order to restore equilibrium. In Whitehall, this meant reversing the decline in headcount effected during years of austerity, engaging significant and expensive assistance from management consultants, and shelving work on non-Brexit priorities. As one [commentator](#) wrote, Brexit 'absorb[ed] the oxygen needed to solve other problems'. In HM Revenue and Customs alone, 39 projects or reforms were delayed or abandoned to make way for Brexit planning. The Domestic Abuse Bill, the NHS Reform Plan, and the Social Care Green Paper were all also said to be (partly) casualties of Brexit. And, according to the National Audit Office, the Civil Contingencies Secretariat [re-allocated](#) more than half its staff to 'no-deal' planning, slowing its other risk management programmes, including for health emergencies.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The pressure intensified with Covid-19. The urgency of the pandemic countermeasures; the need for intense yet rapid coordination both within government and between the state, business and society; and — again — multiple profound uncertainties, all posed a significant risk to organisational performance. Moreover, these challenges had to be met at the same time as government managed a swift ‘channel shift’ to remote working and a workforce that itself was largely locked-down.

Resource acquisition duly went into overdrive, with industry and academia drafted in to aid the national effort to a degree perhaps unparalleled since the Second World War.

As for the trade-offs, unlike with Brexit, frontline public services now experienced significant disruption. The backlog of cases in both the [health](#) and [justice](#) systems have been well publicized; but there are similar, if less measurable, problems in education and social policy, too. Covid-19 also took a toll on processes. Government transparency, as measured on conventional metric, [worsened](#) during the pandemic, and the [Public Accounts Committee](#) complained that implementation of its recommendations slowed. Normal financial safeguards were [left out](#) of Covid-19 loan schemes designed and implemented at pace, and recovery rates for [fraud and error in established social security](#) programmes also declined. Lastly, [standard procurement controls](#) were relaxed, enabling rapid acquisitions but potentially risking value for money, equality of treatment and legitimacy.

In short, as the organisation theorists would predict, public services faced a ‘speed-accuracy’ trade-off in much of the Covid-19 response.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT’S APPROACH TO GOVERNING HAD?

The government’s intention to reduce Civil Service headcount to its austerity-era low point suggests that Ministers remain unconvinced that a larger state is required to hedge against the kind of unexpected adversity confronted in recent years. Rather, Brexit and Covid-19 are taken as evidence that rapid flexing of bureaucratic capacity in response to urgent need is a viable alternative to building more ‘internal’ resilience, particularly given the challenging fiscal position. As the Minister for Government Efficiency recently [remarked](#), ‘there have been exceptional reasons why you’ve needed more [personnel] in the last couple of years. But those reasons are coming to an end.’

Optimists may regard this ‘crisis-flex’ approach as a welcome balancing of efficiency and resilience — qualities that have traditionally been hard to reconcile, whether in [government](#) or in [business](#). They may also suggest that the experience of managing Covid-19 demonstrates that governments do seem able to access new and valuable sources of talent and capability during periods of national peril that are otherwise hard to reach (an argument for which there is [some international evidence](#) from earlier crises.)

On the other hand, critics will raise at least three significant objections to this ‘crisis-flex’ model of resilience.

First is the highly undesirable trade-offs necessitated by Brexit and, particularly, Covid-19. These may have been both less necessary, and less costly, had internal resilience been greater in 2016 and 2020. Moreover, addressing the long-term Covid-19 collateral in public services will prove challenging in a context of declining resources.

Second is that resource-flexing is challenging for institutional memory. How will lessons be learned, retained and applied in future if staff and contractor turnover is high? For example, while Brexit undoubtedly sapped resources prior to the pandemic, [officials](#) told the NAO that capabilities and experiences developed while preparing for ‘no deal’ — for example, about policy coordination — proved valuable in tackling the subsequent pandemic. In this (limited) sense, the proximity of the two crises was helpful.

Third are the significant risks associated with rapid outsourcing of complex tasks in order to bolster limited internal capacity. In general, whenever large contracts are issued hurriedly and out of extreme necessity, buyers are in a disadvantaged negotiating position, securing inferior terms and limited redress in the event of under-performance. The crisis-flex model may thus be predicated on a false economy.

Horizon scanning and contingency planning help governments to prepare for adverse events. But because the nature and timing of the next major crisis will always be unknown, [‘anticipation’](#) alone provides inadequate protection against severe disruption. Rather, the developing resilience, the ability to function amid adversity, is key. Making such investments in ‘normal’ times, when the risk of paralysing disruption appears vague and far off while the challenges of the present loom large, is challenging. But in the wake of a crisis, or two, there comes an opportunity for questions of resilience to figure more prominently in decision making. It is not yet clear that this opportunity has been fully realised.

THE COURTS, RIGHTS, JUDICIAL REVIEW AND RULE OF LAW

GOVERNMENT ATTITUDE TO THE COURTS AND THE RULE OF LAW

Richard Ekins

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

For [many commentators](#), the characterisation of the government's attitude towards the courts and the rule of law begins with its original sin, the unlawful attempt to prorogue Parliament in September 2019. This set the tone, the argument runs, for the mode of governing that was to follow, in which the populists in No 10 rail against constitutional restraint and seek to undermine the courts and the rule of law.

The reality is more prosaic. In attempting to prorogue Parliament, the government exercised a long-standing legal power not previously thought to be subject to judicial review. Whatever its political merits, the government acted lawfully. The Attorney General rightly advised the Prime Minister that the prorogation in question was lawful, and it was carefully tailored to comply with the terms of the Northern Ireland (Executive Formation etc) Act 2019.

The Supreme Court's judgment invented new legal restraints on the prerogative power to prorogue Parliament, restraints that went beyond the 2019 Act. It was no victory for the rule of law and has rightly been subject to trenchant criticism by [many \(academic\) lawyers](#).

The government should have proposed [legislation](#) to reverse the judgment and restore the law. It has not done so (save to the narrow extent that the Dissolution and Calling of Parliament Bill, which repeals the Fixed-term Parliaments Act 2011, makes provision for the newly restored prerogative of dissolution to be free from judicial review), perhaps because it is wary that this would be misconstrued as seeking revenge.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The government's actions in relation to the pandemic have been challenged in court. The main line of challenge, alleging that various restrictions the government has imposed have been ultra vires (i.e., not authorised by relevant legislation), has failed. Lord Sumption and others have made a strong case that

the challenge should have succeeded. Its failure may suggest a reluctance on the part of the court to intervene during a public health emergency.

In other litigation, campaigners have alleged apparent (not actual) bias in relation to government procurement. This claim succeeded in [first instance](#) and was widely misreported as evidence of corruption. The Court of Appeal has [now overturned the judgment](#), concluding that there was no apparent bias and querying whether the campaign group in question, which had also been active in Brexit litigation, should even have been permitted to bring its challenge in the first place. More recently, the Divisional Court has firmly rejected the same group's challenge to the lawfulness of public appointments in the context of the pandemic, but did accept another claimant's argument that the appointments process was in breach of the public sector equality duty.

Overall, the courts have not been central in arguments about how best to address the pandemic. This does not mean, of course, that the pandemic has not raised important constitutional questions. The government's approach to rulemaking, including the extent to which it has been subject to parliamentary scrutiny, has been much criticised, and of course the failure of senior members of government to comply with the rules is a rolling scandal.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

In 2020, the then Lord Chancellor, Robert Buckland QC MP, set up two independent reviews, first to examine judicial review of administrative action and second to consider the Human Rights Act 1998.

The Independent Review of Administrative Law, chaired by Lord Faulks QC, proposed relatively minor changes to judicial review while making clear that it was open to Parliament to reverse particular judgements. The Lord Chancellor may perhaps have hoped for a more robust report, but he himself adopted an incremental approach to reform and aimed at engaging the higher judiciary on the merits in a series of heavyweight speeches.

Dominic Raab replaced Robert Buckland as Lord Chancellor in September 2021, taking over responsibility for shepherding the Judicial Review and Courts Bill through Parliament. The bill makes only two changes in relation to the law of judicial review, tweaking the law of remedies and limiting judicial review of the Upper Tribunal. These are not radical changes, even if some lawyers have, predictably, denounced them as authoritarian. It seems likely that Raab may want to go further in the future, proposing other changes to the law of judicial review and, in particular, inviting Parliament to reverse judgements that misconstrue legislation or otherwise unsettle the law.

The Independent Human Rights Act Review, which Robert Buckland had set in motion, published its report in December 2021, recommending minor changes to the Human Rights Act. It was published alongside the Ministry of Justice's more far-reaching proposal to replace the Act with a new Bill of Rights. Although much of the detail remains uncertain, part of the point of the proposal seems to be to free UK courts from any duty to follow the Strasbourg Court, a change which [may risk](#) encouraging the judicial adventurism the government otherwise says it opposes.

The government's legislative proposals are often criticised as attacking the rule of law. The Overseas Operations Act 2021 was alleged to provide impunity in relation to war crimes and torture. However, the bill [did not grant impunity](#) to any person for any wrong — ever more so [once it was amended](#) to exclude alleged war crimes. This legislation, as well as in promised legislation in relation to legacy cases in Northern Ireland, government and Parliament are grappling with how best to act in light of contestable human rights law. The proposals in question warrant close scrutiny but should not be caricatured.

[Writing](#) in April 2021, Professor Colm O'Cinneide rightly observed that the government's constitutional agenda was neither populist nor authoritarian, but rather 'a post-Brexit attempt to return to an older constitutional orthodoxy — namely the traditional model of the "political constitution", which formed the core of the British constitutional system for much of the 20th century'. The merits of the agenda are, quite rightly, disputed. Whether the government proves in the end willing or able to implement such an agenda remains to be seen.

REFORMING JUDICIAL REVIEW

Joe Tomlinson

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Judicial review — the court process through which people can challenge decisions of the government and regulators — has become increasingly contested in recent years. From the government's point of view, the central problem is that courts have overstepped the boundaries of 'the legal' and have begun to interfere with 'the political'. By doing so, they are cast as interfering with the legitimate business of government and undermining its capacity to 'get stuff done'.

Before the 2019 general election, a protracted period of political hardball concerning the UK's withdrawal from the EU left a sense of dissatisfaction with our constitutional arrangements — not least in the Conservative Party. The courts were not immune from this; in fact, the judges became something of a lightning rod. For instance, the two high-profile Miller cases — the first relating to the triggering of Article 50, the second to the prorogation of Parliament — saw the government suffer defeats on legal principle that reverberated in the political arena. Although it is a strain to suggest that a handful of exceptional 'Brexit cases' represent conclusive vindication of the pre-existing government anxiety that the courts are too 'activist', many nonetheless took the opportunity to make precisely that point. At the same time, the use of phrases such as 'unelected judges' became even more common.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

There has also been review litigation related to Covid-19 policies, which — despite some high-profile cases concerning procurement — have shown the courts willing to give the government significant room to manoeuvre. This is despite the government's extensive reliance on secondary legislation, which is more open to judicial review than primary.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

This heated sense of frustration mutated into a policy agenda, albeit couched in moderate, incrementalist and even technocratic terms. The Conservative Party manifesto in 2019 promised to 'look at the broader aspects of our constitution:

the relationship between the Government, Parliament and the courts'. It further pledged to 'update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government'. Since the 2019 general election the government has moved relatively quickly to introduce reforms.

The Independent Review of Administrative Law, chaired by Lord Faulks QC, was launched in July 2020 to consider options for reforming judicial review. It was given sweeping terms of reference, a requirement to consult, and very little time to do the work.

It submitted its report to the Lord Chancellor in January 2021. It concluded that the judicial review system was generally working well and recommended relatively minor changes. The government then consulted on a much broader range of reforms and settled somewhere between what the panel had recommended and its own proposals in the consultation paper for the Judicial Review and Courts Bill.

We were left with two reforms in the bill. First, the abolition of a type of judicial review called 'Cart judicial review' — a process which, in specific, exceptional cases, allows people using the tribunals system to seek a further appeal to the High Court. Second, the creation of more flexible remedies, which ultimately may give government more room to manoeuvre when they lose cases. These changes are relatively minor when compared to some of the government's rhetoric around potential reforms. Robert Buckland, the then Lord Chancellor, declared the watchword of the reforms to be 'incrementalism'. At the time of writing, the bill is expected to pass soon.

The government also established the Independent Human Rights Act Review, chaired by Sir Peter Gross, in December 2020. The Human Rights Act has become central to judicial review claims, and the review considered the relationship between domestic courts and the European Court of Human Rights and the impact of the Act on the relationship between the judiciary, the executive, and the legislature in the UK. Their report was published, after a consultation, in December 2021. It also made relatively minor proposals and, again, the government is currently consulting on much more radical proposals. It is a point of speculation whether the presence of a new Lord Chancellor, Dominic Raab, who has frequently expressed scepticism about human rights law, will herald a closing of the gap between political rhetoric and policy implementation.

That governments get frustrated with the judicial review process is neither new nor surprising. There is a long history of governments striking back against court judgments and clamping down on the entire system. In 2004, David Blunkett,

then Home Secretary, caused a constitutional backlash when he sought — and ultimately failed — to oust judicial review in immigration and asylum cases. Brexit developments simply added fuel to extant concerns.

However, the present wave of reforms is open to question on at least two fronts. First, there is limited evidence that the courts are ‘activist’ in the way the government suggests they are. There is plenty to show that UK courts are highly deferential to government — particularly on matters of social or economic policy. The ‘problem’ of judicial power, as the government sees it, is at very least overstated, and it takes a very particular reading of cases to conclude it is a ‘problem’.

Second, a fixation on the notion of judicial power detracts from a focus on the genuine problems with the judicial review system, such as lack of access for most people who cannot take the financial risks it would entail. Despite two reviews by Sir Rupert Jackson, commissioned by the Ministry of Justice, which proposed a variety of solutions, and a report from the Independent review of Administrative Law, the Ministry has not acted. Indeed, the Home Office is now changing the costs rules in immigration judicial review cases, to make them more, rather than less, problematic.

Although it is legitimate to debate the role of judicial power, it is hard to avoid the impression that the ongoing reform process is ultimately fixated on problems more imagined than real.

THE RULE OF LAW

Jonathan Jones

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

A major theme of the government's approach to the UK's constitutional arrangements has been the reassertion of democratic control and the supremacy of Parliament.

Brexit was famously an exercise in 'taking back control' from the EU. It is now to be for Parliament to decide 'what to do with our new freedoms, and deliver changes in a way that works for businesses and citizens across the country'.

So now we have left the EU, the true sovereignty of Parliament is restored, free from the shackles of the EU law and the jurisdiction of the European Court of Justice (ECJ).

But things are not that simple. First, the idea of complete 'sovereignty' — in the sense of unencumbered freedom of action — for the UK after Brexit was always a mirage. The UK is bound by many international agreements — freely entered into as a sovereign state — which constrain its freedom. They include, of course, the agreements it has reached with the EU itself — the Withdrawal Agreement (including the Northern Ireland Protocol), the Trade and Cooperation Agreement and the rest of the Brexit deal. As it happens, the government has realised (perhaps belatedly) that these agreements even confer what might be called a limited and specific jurisdiction on the ECJ in the resolution of disputes between the UK and the EU. Unless and until it can negotiate changes to these agreements, the UK is bound by them as a matter of international law.

Unfortunately, the government does not see things quite this way. Its position on the Internal Market Bill in 2020 (over which I resigned as [Treasury Solicitor](#)), as [set out by the Attorney General](#), was (and apparently still is) that 'Parliamentary supremacy means that it is entirely constitutional and proper for Parliament to enact legislation, even if it breaches international treaty obligations'.

This relationship between national and international law also creates tensions for the government's proposals on human rights. While wanting to change the Human Rights Act and create a new UK 'Bill of Rights', the government is committed to remaining a party to the European Convention on Human Rights (ECHR), including the jurisdiction of the European Court of Human Rights in Strasbourg. The more the government restricts the ability of claimants to enforce their rights in the UK courts — whether through procedural hurdles such a

requirement for ‘permission’, or by directing the UK courts to take a narrower interpretation of certain rights — the greater the risk that unsuccessful claimants will take their cases to Strasbourg. Under the ECHR the UK will remain bound to comply with any judgment where it loses. Ironically this could have the effect of increasing, rather than reducing, the role of the ‘foreign’ court in Strasbourg.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The government’s approach to legislating for the Covid-19 pandemic has also involved extensive use of secondary legislation made by ministers, typically subject to minimal parliamentary scrutiny.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT’S APPROACH TO GOVERNING HAD?

For all the talk about reinforcing the powers of Parliament, in practice the effect of recent changes has been to concentrate greater power with the government.

Parliament’s ability to debate the Brexit deal was vanishingly small. Most of the changes to UK law needed to give effect to it were (necessarily, given the volume and complexity involved) made by ministers in the form of statutory instruments. The proposal in this [statement](#) from then-minister Lord Frost for an ‘accelerated’ mechanism for reviewing ‘retained EU law’ suggests Parliament’s role may be limited here too.

The government’s constitutional reforms also have a theme of reducing scrutiny of government decision making.

The changes to judicial review are said to be about ensuring that the roles of the courts, Parliament and government are ‘properly balanced’. The government’s [view](#), as set out by Suella Braverman, the Attorney General, is that the courts have meddled too much in political questions that should be the preserve of Parliament and the government. But in practice the proposals are mainly about reducing the ability of the courts to interfere with decisions of the government. In the two main cases where the courts are said to have overstepped the mark, the government was asserting its own powers, not those of Parliament. In Miller I, the government argued (unsuccessfully) that Parliament did not need to approve the decision to start the Article 50 Brexit process; and in Miller 2 the government was trying (again unsuccessfully) to suspend Parliament altogether.

Similarly, the government’s [proposals](#) to reform the Human Rights Act 1998 reflect its view that the Act ‘[compels] the courts to displace the role of Parliament in determining difficult questions of public policy’, and that there has been a ‘shift of law-making power away from Parliament towards the courts’. But

the intended effect is mainly to make it more difficult for claimants to enforce their rights against government — whether through procedural hurdles like a requirement for permission, or by directing the courts to take a narrower approach to the interpretation of particular rights.

In other areas too, the government has demonstrated an aversion to scrutiny, and constraints on it have proved to be weak. The ministerial code has been shown to be toothless, the powers of the independent adviser are severely limited, and the Prime Minister can ignore his findings if he wants. The Attorney General, supposedly an upholder of the rule of law in government, was an active proponent of its plans to break international law.

Is this — the concentration of power with the executive and the weakening of controls over it — an inexorable trend?

That is ultimately a political question, and the answer lies primarily in the government's own hands, at least so long as it has a strong Commons majority. But we are seeing some signs of Parliament asserting itself — with highly critical reports from Commons and Lords Committees on the Covid-19 legislation and calls for better scrutiny of statutory instruments. Many — including the independent adviser on ministerial interests and [the Committee on Standards in Public Life](#) — have argued for a new, statutory ministerial code underpinned by full, independent powers of investigation. And — who knows? — a future government might itself see the value of reasserting the importance of standards in public life and respect for the rule of law.

PROTECTION OF HUMAN RIGHTS

Stevie Martin and Stephanie Palmer

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

From a human rights perspective, one of the most significant repercussions of the UK's new relationship with the EU is that the EU Charter of Fundamental Rights ('the Charter') is not retained EU law and has therefore [ceased](#) being enforceable before domestic courts. The justification was that those rights already exist in domestic law. This explanation has been disputed by the Joint Committee on Human Rights, which [concluded](#) that the government's approach 'results in an uncertain human rights landscape' and that 'some of the rights will inevitably be lost'.

In particular, although many of the rights in the Charter find analogues in the European Convention on Human Rights (ECHR), standing under the Human Rights Act 1998 is narrower than under the Charter and the remedies are weaker. Further, some of the rights in the Charter are based on provisions of other international treaties, which have not been incorporated into domestic law, for instance, the rights of the child set out in Article 24 of the Charter. Similarly, there are several Charter provisions which place more expansive obligations on member states than is currently the case in UK domestic law. For instance, Article 37 of the Charter provides that '[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development' and (subject to current proceedings before the European Court of Human Rights [ECtHR]) no equivalent obligation can be distilled from the ECHR or elsewhere in domestic law.

The risk that the domestic courts will be unable to protect previously enforceable Charter rights is further compounded by the cautious approach that the Supreme Court has recently taken to going beyond the judgments of the ECtHR. The rights in the ECHR that have been given effect by the Human Rights Act do not protect rights to the same extent as those in the Charter and the current Supreme Court has indicated an unwillingness to extend existing ECHR rights through interpretation. Applicants will no longer be able to enforce many of their formerly protected Charter rights.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The pandemic has had a profound impact on rights protection in the UK. There have been a number of judicial reviews including, for instance, the rights implications of lockdown measures and NHS guidance. There were cases involving challenges to restrictions on visiting care home residents, extradition where that posed a risk of exposure to Covid-19 and guidance on who should be admitted to hospital and school closures.

Although many of these cases have garnered considerable public attention, they have, in the main, involved relatively straightforward legal questions and the application of uncontroversial principles. In many cases, it is a noticeable trend that the courts have demonstrated considerable deference to the policy decisions of the government, noting the unique nature of the pandemic.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

A recurrent theme in the Johnson government's approach to governing is to limit the constitutional checks on the exercise of executive power. Given this stance, hostility to the Human Rights Act 1998 and the European Convention on Human Rights is hardly surprising.

The government is proposing to repeal the Human Rights Act 1998 and replace it with a domestic 'Bill of Rights', which is set to recast the relationship between the courts, Parliament, the executive and the ECtHR. In 2020, the government announced an 'Independent Human Rights Act Review'. [Central](#) to this review was the perception that domestic courts are subservient to — and hamstrung by — the ECtHR and that judicial decision making in human rights cases is leading courts to overstep their proper constitutional function. The panel overseeing the review was [largely supportive](#) of the existing human rights framework in the UK and made only limited recommendations for change.

Following on from the panel's carefully considered report, the government launched yet another [consultation](#) to reform the Human Rights Act. It has pledged to 'overhaul the Human Rights Act ... and restore common sense to the application of human rights in the UK'.

While the rights in the proposed 'Bill of Rights' correspond with the ECHR rights are currently rendered justiciable in domestic law by the Human Rights Act, there are significant concerns regarding the ability of individuals to rely effectively upon their rights under the new 'Bill of Rights' document. The Human Rights Act provides a statutory basis for the courts to hold public authorities to certain human rights standards but [there are reasons to doubt](#) that the proposed bill will

be as effective, given that the government has promised that the new legislation will ‘provide more certainty for public authorities to discharge the functions Parliament has given them, without the fear that this will expose them to costly human rights litigation’. Further, the government is proposing the introduction of a ‘permission stage’ to ensure that ‘spurious cases do not undermine public confidence in human rights’ and to ‘restrain the ability of the UK courts to use human rights law to impose “positive obligations”’. Both restrictions run the risk of significantly undermining the rights of vulnerable individuals, for instance those facing removal from the UK and/or those who have been the victim of human trafficking, who will face greater delays and further cost, if they must pass through a permission stage before having their substantive case heard.

Other marginalised groups including, for examples, victims of domestic abuse, who have relied on the [positive obligations](#) in the ECHR to ensure a degree of protection by state authorities, and members of the LGBT+ community, who have been able to rely on positive obligations to secure a [semblance of equality](#), may also lose the ability to vindicate their rights before domestic courts. This would see a return to the position prior to the introduction of the Human Rights Act, in which individuals seeking to enforce their ECHR rights were forced to undertake lengthy and costly proceedings before the ECtHR. This, in turn, will likely see an increase in the number of findings of violations of the ECHR by the ECtHR against the UK.

THE EU LEGAL ORDER AND THE ROLE OF THE EUROPEAN COURT OF JUSTICE

Catherine Barnard

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

[Vote Leave](#) argued that a remain vote would mean that 'the European Court will still be in charge of our laws'. The implication was clear: a Brexit vote would end the effect of EU laws in the UK and remove the role of the European Court of Justice (ECJ). Neither claim is (totally) true.

The EU (Withdrawal) Act 2018 (EUWA) was passed to ensure continuity of the UK's legal system after Brexit. This meant that all EU law (except the Charter of Fundamental Rights), together with principles of interpretation of that law (known as 'general principles of law') and the pre-Brexit case law of the Court of Justice, was converted into UK law on 31 December 2020 as 'retained EU Law' ([REUL](#)). The Act also provided for the supremacy of EU law over pre-Brexit UK law. So, an EU Treaty provision, such as that on equal pay, trumps conflicting provisions of, for example, the Equality Act 2010. However, after Brexit, Parliament can now pass a law to reverse any court decisions giving precedence to EU law. It can also pass laws to repeal any REUL it no longer likes. So, to that extent control has been taken back.

Since 31 December 2020, the UK is no longer obliged to comply with EU law. The Trade and Cooperation Agreement (TCA) expressly allows each side to set its own policies in areas such as social and environmental matters. However, so-called level playing field provisions mean that if this creates a material impact on trade or investment, the EU may retaliate.

The ECJ still has an important, if residual, role under the Withdrawal Agreement: the provisions on citizens' rights allows UK courts to make a reference (i.e., to ask a question) to the ECJ about the interpretation of the WA until 2028.

The general dispute resolution mechanism (DRM) provides for political consultation and then arbitration; however, if a point of EU law is at issue, a reference must be made to the ECJ.

Under the Northern Ireland Protocol, the ECJ continues to have the same role as it did before Brexit in matters covered by the Protocol. So, for example, the Commission can bring enforcement proceedings against the UK (Article 258 TFEU) and national courts can make references to the ECJ (Article 267 TFEU).

This role was highlighted when the UK unilaterally extended grace periods agreed to smooth the introduction of the Protocol. The Commission started (but subsequently suspended) enforcement proceedings for breach of the Protocol as well as starting the DRM for breach of the duty of good faith. This particularly aggravated the UK, which argued in its [White Paper](#) in July 2021 that the ECJ should have no role under the Protocol. The UK wants the DRM that applies under the TCA to apply to the Protocol. Yet because the TCA contains no elements of EU law, the TCA's DRM can be based on the model found in more standard trade agreements (political consultation and then arbitration, with no role for the ECJ). One possible compromise might be that the Withdrawal Agreement's general DRM be applied to the Protocol as well.

The ECJ also continues to have an important indirect role in the UK as a whole. Under the terms of EUWA 2018, all pre-Brexit ECJ case law became retained EU law, and so any decisions of the ECJ or national decisions on EU law continue to apply in the UK. However, the Supreme Court and Court of Appeal (and their Scottish equivalents) can depart from those decisions where it is 'right to do so'. The UK courts have not [rushed](#) to take advantage of this power, a power which Lord Frost has since proposed extending to all courts.

In respect of post-Brexit ECJ cases, UK courts and tribunals are not bound by them, nor can they refer any matter to the ECJ. But a UK court or tribunal may have regard to anything done on or after the end of the transition period by the ECJ 'so far as it is relevant to any matter before the court or tribunal'. In other words, UK courts can take post-Brexit ECJ case law into account when interpreting REUL.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

During the first phase of the pandemic — and before the end of the transition period — the UK was still subject to EU rules, most importantly the EU State aid rules. They did not constrain the UK's response.

Some of the UK's [schemes](#), such as furlough, were universal and so did not need to be notified to the Commission; others, such as the Coronavirus Business Interruption Loan Scheme, were notified and received expedited clearance under the [Commission's Temporary Framework](#). The Medicines and Healthcare Regulatory Agency (MHRA) also approved the first vaccine during the transition

period, a decision taken under the relevant EU legislation allowing member states to grant temporary authorisation. The first procurement of vaccines also occurred during transition: under [EU rules](#) the UK was not obliged to participate in the EU's joint vaccine procurement scheme and went ahead alone.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Given that the government prioritised regulatory autonomy in the TCA, it is not surprising that Lord Frost, then Brexit minister, thought the presence on the UK statute book of swathes of REUL was unacceptable. In his final [statement](#) to Parliament in December 2021, he said he wanted to give REUL a 'more appropriate status within the UK legal system for the purposes of amendment and repeal'. This prompted concerns that if this resulted in downgrading all REUL to secondary legislation (some of it is currently considered primary legislation), thus making it much easier to repeal, Parliamentary scrutiny would be inadequate, especially if, as proposed, an 'accelerated process' is involved. In its [Benefits of Brexit](#) policy paper, the government [reiterated](#) Lord Frost's ambition to allow 'changes to be made to retained EU law more easily'.

The government is also reviewing the substance of REUL. No doubt this review will suggest areas for amendment, replacement or repeal but the space for reform is constrained in practice by the level playing field provisions in the TCA; concerns about [regulatory divergence](#) within the UK, particularly given the straitjacket imposed by the Northern Ireland Protocol; and [manufacturers](#) not wanting divergence, arguing that there is no business case to be made.

So, returning to Vote Leave's claims, control has been taken back, but perhaps in a more *specific* and *limited* way than its advocates had first indicated.



DEVOLUTION AND THE UNION

RELATIONS BETWEEN THE UK AND DEVOLVED GOVERNMENTS

Mike Kenny

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Brexit has certainly had major repercussions for the health and harmony of the UK's own Union. From 2016 to 2019 there was a notable deterioration in the relationship between devolved governments and central government in London. Significant legal and political disputes [broke out](#) during this extended political crisis.

Key choices made by the May and Johnson governments made conflict with Cardiff and Edinburgh (which were both opposed to Brexit) inevitable. This was certainly the case once May decided that her government's 'red lines' in negotiations with the EU involved [leaving](#) the Single Market and the customs union. In other respects, it adopted a more consultative and conciliatory [approach](#) notably in the 2017 dispute over returning powers from Brussels in areas of devolved competence. Still, this was a low point in relations between these governments, and the Withdrawal Agreement passed at Westminster was never given formal consent by Holyrood.

Johnson's government adopted a more combative approach. In 2020 it introduced the controversial [UK Internal Market Act](#), which introduced new rules based upon mutual recognition and non-discrimination in goods and services. These were applied to a variety of policy areas right across the UK, and effectively cut across the devolved administrations' [regulatory autonomy](#).

Yet, despite these disputes, the territorial tensions created by Brexit were somewhat mitigated by the changing political weather of 2019-20. The December general election resulted in a clear majority for the Johnson government, clearing the way to securing Brexit. Then, the May 2021 Holyrood elections again made the SNP the largest party at Holyrood, falling just short of an outright majority in favour of a further Referendum on Scottish independence.

The idea that Brexit has been the sole cause of the instability that characterises territorial relationships within the UK is in some ways misleading. It leaves out of the picture the immense challenges to the UK's model of territorial governance that the pandemic has raised and the notable shift of perspective and policy on the Union at the top of British government.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

Had the pandemic not arrived in the UK in 2020, it is possible that the UK's territorial politics might have become slightly less volatile — although Northern Ireland would have been a notable exception. The pandemic also helped take the sting out of the referendum question, [reducing pressure](#) on the First Minister, Nicola Sturgeon, to secure a further poll on Scotland's future .

Instead, new points of tension within the UK's system of territorial governance emerged. One of the key questions raised by the Covid-19 pandemic is how central government should [operate](#) in the face of a crisis in which many of the key decision-making powers sit with the leaders of the devolved administrations. Another has been the need to accept and communicate the reality that, in key respects, the UK government's writ has been [confined](#) to England. All the while, the UK government's decisions are readily subjected to comparisons with these other territorial governments.

What has made this situation more complex still is that central government still holds the key fiscal levers in the UK. The Chancellor's introduction of the furlough scheme to prop up businesses and workers during much of 2020 showcased the economic benefits of a union that pools risks and redistributes resources geographically. His subsequent reluctance to re-introduce a similar scheme in the late 2021 was hailed by nationalists as emblematic of the need to reacquire sovereignty for the smaller nations.

As the pandemic hit, there was a brief period of wary cooperation between all four governments within the UK. This was followed by a growing inclination to move at different speeds, and adopt [somewhat different](#) rules, as all sought to move out of the lockdown introduced in early 2020. This shift was triggered in part by the British government's decision to end the pattern of including devolved leaders in consultations ahead of key announcements. It also resulted from the political incentives for these leaders to [contrast](#) their own more cautious approach to Johnson's methods, although this was often more about hyping minor differences in rules or guidance than substantive policy differences.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Figures at the top of British government have shown considerable [unease](#), and some outright hostility, faced with the challenge of working with and potentially coordinating the efforts of these other governments.

The growing push-back against the pro-devolutionist ethos that [captured](#) large parts of the British political establishment after 1997 signals an important turn

in unionist thinking within British politics. It reflects the gradual [re-legitimation](#) of an older species of integrationist unionism — last politically prominent during the Thatcher years, and now reconstituted in pro-Brexit circles around the conviction that sovereignty regained from Brussels means sovereignty restored to the Westminster parliament.

What some have labelled a more ‘[muscular](#)’ or ‘[hyper-](#)’ unionism is a product and partial cause of the growing political instability and conflict associated with devolution.

This assertive form of unionism has been particularly influential under Johnson, and its current hegemony is to some degree contingent on his tenure as Prime Minister. Other Conservatives, including figures like Michael Gove, have [signalled](#) their commitment to a more realist and strategic understanding of the tasks facing the central government in the context of devolution, and some Conservatives [have stressed](#) the importance of improved intergovernmental coordination and a more balanced policy agenda to promote the union. Flesh has been put on the bones of this agenda in the form of the proposals advanced by the [Intergovernmental Relations Review](#), which involved officials from all four governments.

There is a growing conviction that the domestic union is now a first-order political issue — and not just because of ongoing instability in Northern Ireland, or the independence issue in Scotland. The return of the UK union to the forefront of political life is one of the most important repercussions of the crises that have wrought British politics since June 2016.

RELATIONS BETWEEN THE UK AND DEVOLVED ADMINISTRATIONS

Janice Morphet

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

The trajectory towards the establishment of the Devolved Administrations (DAs) had its basis in the EU governance principle of subsidiarity, strengthened in the Maastricht Treaty 1992. Once established in 1999, the role of the DAs was primarily to [implement](#) EU legislation and programmes negotiated by the UK government. These devolved responsibilities were extended as the principle of subsidiarity was enhanced in the period after [the EU Governance White Paper of 2001](#), finding their fullest expression in the Lisbon Treaty signed by Gordon Brown in 2009. Although the differences between the responsibilities for the delivery of subsidiarity were to some extent hidden within the UK, as the different nations developed their own language of governance and priorities for delivery of EU programmes, a more centralised approach emerged in England, with local authorities being restricted in their decision making about local and community requirements with their funding increasingly being [tied](#) to Whitehall deals, in which projects need central approval. The devolution to the Mayor of London, with the GLA being a local authority but where the Mayor's powers are more akin to those of the First Minister's has been less discussed.

The strengthening of the EU subsidiarity principles in 2007 began to change Whitehall's view of the role of the DAs — first exhibited through a response to the 2014 Wales Bill and then the first Her Majesty's Treasury deal for the Glasgow City Region (2014), followed by others for areas of Wales and Northern Ireland.

The different voting patterns in the Brexit referendum created new tensions between the DAs and London. As Brexit removed the requirements for subsidiarity, the arrangements for the transition and new internal legislative programme, including for the internal market, started to return powers to the centre. Key devolved areas of decision making for EU programmes were put into doubt in the EU Withdrawal Act 2018 including for transport, energy and the environment. The Internal Market Act 2020 removed more devolved powers from the DAs. One of the last acts of Theresa May as Prime Minister was to ask Lord Dunlop to consider how the union could be strengthened through [increased](#)

[capability in Whitehall](#), and one of the first acts of Boris Johnson as Prime Minister was to commission the [Hendy Review on Union Connectivity](#). The Review of Intergovernmental Relations, published in January 2022, has generally been welcomed, although it was shortly followed by the Prime Minister's announcement that he was replacing EU legislation continued after Brexit, receiving criticism for scant consultation by the DA leaders.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The PM's approach to managing the pandemic in England did not rely on the government's longstanding partnership with local authorities and public health teams. In Scotland and Wales, the First Ministers became the trusted public sources and demonstrated that their powers were different. This was a major lesson for the UK media, which had to learn to talk about the [different rules in Scotland, Wales and Northern Ireland](#), whereas government ministers of operational departments primarily had power over England only — something that was well understood elsewhere in the UK. In England, the frustration in local government was expressed through the directly elected mayors in London and Manchester, while local authorities started to establish and operate their own local systems to manage the pandemic. As the Prime Minister centralised his approach to the pandemic, the more his poll ratings reduced. The vaccination programme, that was localised from the outset, [helped a ratings improvement](#) and could have provided a lesson in the outcomes of better relationships with local leaders.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

The future of relations between the leaders of the DAs and central government in London remains uncertain. The publication of the government's 'Levelling Up in the UK' [White Paper](#) (Cm 604) appears likely to further test the extent to which central government is perceived as undermining the decision making in DAs that has been increasingly in practice since devolution. In Scotland, Wales and Northern Ireland, the White Paper suggests that only education and health should be devolved, which returns the practical devolved powers back to the pre-1999 position. There are also further challenges for devolution in England, for which the White Paper appears to offer more deal funding, but it remains uncertain how decisions are to be made about the inclusion of specific projects. A new governor model is being introduced as an alternative to a directly elected mayor and government regional directors reinstated after their abolition in 2011. Additional powers are suggested for some mayors of combined authorities but with no detail about how this might be achieved. Equivalent powers to those of

the Mayor of London would be welcomed in Manchester and the West Midlands, but the Greater London Authority is a local authority, and it is uncertain whether this is what is proposed. Overall, the implementation of the government's post-Brexit agenda appears to include taking back control within the union as well as from Brussels. There are already [some voices](#) proposing a new constitutional convention to secure long-lasting powers for Parliament, DAs and local authorities, but, as with devolution, this might be a long road.

ENGLAND

Arianna Giovannini

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

After pledges to 'get Brexit done' and 'level up the country' propelled Johnson's government to power, finding a sustainable settlement for England's subnational governance arrangements is increasingly important. England remains the only UK nation with a [patchwork system](#) of devolution underpinned by complex local governance structures — and one of the most [regionally unequal and centralised](#) countries in the developed world. This means local leaders do not have a direct say in decisions about Brexit's implications for their areas or in plans to rebalance the economy. Hence, most of the levers to shape key policy that will affect the communities they serve are still held in Westminster.

Brexit and the process of 'taking back control' offered an opportunity to reconsider how power and resources are distributed in England and to reset central-local relations on a more equal footing. On power, although devolution hit a stalemate during May's premiership, the agenda seemed to gain [new momentum](#) under Johnson. Yet, beyond rhetoric, there has been a limited shift of powers away from the centre. So far, only one new mayoral combined authority has been created in West Yorkshire — and devolution negotiations have been used by central government to pursue local government reform through the [back door](#). Meanwhile, existing metro-mayors have been 'ranked' based on their 'electoral value' — with those operating around former Red Wall communities and key Conservative seats often getting a [larger share](#) of government attention (and investment).

On resources, Brexit ended EU structural funds that were [vital](#) for regional and local economies. To replace these, the government introduced [new streams](#) — from the Levelling Up Fund (LUF) to the UK Shared Prosperity Fund (SPF) — [promising](#) they would be better targeted and match previous EU receipts. These, however, are competitive, centrally administered and 'policed', short-term and allocated through [opaque](#) and [often politically-driven](#) methodologies. They are also smaller in size. The SPF is set to deliver a [40%](#) shortfall over 2022-25 compared to what the UK would have likely received from the EU. Meanwhile, the 2021 allocations of LUF amounts to just [£32](#) per person in regions like the North — with higher-need combined authorities and councils at [severe risk](#) of being short-changed. Critics of EU structural funds argued they were too bureaucratic and 'poor value for money'. But, in practice, the domestic pots that are replacing

them have not brought improvements. In a context of limited and patchwork devolution, they are further reducing local autonomy and enhancing central leverage.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The pandemic exacerbated these processes, putting local authorities in the [eye of a perfect storm](#). On the one hand, councils continued providing essential services when demand soared and resources shrank, showing resilience despite the toll exacted by a decade of [austerity](#). On the other, the absence of a coherent system of devolution and constitutional protection for subnational governance enabled central government to sideline them in the management of the crisis.

Thus, the pandemic further exposed the [dysfunctional nature](#) of centre-local relations in England. The government entered almost instinctively into a [top-down command and control mode](#): (re)centralising most decision making in the face of the stark regional differences in Covid-19's spread, ignoring the knowledge held by devolved and local government, and often ostracising local leaders' requests for a seat at the negotiations table. This led to [poorer Covid-19 responses](#) — as epitomised by the controversy over the distribution of PPE in the first phase of the pandemic, or the government's continued delays in sharing infection data with councils. Centrally imposed decisions also exacerbated relationships between government and local leaders — illustrated by the imposition of local lockdowns 'by decree' with no local consultations, as in the case of [Leicester](#), or the standoffs between the Prime Minister and mayors over Covid-19 support-packages in [Greater Manchester](#) and [London](#).

More broadly, Covid-19 mapped onto and aggravated England's [regional inequalities](#). This is clearly reflected in [higher-than-average death rates](#) and the stark [economic impact](#) of Covid-19 in the most deprived regions and on the [most vulnerable](#). Early signs suggest England's uneven recovery is failing to close divides wrought by Covid-19, let alone repair pre-existing ones.

WHAT IMPACT HAS JOHNSON GOVERNMENT'S APPROACH HAD?

Restoring domestic sovereignty through Brexit was presented by Johnson's government as the key to enabling policies that would 'level up the country'. Yet, the drivers of the inequalities that cut across England — its political and economic overcentralisation — have remained largely unaddressed.

Indeed, under Johnson policy agendas have been compounded: Brexit and Levelling Up have intertwined; devolution has been 'absorbed' into Levelling Up; and vital funding streams have been politicised. Priorities have been

muddled up while government has failed to develop a clear vision for England's governance, and to clarify its role within the [increasingly creaking machinery](#) of intergovernmental relations that is keeping the union together.

Arguably, Michael Gove's appointment at the helm of the rebranded Department for Levelling Up, Housing and Communities was an attempt to breathe new life into commitments to rebalance the economy and to empower subnational governance institutions. Although the long-awaited [Levelling Up White Paper](#) got the diagnosis and ambitions right, the proposed solutions are underwhelming.

On devolution, there is an ambition to deepen and broaden the agenda, introducing a [much-needed framework](#). But this is, again, orchestrated from the top-down, and government's direction of policy from the centre and the Treasury's control of financial priorities have been left [untouched](#). New 'County Deals' will be implemented; yet the first areas to go ahead have been 'cherrypicked' by the government. Existing and new 'devo deals' can be expanded but will remain competitive and consequently not available to all places.

The 'governance revolution' promised by the White Paper requires a radical shift of power over decision making and resources to the subnational level — including reform to government, and a constitutional settlement to make it stick. Alas, none of these feature in the current plan; leaving the governance of England, and the centre-local relations that underpin it, profoundly unbalanced.

DEVOLUTION AFTER BREXIT AND COVID-19

Graeme Roy

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

More than five years after the referendum, the fallout from Brexit remains a source of tension across the nations of the UK.

In Northern Ireland, opposition to the Protocol amongst some unionists has brought Stormont to a standstill, raising new questions about the stability of the devolved political institutions. No special post-EU arrangements have been forthcoming for Wales or Scotland, despite calls from their governments for a [softer form](#) of Brexit. In Scotland, the sight of fishing industry protests outside Downing Street in early 2021 brought home the reality of new trade barriers with the EU. But the long-term costs of Brexit will be more significant, if less immediately obvious. Scotland [exports](#) more to the EU than it does to North America, Asia, Australasia, Africa and the Middle East combined. Increased trade costs will impact on jobs and activity across the economy. With Scotland facing a tougher [demographic outlook than the UK](#), the implications of the loss of freedom of movement of people however, present arguably an even bigger challenge for Scotland's long-term economic prospects.

Calls by the Scottish and Welsh governments to be involved in the negotiation of future UK trade deals have, so far, been ignored. Calls for regional variation in migration policies have also been rejected. Most controversially, the passing of the Internal Market Act has created a new source of political conflict. Although it might not be the 'power grab' the devolved governments claim, it will limit the effectiveness of devolved decision making. The handling of the Act from drafting to implementation has attracted criticism, and it is only a matter of time before it is tested in the legislatures (and likely the courts).

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The devolved nations' economies have experienced a significant shock because of the pandemic. In Scotland, day-to-day business activity fell by over 20% at the height of the first lockdown. Initially, there were fears that recession in the devolved nations might be [deeper](#) than for the UK as a whole. But unemployment rates and economic activity in Scotland, Wales and Northern Ireland have all moved broadly in line with the UK overall, although in recent months economic

confidence in the devolved nations has tended to [lag behind](#). The greatest uncertainty so far concerns the Northern Ireland economy where new trade frictions led to reports of shortages in certain products in 2021. More damaging has been the ongoing political fallout from the Northern Ireland Protocol and the knock-on long-term implications for investment and growth.

Why has the economic fallout from the pandemic been broadly similar across the devolved nations? In part, it reflects the nature of a global pandemic and the ability of the virus to spread across borders. It also reflects the fact that policy variations in responding to the crisis have mostly tended to be marginal, at least from an economic perspective. Throughout 2020, whereas the Scottish government largely implemented stricter measures sooner than the UK government and loosened them later, the differences concerned a matter of days (or at most a couple of weeks). This changed in late 2021 with the devolved nations reacting more cautiously to the Omicron variant, but those differences were short-lived.

Whether this was through choice or necessity borne out of the economic and fiscal [structure of devolution](#) in the UK is open to debate. Whereas the devolved nations might have, in principle, responsibility for areas at the frontline of efforts to combat the crisis, including the NHS and the timing of restrictions, their powers to vary the scale and duration of financial support has been strictly limited. Westminster's control of key funding mechanisms (either directly through furlough and other financial support to businesses, or indirectly through the [Barnett Formula](#)) has been critical in shaping policy responses across the UK.

There will be important lessons for devolution from the experience of the pandemic. Did the delivery of policy, including public-health messaging, in Edinburgh, Cardiff and Belfast lead to a better economic management of the crisis? Or did it cause poor coordination and unnecessary confusion? Did devolved fiscal arrangements [work effectively or transfer too much risk](#)?

The answer to these questions will take time, partly because it will be many years before the full economic consequences of the crisis are known. However, voters appear to have a much more favourable opinion of the handling of the crisis by their [devolved governments than that of the UK government](#).

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

It seems that yet again we live in an 'unsettled union'. In the past, the go-to response had been to offer 'more powers', but it would appear that Boris Johnson's response has taken a more interventionist or '[muscular](#)' approach. The Internal

Market Act and the launch of the new Shared Prosperity Fund provide two new mechanisms for the UK government to take a more proactive role in the economic development of the devolved nations.

However, more fundamental will be how the UK government chooses to engage with the devolved nations across all manner of policy areas. ‘Muscular unionism’ does not necessarily mean ‘picking fights’ or imposing Westminster’s will on policy makers in Belfast, Cardiff or Edinburgh. The recent announcement that the Prime Minister will chair a new council of devolved leaders is, in principle, an opportunity to reset relationships. The proof will come, of course, in how such efforts to restore intergovernmental relations operate in practice.

Wider constitutional debates will cast a shadow over all of this. Most significantly, Scotland’s First Minister has promised to hold a second referendum in 2023 arguing that independence is crucial to helping Scotland rebuild from Covid-19. We have yet to hear much from the SNP-led Scottish government on what form independence would take, and how quickly — and through what means — any re-entry into the EU might take place. One thing that we can be sure of is that neither Brexit nor Covid-19 have dampened constitutional tensions across the UK.

COMMON FRAMEWORKS

Jack Sheldon

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Devolution in Northern Ireland, Scotland and Wales was designed in a way that assumed EU membership. Many competences relating to policy areas where powers were exercised at European level, such as agriculture and fisheries, environmental regulation and public procurement, were devolved. However, requirements for the devolved institutions to comply with EU law meant European policy frameworks applied across the UK in these areas. This limited the scope for autonomy to be exercised at devolved level and hence for regulatory divergence between the constituent nations of the UK.

The idea behind 'common frameworks' is to provide for UK-wide policies in some areas of devolved competence that were previously subject to EU regimes. This could limit the potential for such divergence between the UK's component territories where that is considered undesirable, for instance because it could act as a barrier to cross-border trade or prevent the UK from entering international trade agreements.

In October 2017 the four administrations within the UK [agreed](#) to work together to establish such frameworks. An important proviso that secured buy-in from the devolved governments was that frameworks would be negotiated, agreed and implemented in a way that would 'respect the devolution settlements'. The UK's governments had [little previous experience](#) of co-designing policy in this way, and faced a challenging political backdrop, given the major political differences detailed elsewhere in this report.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

Covid-19 contributed to delays. It had been [intended](#) that common frameworks would be in place by the end of the Withdrawal Agreement implementation period in December 2020, but only three were [provisionally agreed by then](#). An [update](#) in autumn 2020 noted the pandemic had 'placed significant capacity pressures on government departments'.

Covid-19 has also illustrated how decisions taken in one part of the UK can impact on others, even where policy is devolved. Despite high-profile divergence between different parts of the UK on some aspects of the Covid response, there has been significant [intergovernmental engagement](#), around issues such as the

vaccine rollout, international travel restrictions and the operation of the ‘Covid pass’. This experience may well have shaped thinking on how governments might cooperate effectively in the policy fields covered by the frameworks.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT’S APPROACH TO GOVERNING HAD?

The Johnson government has pursued a strikingly [assertive](#) approach to the union, expressed through a concerted push to strengthen the profile and influence of central government in the devolved territories.

A key manifestation of this ‘muscular unionism’ is the [UK Internal Market Act](#), of 2020. Whereas Theresa May’s administration envisaged that common frameworks would serve as the primary mechanism restricting unwanted internal regulatory divergence, the Johnson government [argued](#) in 2020 that additional measures were needed to provide a ‘comprehensive safety net’. The Internal Market Act introduced forms of mutual recognition and non-discrimination for goods and services which cut across common frameworks by legally limiting regulatory divergence, regardless of the content of the frameworks. The legislation was vehemently opposed by the [Scottish](#) and [Welsh](#) governments, which argued frameworks were sufficient to prevent undue divergence. It was passed without the consent of any of the devolved legislatures, marking a clear departure from the consultative approach to this issue adopted by the May government.

Although later discussions on common frameworks have been overshadowed by the fallout from the Internal Market Act, by early 2022 they were nearing their conclusion. At the time of writing, 29 such frameworks have been provisionally agreed, subject to parliamentary scrutiny, covering areas such as [driver licencing](#), [food labelling](#) and [public health protection](#). One, relating to [hazardous substances](#), has been published as a final document. In [other areas](#), where frameworks were anticipated, it has now been decided this is not required. In a few cases, notably [agriculture](#) and [fisheries](#), common ways of working across the UK have been implemented through primary legislation, alongside framework agreements.

The frameworks that have been published typically specify fields in which joint decisions could be taken, set out processes for making such decisions and present arrangements for amending the framework. Most contain little policy substance, but reflect a desire to maintain the status quo, at least initially. In some cases, broad objectives are set out. For instance, the [public health protection framework](#) includes a commitment to ‘strengthen UK-level communication and coordination, working closely on individual or related issues regarding the prevention and control of serious cross-border threats’.

The significance of the frameworks will become clearer, if and when policy changes are proposed in the areas they cover. If followed, the processes of co-decision that are foreseen could make an important contribution to establishing [new norms of intergovernmental cooperation](#) in relation to devolved policy issues where decisions may have UK-wide impacts. One [point of tension](#) could come if there are policy changes at EU level affecting areas covered by frameworks. The Scottish government has [indicated](#) a desire to ‘keep pace’ with EU law, whereas the UK government sees the ability to diverge from EU policies as a key benefit of Brexit. The non-binding nature of the frameworks means they are unlikely to act as constraints against a government determined to push ahead with a particular policy where consensus cannot be reached. In these circumstances the Internal Market Act’s provisions might come into play — [reducing the effectiveness](#) of any regulations made at devolved level.

There appears to have been a genuine effort across the different administrations to work constructively on common frameworks. This may serve as an example of how relationships between the UK and devolved governments [can operate effectively](#) when an ethos of intergovernmental partnership is adopted, with shared objectives and close engagement throughout the policy process. Although this approach contrasts with the combative instincts of some in the Johnson government, it seems essential if intergovernmental relations are to be placed on a more stable footing.

NORTHERN IRELAND PROTOCOL

Katy Hayward

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Northern Ireland has always been something of an oddity when it comes to its constitution and governance. A hundred years after its foundation, the coming into effect of the Northern Ireland Protocol raised its exceptional status to a new level. This has produced a tranche of new challenges for the region, both practical and political. Already suffering from their own forms of [debility and sclerosis](#), Northern Ireland's democratic institutions are under extraordinary pressure.

The [1998 Belfast/Good Friday Agreement](#) sought to stabilise Northern Ireland by formalising cooperation across the lines of conflict over it: British-Irish and north-south, as well as unionist-nationalist. Recognising that these relationships would be fundamentally altered by the UK's withdrawal from the EU, [both sides agreed](#) on the need to 'protect the 1998 Agreement in all its dimensions'. This came through as an objective of the [Protocol](#) in the Withdrawal Agreement. The Protocol could not prevent change to the British-Irish and north-south dimensions of the 1998 Agreement, but it has had its own impact upon them. Recognising the new practical and political challenges for Northern Ireland across these strands is essential to improving its post-Brexit governance.

A simple way of picturing the challenge is to imagine Northern Ireland having to keep track of five different spinning plates, in addition to the devolved legislation passed by the NI Assembly itself. The first three are domestic within the UK. First, UK law applies in Northern Ireland in 'reserved' or 'excepted' areas. Notably, this includes trade and international relations. Ultimately, the UK government is responsible for ensuring that international agreements like the Protocol are upheld. This could mean the UK government taking charge of building the [Border Control Posts](#) in Northern Ireland ports if the NI Minister responsible continues to refuse to do so.

Second, Northern Ireland will be affected by changes to the EU laws that were retained in UK law. The ['fast track process'](#) for amending this law that is currently under development in Westminster will make it all the more difficult for MPs, let alone MLAs, to follow and scrutinise changes to the legislation applying here.

Third, Northern Ireland has to align with [common frameworks](#) in the UK, both legislative and non-legislative. The frameworks have been developed to allow the autonomous decision-making powers of Northern Ireland, Scotland and Wales to be exercised in a way that does not cause internal difficulties for the UK as a whole. Quite a number of the policy areas to which they relate are ones that have an EU dimension. This brings particular complexity for Northern Ireland, as seen in the next two of the ‘spinning plates’ that it must manage.

Fourth, there is the portion of the EU acquis that applies under the Protocol. Applicable EU law supersedes domestic law, and so it is important that the NI legislators are aware of what this covers. A complicating factor is [dynamic alignment](#). This means that amendments or replacements of the EU legislative instruments listed in the Protocol Annexes (2–5) are to have effect in Northern Ireland. Furthermore, if the UK government consents, new pieces of EU legislation could be added to the Protocol. The [Carbon Border Adjustment Mechanism](#) is one such possibility. At the moment, the primary work of scrutinising the new and amended EU legislation that applies in Northern Ireland falls to the [House of Lords Sub-Committee on the Protocol](#).

Finally, Northern Ireland will need to keep track of Irish and/or EU law that comes under a policy area for north–south cooperation on the island of Ireland. Article 11 of the Protocol seeks to maintain both the formalised and operational areas for cooperation (such as agriculture, transport, health) and other types of cooperation that were previously enabled by common EU membership (fisheries, telecommunications, justice and security). The difficulty for Northern Ireland, as [explained by Lisa Claire Whitten](#), is that there are significant gaps in the legal and policy frameworks for allowing such cooperation, meaning that UK [divergence from the EU](#) could cause problems over time. This creates an enormously complicated arena for governance in Northern Ireland. There are three particular challenges: (a) keeping Northern Ireland stakeholders, officials and legislators informed of what is evolving in these five realms; (b) scrutinising the relevant new and amended legislation and frameworks; and (c) managing potential ramifications of them and friction between them, especially as the UK and EU diverge over time. These challenges can only be met with a multilevel approach. First and foremost, there needs to be better communication.

Within Northern Ireland, for example, the Executive Office has developed an EU Legislation Information Tracking System (EULITS) to communicate information to NI departments on EU legislation contained in the Protocol. Within the UK, the government’s Explanatory Memoranda on EU legislation applying under the Protocol often do not have sufficient detail as to consider the implications for Northern Ireland. The same is true of many of the published common frameworks

relating to the region. And the work of the UK-EU Joint Consultative Working Group, which forms the main hub for overseeing the legislative and governance aspects of the Protocol, is hidden from public view.

The UK and EU have set governance as one of their shared priorities for their ongoing talks on the Protocol. Unfortunately, they interpret the issue in very different ways. The [EU's focus](#) is on improving transparency and engagement with Northern Ireland stakeholders, whereas the [UK's focus](#) is on the need for a 'partnership of equals' between the UK and EU and on the 'highly unusual' role of the Court of Justice of the EU. However, both agree that the current processes and institutional arrangements in place are inadequate. Finding agreement on how to improve the post-Brexit and post-Protocol governance for Northern Ireland is just as urgent and important a task as resolving the remaining difficulties with the movement of goods across the Irish Sea.

NORTHERN IRELAND: THE STATE OF PLAY AFTER COVID AND UNDER JOHNSON

Katy Hayward and Darren Litter

The January 2020 New Decade, New Approach (NDNA) agreement restored the devolved institutions in Northern Ireland (NI) following a three-year suspension. The agreement was made possible by the intergovernmental approach re-employed by then Irish Tánaiste, Simon Coveney, and then NI Secretary of State, Julian Smith. Characterised by permitting space for deliberation while firmly and jointly encouraging agreement, this approach has been integral to sustaining the peace process since the mid-1980s. Just two years on, both the approach and the ambitions of the NDNA seem almost unimaginable in present-day Northern Ireland.

The NDNA is ‘extremely ambitious’, laying out more than 80 specific commitments and promising both large-scale investment and public sector reform. There has been some limited progress on this, but the fallout from Brexit (including the Protocol) have placed extraordinary pressure on the ‘carefully constructed foundations’ that enable the NDNA and its predecessor agreements to operate. One sign of this is the Democratic Unionist Party’s (DUP) recent withdrawal from the NI Executive, centring on its contention that the Protocol infringes the UK government’s NDNA commitment to ‘protect Northern Ireland’s place within the UK Internal Market’. Having just navigated the Covid-19 pandemic — itself a source of friction within the NI Executive — Northern Ireland has been thrust back into the political unknown.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The pandemic hit Northern Ireland within weeks of the Executive’s restoration. The inexperience and mutual unfamiliarity of the ministers and MLAs compounded the difficulties of decision making for the five-party Executive. This soon turned into near-paralysis when the Covid-19 responses of the Irish government and those of the UK began to diverge. Whereas unionist parties were keen to follow the approach and timetable of Westminster, nationalist parties in the Executive argued that NI’s connectedness to Ireland meant that it should follow those of the Irish government instead. The resulting policy in Northern

Ireland for the first several months of the pandemic was an unhappy compromise, with no restrictions on movement from either Britain or Ireland despite the risk posed to what was already the worst performing regional health service in the UK.

The NI Health Minister Robin Swann was considered to have inherited a ‘poisoned chalice’ with the health brief — and this took a particularly dark turn when he became subject to [death threats](#), as he pushed the divided Executive to agree stringent measures to reduce the spread of the virus. Despite alarming [missteps](#) and high [death rates](#), public opinion had swung behind Swann by [autumn 2021](#), with an astonishing 71% approval rating. He and his Ulster Unionist Party will hope that Swann’s last big move to lift all remaining Covid restrictions on 15 February will be borne in mind on the 5 May 2022 Assembly election.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT’S APPROACH TO GOVERNING HAD?

Alan Whysall, a former senior NI Office (NIO) official, noted the post-Brexit shift in the UK government’s approach to NI, observing that the ‘Westminster government has over the last two years appeared to many to have been willing to see division develop over the Protocol for its own reasons’. The government has [pointed](#) to a lack of cross-community support for the Protocol, yet although it is a [divisive issue](#), all sections of society appear to have [greater concerns](#) (namely health, the economy and the Covid-19 recovery). The government also appears to [echo](#), if not [inflame](#), the anti-Protocol views and [actions](#) of the DUP, using [language](#) that [exacerbates](#) unionist concerns rather than tempers them. The Foreign Secretary, Liz Truss, for example, [refused to meet](#) with any of the NI parties that do not share the government’s position during a so-called ‘fact-finding mission’ to Belfast in late January.

Divisions and suspicions about the government’s closeness to the DUP were only exacerbated by the [government’s plan](#) to temporarily allow a return to double-jobbing for Northern Ireland MPs — something that clearly would have advantaged the DUP. This plan was only withdrawn in the face of [united condemnation](#) from all other NI parties, much to the embarrassment of the DUP leader Jeffrey Donaldson. Little wonder, then, that unionists remain as sceptical as others when it comes to the government’s handling of the Protocol. In this respect, the government is [trusted by just 4%](#) of voters to manage Northern Ireland’s interests, and Boris Johnson is consistently the least-popular of all political leaders among the NI public (with a popularity rating of -82).

As with delivering NDNA, effectively addressing the challenges confronting NI is dependent on funding. The region already receives the [highest public spending](#) per

person in the UK (14% above average). Stormont's Department for the Economy assesses that, due to the loss of more than £100 million in funding from the European Regional Development Fund (ERDF), drastic measures may need to be taken, including the cutting of apprenticeships by 50%, university places being reduced and the rollout of NI's long-awaited city deals being slowed. In its current 'shadow' form, which could well continue after the Assembly election (and legally), the NI political system only has limited ability to meet this and an array of other knock-on policy challenges. For instance, its first multi-year budget since 2015 cannot proceed without Executive approval, with the real-time effect of the health service being deprived of a 10% spending increase, and the economic development agency [Invest NI](#) 'currently unable to issue any new financial offers' to businesses.

NDNA was in many respects the triumph of a persistent strain of representatives who [understood](#) 'the traditional role of successive British governments of working to foster constructive politics in NI, in close partnership with Dublin'. It is difficult to marry this to the new post-Brexit model of deepening '[British sovereignty](#)' and centralising unionism, as the sacking of Julian Smith encapsulated. As Jill Rutter [rightly anticipated](#), the government's NI operation has been lacking since. The strains upon the 1998 Agreement's power-sharing institutions are now showing in boycotts, rogue Ministerial orders, and the aforementioned resignation of the First Minister. As things stand, the prospects for democratic governance of Northern Ireland as it enters its second century of existence look decidedly shaky.

INDEPENDENCE AND INTERDEPENDENCE OF SCOTLAND AFTER BREXIT

Nicola McEwen

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

In 2014, Scots were asked: Should Scotland be an independent country? Brexit and a new electoral mandate for the SNP government have created the conditions to claim the right to ask the question again.

Membership of the EU remains central to the Scottish government's independence ambitions. In 2014, debate focused on whether Scotland could ensure continued membership. In the wake of Brexit, it is now clear that an independent Scotland would have to apply for, and negotiate, membership. Those negotiations may be challenging and would require unanimous agreement of the EU27. But Scotland is a resource-rich, European liberal democracy, with a long history of membership, and it is reasonable to assume membership could be agreed.

Under independence in the EU, the border between Scotland and England would not only become an international border, but also a [new border](#) between the EU and the UK. This means that controls on trade required as a result of the UK-EU relationship would be applicable to the Anglo-Scottish border too.

The relationship between the UK and the EU may change over time — to become closer, or more distant — but under current arrangements, it involves significant 'at the border' and 'behind the border' controls on imports and exports. These would necessitate some form of customs and inspection facilities on or near the Anglo-Scottish border, at least along the main trunk roads, to protect the integrity of the EU Single Market.

Passport checks, however, are unlikely. Opting out of elements of the Schengen Agreement to allow Scots to continue to travel, live, work and study throughout the Common Travel Area Scotland shares with the UK, Ireland and the Channel Islands would be the Scottish government's top priority in EU membership negotiations.

As borders go, an Anglo-Scottish trade border need not be particularly difficult to manage. There are around 25 crossing points, mostly on minor roads, and

much of the borderline follows rivers, hills and nature reserves. But the symbolic significance of a hardened border, alongside the detrimental impact on businesses, could weaken the appeal of the free movement opportunities that would flow from independence in the EU.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

New constitutional structures do not change geography. Cooperation between governments north and south of the border would be necessary under any constitutional arrangement, including independence. New requirements for post-independence border management could even incentivise closer cooperation between transport agencies than is necessary under devolution. Other public bodies, such as the police, security services, environmental and public health agencies would also be expected to cooperate pragmatically, given shared policy challenges and specific cross-border issues.

The pandemic has provided a perfect illustration of such a challenge. The devolved governments led the public health response within Scotland, Wales and Northern Ireland, but collaborated with the UK government over lockdowns, testing facilities, international travel restrictions and procurement of PPE and vaccines. The depth of collaboration may differ under independence, not least because the Scottish government would have more responsibilities, including financing a furlough-type scheme. But the cross-border nature of virus transmission and the interconnectedness of their societies would have made intergovernmental cooperation essential. Other neighbouring independent countries, for example, the Baltic and Benelux countries, worked closely together, as did authorities north and south of the Irish border.

Cooperative governance during the pandemic occurred at a time when the relationship between the UK and devolved governments had deteriorated significantly as a result of Brexit and the UK government's approach to it. Notwithstanding pandemic cooperation, these relations remain characterised by deep mistrust.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Brexit has ensured that independence has become the dominant issue in Scottish politics. In contrast to 2014, when Scots were broadly satisfied with the way Scotland was governed, claims for a new referendum are founded on a Brexit-shaped sense of injustice that Scotland was taken out of the EU against its collective will.

The Johnson administration's approach to territorial governance is deepening that sense of injustice. The UK government has assumed a bigger role in the

devolved territories, including in areas of devolved responsibility. Initiatives such as Levelling Up and the Shared Prosperity Fund look set to bypass the devolved institutions. Legislative changes, most notoriously the [United Kingdom Internal Market Act](#), threaten to undermine the authority of the devolved institutions. A recurring willingness to override the [Sewel convention](#) — the convention that the UK parliament would not normally legislate in devolved matters without devolved legislatures' consent — has reinforced claims that the political institutions that embody Scotland's distinctive preferences are being eroded.

Will this approach to territorial governance strengthen the union or undermine it? The former seems unlikely. The establishment of the Scottish Parliament was endorsed by 74% in the 1997 referendum. It was, according to former Labour leader, John Smith, 'the settled will' of the Scottish people, and a way of reconciling nationhood and self-government with political union. From that perspective, the Scottish Parliament is part of the union's strength. Undermining its authority and stature could weaken the union it helps to uphold.

Yet there is little evidence that independence has become Scotland's new 'settled will'. The independence issue dominates Scottish politics, but it divides Scotland too. In any case, there are many barriers on the road to an independence referendum. Chief among these is whether the Scottish Parliament, despite its pro-independence majority, has the legal authority to hold a referendum on a constitutional issue. Boris Johnson, like his predecessor, has rejected requests to transfer the relevant constitutional authority on the model of the [2012 Edinburgh Agreement](#). It is expected that his government would mount a legal challenge to a referendum law passed by the Scottish Parliament, and the First Minister has ruled out a Catalan-style referendum, out-with the rule of law.

The weight of constitutional authority may rest with the UK Parliament and government, but the outcome of this referendum dispute may be a political stalemate that reinforces division, crowds out other issues and raises doubts about whether the union is still upheld by popular consent.

THE UK GOVERNMENT AND THE UNION

Dan Wincott

WHAT ISSUES ARISE FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Brexit challenged the UK's union, with the Johnson administration's choice of a sharp break from the EU deepening the tensions, especially for Northern Ireland. Westminster, it sometimes seems, wants to 'take back control' from the devolved governments as well as the EU.

Each part of the UK has its own structure and dynamics. Always an ad hoc and asymmetrical bundle of arrangements, devolution has [never been a coherent system](#). It was created without robust institutions for 'shared' rule or intergovernmental relations. Such fundamental issues as the basic rationale for redistributing resources among individual and across territories have never been addressed properly. No alternative to the '[Barnett formula](#)' for the territorial block grant has ever gained traction.

Different, strongly felt national identities mark populations and governments in each part of the UK: alongside governments that explicitly self-identify as Scottish and [Welsh](#), plus both British and Irish identities within Northern Ireland, UK-level state nationalism has an [Anglo-British character](#). These distinct identities lend further fragility to the UK's overall multilevel framework.

The basic statutes underpinning the devolved authorities prevented them from violating EU law. In practice, the '[scaffold](#)' that EU membership provided was even more fundamental: it held devolution's ramshackle arrangements together, while giving them scope to develop.

Some parts of a new intergovernmental machinery have been built up. In 2020, the Johnson administration legislated for a [UK internal market \(UKIM\)](#). Together, the UK and devolved governments are developing new '[common frameworks](#)' for key policy domains. The UK government's January 2022 [Review of Intergovernmental Relations](#) proposed an [ambitious, wide-ranging framework](#). Equally, any new system will need to [transform a deep culture](#) of [\(often partisan\) competition](#) between the UK's four governments.

A competitive approach also animates multiple new UK government funding schemes. Within England, this approach can weaken local strategic planning capacity. As EU structural funds fall away, these schemes often fund local

initiatives directly, with the UK government inserting itself between the devolved authorities and local actors. Complete details for the much-heralded [Shared Prosperity Fund](#) have been unveiled [only recently](#).

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The pandemic has illustrated the union's strengths and weaknesses. Although intergovernmental relations were at a Brexit-induced, historic low-point as Covid hit, a '[four nations](#)' approach was agreed quickly. It worked through emergency structures — the Civil Contingencies Committee (COBR) — and devolved participation in new ministerial implementation groups. The devolved authorities entered the first lockdown largely [in lockstep with London](#). The [furlough scheme](#) provided vital pan-UK Treasury support to businesses and employees.

But from the start, intergovernmental relations were also marked by tensions, often underpinned by distinct national perspectives. For example, though the Welsh authorities moved quickly to procure Covid-19 tests in February/March 2020 they were quickly superseded by a UK government/Public Health England-led approach. This [murky episode](#) hardly exemplifies effective intergovernmental coordination.

Anglo-Scottish relations were tense from an early stage. [UK ministers](#) complained about Nicola Sturgeon undermining COBR in early 2020, [rushing out announcements](#) after confidential meetings. What the SNP saw as responsible government appeared provocative in London.

Intergovernmental tensions increased and coordination waned as England's initial lockdown eased from May 2020. Treasury policy became attuned primarily to London, [some argue](#). [Devolved authorities](#) became policy takers, left to design emergency rules without direct recourse to financial support. Later Johnson [offered](#) funding support for a future 'go-it-alone' devolved lockdown.

Throughout the pandemic the four governments' rules often differed, with Conservative politicians repeatedly tempted to criticise devolution. Early on, in April 2020, Matt Hancock [asserted](#) 'it's not a Welsh Health Service or an English Health Service but a National Health Service' when writing for a Welsh audience.

Boris Johnson recently derided Wales' new post-Christmas Covid-19-control policies as '[baroque eccentricities](#)', while Welsh Secretary, Simon Hart called them 'mystifying and contradictory'. For Suella Braverman, Attorney General, ['sometimes the rules of other Administrations can be confusing'](#).

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Reflecting its [Anglo-British worldview](#), the Johnson administration has been assertive, even abrasive, over devolution. Some call the UK government '[muscular unionists](#)'.

Faced with Scotland's independence-minded government, reconstructing UK governance after Brexit poses unavoidable challenges for Johnson. When the UK government pushed its [internal market](#) legislation ahead of ongoing collaborative work on [common frameworks](#), the Scottish government refused to cooperate. Then, shortly before its July 2020 White Paper, the UK government [stopped working with Welsh officials](#); it has consistently adopted an abrasive tone over UKIM with devolved governments as well as the EU.

Alongside forcefully affirming its pan-UK governing roles, Johnson's initiatives often have a [muscular unionist](#) quality. His administration also intervenes in traditionally devolved domains, including through [funding schemes](#) that [by-pass devolved governments](#) when local actors bid into Whitehall-controlled funds.

The aphorism '[devolve and forget](#)' captures Whitehall's limited interest in devolution. Devolution has [changed little at the UK's 'centre'](#). England's sheer size — 85% of the UK population and economy — easily marginalises devolution. Even so, England is [strangely absent](#) from official discourse; Whitehall often [governs](#) England in the name of 'this country' or 'the nation'.

Anglo-British state nationalism is a taken-for-granted disposition or mindset rather than a strategy. The Anglo-centric [conflation](#) of England and Britain is shared by certain commentators, lawyers and judges as well as some politicians and officials.

Sometimes mixed with a dose of hostility, it underpins the government's characteristically limited interest in devolution. It is at the [root](#) of the [unitary state](#) understanding of the UK, marked by Westminster sovereignty (a view seemingly supported in some recent [UK Supreme Court judgments](#)). In asserting Westminster's governing prerogatives, Conservatives seem to be speaking to themselves and their core support, not engaging devolved audiences.

Despite plans to formalise intergovernmental relations, remaking the union after Brexit faces deep challenges. Whatever constitutional status the nations come to have, good relationships among their governments are needed. Devolution was weaned on a diet of fudge. Although conflict is sometimes unavoidable, abrasive, mutually hostile territorial politics poison the nourishing fare needed to sustain better relations.



ELECTIONS AND DEMOCRACY

THE RULES OF ELECTIONS

Alan Renwick

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

Brexit has had two direct effects on UK election rules. First, it has changed the franchise. Previously, EU citizens resident in the UK could vote in all elections except those to the Westminster Parliament. Now, authorities in the UK decide who has that right. Given their diverging approaches to the EU, it is no surprise that policy makers across the UK have taken different paths. Those in [Scotland](#) and [Wales](#) — who determine the rules for Scottish Parliament and Senedd elections and for local elections in their areas — have opted to preserve EU citizens' rights, and, indeed, extend them to residents from anywhere in the world. The UK government, by contrast, [has proposed](#) — in [legislation](#) currently before Parliament that will apply to all other elections (including those in Northern Ireland) — that a person's voting rights will continue only where the UK contracts a bilateral agreement with their country of citizenship.

Second, Brexit has restricted the range of voting systems used in the UK. Previously, we had two sets of UK-wide elections: to the House of Commons and to the European Parliament. These used different voting systems: First Past the Post for Westminster and proportional representation (in two versions, in Great Britain and Northern Ireland) for Brussels. The latter has, of course, now gone. That might seem a minor change: European Parliament elections, after all, never set many pulses racing. But these contests nevertheless mattered. Success in them could bring both prominence and money to small parties that First Past the Post would otherwise have suppressed. Ironically, UKIP was the principal beneficiary of that effect: the party's significant seat shares from 2004 onwards gave it much oxygen, without which its impact may have been greatly reduced. Breakthroughs for new parties will be harder now that the European Parliament route has gone.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

The Covid-19 pandemic had a profound effect on elections in the short term. The May 2020 round of local elections was [postponed](#), and by-elections were also suspended. When widespread voting did eventually return in May 2021 — with a bumper round of elections for local councils, mayors, police and crime commissioners, the Senedd and the Scottish Parliament — [special provisions](#)

were made to ease voting by proxy for those who were self-isolating and to enable administration of the ballot in such unusual times.

Yet the pandemic may have no deep lasting effects. Unlike in so many other walks of life, the technology of elections did not change. According to [Electoral Commission analysis](#), the proportion of voters casting a postal ballot increased only slightly, whereas the share applying for an emergency proxy vote was much as before. No new voting habits emerged that might persist.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

By contrast, the Johnson government's own approach could have profound implications for electoral law and the integrity of elections in the UK. Across multiple domains, the government has acted in ways that weaken longstanding checks and balances on executive power. In the electoral sphere, that is seen in two measures currently before Parliament.

First, the [Dissolution and Calling of Parliament Bill](#) will restore to the Prime Minister the power to call a general election without consulting Parliament. A belief has grown that the removal of this power by the 2011 Fixed-term Parliaments Act prevented escape from gridlock over Brexit in the 2017–19 Parliament. But the [evidence](#) confounds that belief. The House of Lords has urged a rethink. How the matter is resolved is likely to be known by the time this report is published.

Second, the [Elections Bill](#) seeks to diminish the independence of the Electoral Commission. Many Conservatives are dissatisfied with the Commission. That is partly justified: some Leave campaigners were treated very badly following the Brexit referendum, as investigations into alleged breaches of campaign spending rules dragged on for years. But the proposal contained in the Elections Bill — to tighten government control by requiring the Commission to follow a 'strategy and policy statement' drawn up by ministers — has nevertheless sparked great unease. The Commission has [emphasised](#) the need to preserve its independence — and the Commissioners collectively have urged ministers to abandon the plan. The Commons Public Administration and Constitutional Affairs Committee (PACAC) — chaired by pro-Brexit Conservative William Wragg — has [found](#) 'a lack of supporting evidence to demonstrate that the proposed measures are both necessary and proportionate' and said they be amended. When the House of Lords began scrutiny of the bill, one speaker — a Conservative parliamentarian of over fifty years' standing — said, 'I have never seen such chilling words in any bill from any government of any party'.

While some of the bill's other provisions, such as easier access to the ballot for disabled voters, have been broadly welcomed, its measures introducing a requirement for voters to show ID at polling stations and tightening access to postal and proxy voting have prompted widespread concerns. PACAC has [set out](#) these concerns: voter ID requirements could particularly raise barriers to voting for some disadvantaged groups; they will also impose additional burdens for election administrators; meanwhile, evidence of any significant fraud at polling stations (the problem that voter ID is intended to address) is lacking. The committee recommended that the changes be delayed pending more research. It also criticised the fact that further provisions in the bill, replacing the Alternative Vote voting system for mayoral elections with First Past the Post — were introduced late, preventing proper parliamentary scrutiny. All in all, the bill's parliamentary passage in the coming weeks is likely to be very bumpy.

Beyond the Elections Bill, the government stands accused of inaction in the face of real need for change. Numerous bodies — notably, the [Law Commission](#) — have argued that electoral law, which is scattered across multiple statutes and contains numerous ambiguities, badly needs to be consolidated and clarified. But ministers have said that time is lacking to act. Meanwhile, there has been little action to counter spiralling electoral disinformation. The May government's [Online Harms White Paper](#), published in April 2019, recognised that online disinformation could damage democracy and pledged measures to tackle it. But that [was gone](#) from the [draft bill](#) published in 2021, replaced by a rhetoric of reliance on a free market of ideas.

PARTIES, GOVERNANCE AND PARTY FUNDING

Justin Fisher

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

Party funding has not been immune to the effects of the pandemic. Certainly, the main parties' most recent [accounts](#) (to year-end 2020) show that Covid-19 has taken its toll. All three reported significant drops in income, in part because of cancelled conferences. The year after a general election typically leads to a sharp drop in income — donors are much more likely to respond to the prompt of a general election rather than to routine costs. However, both the Conservatives (£13m) and Liberal Democrats (£4.7m) had notable and unusually large surpluses from 2019 having been in receipt of significant donations in the run up to the general election, meaning that that the fall in income in 2020 was offset up to a point.

Yet Conservative central income in 2020 was at its lowest for nearly 20 years, and all three parties' expenditure in 2020 exceeded their income — in the case of the Conservatives and Liberal Democrats by some margin (over 20%) — reversing a trend apparent since the mid-2000s whereby all three parties have generally managed to [balance](#) their income and expenditure. In sum, although the surpluses generated in 2019 helped two of the parties, the impact of the pandemic on finances will clearly be a worry. Parties' financial needs exist throughout the electoral cycle — not just at the time of elections and none of the parties is likely to be able to generate large surpluses to cover leaner years in the near future. For the Conservatives, while there was suggestive evidence that the previous Labour leadership had stimulated [an uptick in corporate donations](#), the perceived threat to business of the current leadership is far less apparent. Coupled with the declining popularity of both the party and especially [the Prime Minister](#) in the last months of 2021, the Conservative Party may be less attractive to donors. For the Liberal Democrats, the issue of EU membership — which was a rallying cry for the larger donations received in 2019 — is no longer a key electoral issue.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

The principal demonstration of the Johnson's government approach has been the introduction of the Elections Bill in July 2021. The bill includes controversial measures to increase political control over the Electoral Commission and new

restrictions on organisations that campaign but do not stand for election — third parties. In both, reforms are proposed which are disproportionate. Not only that, reflecting the approach of the Johnson government, there was no pre-legislative [scrutiny](#) of the controversial proposals related to the Commission.

Politicians have expressed concerns about the Electoral Commission ever since its establishment in 2001. Initially, it was claimed that it lacked sufficient political experience. This concern was partly dealt with by the Political Parties and Elections Act in 2009 where party-nominated commissioners were introduced. New concerns for some politicians emerged, however, following the 2015 general election, when a number of candidate spending returns were investigated. Most cases were dropped, but one MP, his agent and a Conservative Party official did stand trial, with the official prosecuted.

The bill proposes greater parliamentary accountability for the Commission via the introduction of a Strategy and Policy Statement to be approved by Parliament. This is intended to provide the Commission with guidance on how to discharge its functions. The bill also proposes an extension of the role of the Speaker's Committee (which had always overseen the Commission) to examine the Commission's compliance with the statement. The government's [justification](#) for this move was that '[i]n recent years, some across the House have lost confidence in the work of the Commission and have questioned the adequacy of the existing accountability structures.' Apart from the fact that political oversight already exists (via the Speaker's Committee), the justification for further oversight had little evidential base. As the review of the bill by the Public Administration and Constitutional Affairs Committee [noted](#), '...there is a lack of supporting evidence to demonstrate that the proposed measures are both necessary and proportionate.'

In fact, studies of those who have regular and direct experience of the Commission's activities reveal increasing satisfaction. Surveys of electoral agents (legally responsible for candidates' campaign spending) since 2005 point to consistent and, in places, increasing satisfaction with the Commission's work. The 2019 study for example showed 72% of those who expressed a view regarded the Electoral Commission as a useful source of advice (compared with 57% in 2010 and 70% in 2015); 75% thought its guidance for candidates and agents was clear and easy to use (75% in 2015); and 75% thought its written information on the verification and count was clear and easy to use (72% in 2015) — results almost identical to those reported in [2017](#).

A further example of a disproportionate response relates to third parties. The bill proposes a ban on registering as both a political party and a third-party campaigner. At first sight, this looks like a logical step to prevent spending limits being artificially inflated through the combination of third party and

political party spending. However, since the last changes were made to third-party campaigning in 2014, there has been only one instance of an organisation registering as both a political party and a non-party campaigner (at the 2019 general election). Furthermore, in that single case, the organisation did not use the loophole, only reporting spending against the political party limit.

The two examples, together with the bill's other area of controversy — voter identification — all represent disproportionate and unnecessary measures informed by insufficient evidence, which have great potential to deliver unwelcome consequences. They threaten the [independence](#) and, therefore, the effectiveness of the Electoral Commission, and are likely to adversely disadvantage third parties — particularly as other rules [proposed](#) on third party campaign expenditure are also poorly conceived. Looking forward, if the Bill survives unscathed this is likely to lead to more legal involvement in elections — not necessarily because of intentional wrongdoing, but because of unworkable legislation.

MULTILEVEL DEMOCRACY

David Bell and Willem Sas

WHAT ARE THE ISSUES ARISING FROM THE UK'S NEW RELATIONSHIP WITH THE EU?

2021 proved an extreme test of the stability of multilevel governance within the UK. Brexit and the pandemic each provided a set of conflict points weakening the bonds between the UK government in Westminster and those in the devolved governments. The UK government has robustly asserted the sovereignty of the Westminster Parliament while making few concessions to the notion that the UK is a 'union' of separate nations. One cost of this approach has been a significant weakening of trust in UK government in the devolved nations.

Brexit continues to be very testing for UK intergovernmental relations. The new relationship with the EU meant the return of many legislative functions to the UK. The devolved governments considered that some of these functions should fall within their legislative ambit or at least involve genuine negotiation with the UK government: in almost all cases, the UK government retained the repatriated powers and has often sought to exercise them without formal involvement of the devolved governments. Commercial interests in trade vary across the UK, yet the devolved governments were not given any role in the trade agreements signed during 2021. This is in sharp contrast to other jurisdictions where such consultation is routine.

The EU's responsibility for market regulation was also repatriated after Brexit. This was done through two key mechanisms: 'common framework' agreements and the Internal Market Act 2020 (IMA). The common frameworks provide common approaches, agreed between the UK and the devolved governments, to specific policies — such as those controlling hazardous substances, emissions trading, food standards. At the end of 2021, 29 common frameworks had been provisionally agreed. However, and much to the annoyance of the devolved governments, this process has been partially superseded by the Internal Market Act, enshrining two principles: mutual recognition (goods that are recognised in one jurisdiction can legitimately be sold in all other jurisdictions) and non-discrimination (regulations cannot discriminate against goods from other parts of the UK). This potentially limits their ability to raise standards on goods and services, if they are not being raised in other parts of the UK.

The IMA also enables the UK government to pay for economic development, infrastructure and education within the devolved nations' territories, even though these have been considered as devolved competences. This enables the UK

government to direct spending from the recently announced Shared Prosperity Fund within the devolved territories and brand it as direct UK government support. The devolved governments are also concerned that the Subsidy Control Bill and the National Security and Investment Act give the Secretary of State for Business Enterprise and Industrial Strategy wide grounds to review subsidies or business investment decisions, which involve devolved governments or their economic development agencies.

HOW HAVE PROCESSES AND RELATIONSHIPS BEEN AFFECTED BY THE COVID-19 PANDEMIC?

Dealing with the pandemic provided a radical challenge to governance structures around the world. The UK was no exception: the issues it raised were primarily in the domain of public health and the economy. In the UK, public health is largely a devolved responsibility, whereas fiscal issues are centrally controlled in the UK Treasury. The substantial increase in health spending deemed necessary to deal with the pandemic in the devolved governments, therefore required support from the Treasury. The increases in spending were mind-boggling, much more than had been envisaged in the various fiscal framework agreements between the Treasury and the devolved governments. At the start of the pandemic, the devolved governments were therefore unsure whether increased health spending in England would be reflected in additional Barnett consequentialia to support their health interventions. However, the UK government provided funding guarantees to assure the devolved governments that additional spending would be available. These ad hoc guarantees enabled the devolved governments to fund their public health and economic interventions, enabling them to weather the challenges posed by the pandemic.

Although the funding guarantees were welcomed by the devolved governments, there was dissatisfaction that the UK government appeared unwilling to support economic interventions, such as the furlough scheme, unless these were needed in England. Arguments by the devolved first ministers that additional economic interventions were necessary to support the measures they wished to take on public health within their jurisdictions were brushed aside.

WHAT IMPACT HAS THE JOHNSON GOVERNMENT'S APPROACH TO GOVERNING HAD?

Given these developments, relations between the devolved governments and UK government are difficult. When the UK government proposes legislation in areas within the competence of the devolved governments, it generally seeks their 'consent'. Nevertheless, the UK can enact the legislation even if consent is withheld. Consent was withheld from the Elections Bill by both the Scottish and Welsh Parliaments and from the Policing Bill by the Welsh Parliament. The

Internal Market Bill and the Subsidy Control Bill were both opposed strongly during their parliamentary journey by the Welsh and Scottish legislatures. Within the devolved governments, public opinion supports local politicians rather than those in Westminster. In November 2021, [53%](#) of Scottish adults felt that Nicola Sturgeon was doing well or fairly well as First Minister, only [11%](#) of Scots felt that Boris Johnson was doing well as Prime Minister at the same time. In Wales, [17%](#) of adults had a negative view of Mark Drakeford in September 2021, while 36% had a negative view of Boris Johnson.

Even if analysis of the pandemic does not reveal significant differences in outcomes between the different components of the UK, the UK government and the Prime Minister have significant credibility problems in the devolved nations. In terms of Westminster seats, that may matter less in Scotland, which has few Conservative MPs, but it makes continuing to refuse a new independence referendum harder, if popularity and trust metrics continue to decline. In future analyses, Brexit and the pandemic may be seen to have accelerated that decline.

The question is whether the UK government can change direction to restore trust. Is it willing to reverse its recent course and complete the devolution process along more conventional lines, or will it be further scaled back? In its current shape the UK constitution can at best be considered as hybrid federalism. Devolved nations can allocate budgets to their competences, funding these with a mixture of own taxes and UK government grant, while UK government allocates funding, some of which will be spent within the devolved nations, to competences ‘reserved’ to Westminster. Loss of trust is bound up with UK government interventions, many of them consequences of Brexit, that have clouded the demarcation between devolved government and central government competences.

UK in a Changing Europe promotes rigorous, high-quality and independent research into the complex and ever changing relationship between the UK and the EU. It is funded by the Economic and Social Research Council and based at King's College London.

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