



Parliament and Brexit

Foreword

The Brexit process revealed many things. Not least, it taught us a lot about Parliament's somewhat contested place in our system of government. Throughout the Article 50 period the House of Commons in particular wielded significant influence over a minority government – so much so that Theresa May was moved to criticise Parliament in a live address to the British people.

So what have we learned? And where does Parliament go from here?

This report draws on the expertise of some of the leading scholars in the field. They've been asked to explore the role that Parliament has played to date on Brexit, as well as the challenges and opportunities that Parliament is likely to face during phase two of the UK-EU negotiations.

I'd like to express my heartfelt thanks to Tim Bale, Adam Cygan and Meg Russell (very ably assisted by Lisa James) for pulling this report together. It is they who have marshalled the various contributors and ensured that what follows is of the highest possible standard.

I'd also like to thank the contributors for responding enthusiastically and efficiently to comments, suggestions and edits. Finally, thanks also go to Navjyot Lehl, who has coordinated the whole process and managed the design of the report with her customary professionalism and good humour.

The report that follows makes an important and original contribution on an extremely important topic. I hope you find it both interesting and enlightening.

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Introduction

Anand Menon

Never has there been such profound interest in Parliament as during the long, fraught process of the UK's exit from the EU. During the week of 7 January 2019, BBC Parliament [achieved](#) an average daily reach of 293,000, briefly surpassing even the numbers for MTV. What the process has meant for Parliament and what, if any, lessons this may hold for its role in future are the key questions addressed in this report.

The first thing to note, as Meg Russell points out, is the unique place of the UK Parliament in the country's political system. Not only is the United Kingdom a parliamentary democracy (with government dependent on the confidence of the House of Commons) but parliamentary sovereignty lies at the core of its constitution. Arguably more so than in any other polity, therefore, Parliament here is central to the functioning of democracy.

The fact, then, that so much rhetoric during the Brexit process attacked Parliament is particularly troubling. After the second rejection of her Brexit deal, Theresa May took to our TV screens to [tell](#) the British public she was on their side, while heaping the blame for a failure to deliver Brexit on MPs. And at the 2019 general election, the (post-May) Conservative manifesto criticised the 'failure of Parliament to deliver Brexit.' That election saw both major parties adopt explicitly populist stances – the people versus Parliament for the Conservatives, the people versus the establishment for Jeremy Corbyn's Labour.

Yet, as Philip Lynch points out, it was not Parliament per se that was responsible for the Brexit impasse. Perhaps the most telling division was among Brexiteers themselves. Twenty-eight 'Spartans' voted against Theresa May's Brexit deal three times, alongside the Democratic Unionist Party. Had they not done so, her deal would have passed on the third occasion.

Brexit also cast in sharp relief the two conceptions of UK democracy outlined by Catherine Barnard and Alison Young: a Whitehall vision with ministers at the centre, and a Westminster one that focuses on Parliament. And it was the Supreme Court that clarified the ambiguity, reinforcing the role of Parliament in Miller I by circumscribing government's prerogative power, and emphasising in Miller II that the legislature is the senior constitutional partner.

After rubber-stamping the triggering of Article 50, Parliament ultimately took full advantage of these judgments to play a central role in the Brexit process. But we should beware the assumption that a precedent has been set. Barnard and Young emphasise the constellation of factors that allowed Parliament to take control: a minority government; a Speaker willing to favour the Commons (see also Jack Simson Caird's contribution); and the domination of the agenda by an issue that both divided the parties and was viewed as important enough for MPs to risk their careers over. Consequently, as Daniel Gover points out, the various procedural innovations that Parliament came up with during the Brexit negotiations – innovations which, he notes, could have produced different outcomes had they been sequenced differently or used different voting methods – are unlikely to have a lasting legacy.

Parliamentary activism during the Brexit process partly accounted for the desire of the Johnson government to limit the chance of a repeat in the future. As Lisa James explains, the first version of the EU (Withdrawal Agreement) Bill contained provisions for a parliamentary vote on the negotiating mandate and the final

agreement on the future relationship, while committing government to providing Parliament with regular updates. All were stripped out of the second, post-election version of the bill.

However, as Ewa Zelazna argues, this does not necessarily make effective scrutiny of the EU trade negotiations impossible. Not only will select committees play a crucial role, but Parliament may need to adopt further legislation to give effect to the provisions of any trade deal. Equally, as Jill Barrett points out, the Constitutional Reform and Governance Act 2010 means that an objection from the House of Commons would block ratification of treaties with the EU or other countries.

Maddy Thimont Jack and Hannah White analyse the adaptations that may be needed going forward. For one thing, government will take on new responsibilities in areas previously handled by the EU. There is also a pressing need to make intergovernmental coordination within the UK work effectively (and as Jack Sheldon and Hedydd Phylip point out, there is an interparliamentary aspect to this as well).

More broadly, Nicola McEwen points out the significant issues raised for the devolution settlement by the Brexit process to date: not least when, and whether, consent needs to be sought for the significant number of Brexit-related bills (assessed in detail by Jill Rutter and Joe Owen) yet to make their way through Parliament. Not unrelated to the legislative tasks to be carried out are the flaws in the sifting process instituted for delegated legislation which, as Brigid Fowler and Ruth Fox underline, will continue to be a significant issue going forward.

What of the parties and MPs? Philip Lynch points out that some 180 Conservative MPs defied the whip on Brexit votes (the figure for Labour was 128), with 118 doing so on the first meaningful vote. Divisions in the big parties contrast strongly with the picture painted by Louise Thompson of relative unity within their smaller counterparts in Scotland and Wales, and indeed the new unity on Brexit between parties in Northern Ireland described by Katy Hayward.

For Labour, as Richard Whitaker points out, the problem facing MPs was reconciling their own Brexit preferences with those of their constituents. Only 10 of Labour's 232 MPs in 2016 voted Leave. Estimates suggest, however, that 148 of those constituencies saw a majority Leave vote. In a startling 142 constituencies, the Labour MP voted Remain while the majority of constituents voted Leave.

Both Philip Lynch and Lisa James hint that we might see a return to conflict on the Conservative benches if no trade deal looks likely as the transition period comes to an end. However, any opportunity this might present the opposition looks limited. As Tim Bale reminds us, the kinds of cross-party collaboration that we saw on occasions between 2016 and 2019 seem far less likely in the future: incentives for inter-party cooperation are weaker than the desire to seek individual partisan advantage. Although opposition parties might coordinate positions on the trade negotiations with the EU, the priority, not least for new Liberal Democrat and Labour leaders, will be to build their own brands. One implication of this new political context could be, as Alan Wager argues, a weakening of select committees as a mechanism for holding government to account if their members cannot act in a genuinely cross-party way.

There is much to mull over. And, necessarily, an overview like this cannot do justice to the richness and depth of analysis provided in the contributions that follow. I hope you enjoy reading them as much as I did.

Parliament, politics and anti-politics

Meg Russell

Parliament sits at the heart of the UK's democracy, with core functions of holding the government to account, scrutinising and legitimising its actions. Through local representation and the representation of political parties, it links citizens to the key political decisions that are taken in their name.

In all democracies parliaments are central – it's impossible to be a democracy without a Parliament. But this centrality is particularly so in the UK, for two fundamental reasons. First, as a 'parliamentary' (rather than presidential) democracy the government ultimately depends on the confidence of the House of Commons for its survival. Second, the UK puts the principle of 'parliamentary sovereignty' at the core of its constitution (as discussed in Barnard and Young's contribution to this report). Challenges to the authority of Parliament are thus challenges to UK democracy, and potentially to our constitution itself. Yet such challenges occurred, increasingly, during the Brexit process.

That process saw unprecedented levels of conflict between government and Parliament, and perceived conflicts between 'Parliament and people', precipitated by a unique chain of events. The 2016 referendum handed voters the in-principle decision over the UK's membership of the EU, at a time when most MPs supported Remain (see contributions from Philip Lynch and Richard Whitaker). This already promised tensions, given that Parliament and government were left to navigate the more detailed questions about the form that Brexit should take. The Conservatives were highly divided on Brexit, while most Labour MPs instinctively opposed it. Delivering such a controversial policy with the narrow parliamentary majority that Theresa May inherited from David Cameron looked risky, so she gambled on a general election in 2017 to improve matters; but this resulted in an even weaker minority government. Her authority was undermined, and Parliament more divided than before.

The fractious two years before May resigned as Prime Minister in July 2019 saw record Conservative rebellions and government defeats – with her Withdrawal Agreement rejected by 432 votes to 202 in January 2019, then a second time by 391 to 242 votes in early March. May had battled to achieve an agreement in Brussels which would deliver on the referendum result, protect the interests of Northern Ireland, and hold her party together. But this appeared an impossible task. Venting her frustration after the second defeat in a Downing Street statement, she appealed directly to the nation, claiming that "I am on your side". She suggested that "you the public have had enough", in the face of "MPs... unable to agree on a way to implement the UK's withdrawal".

This was just one instance of an anti-parliamentary rhetoric which became increasingly prevalent after the referendum. It was a [populist](#) 'anti-elite' message which was gladly propagated by the same sections of the media that had traditionally demonised 'Brussels', and was also extended to the courts. The now-infamous '[enemies of the people](#)' headline was a reaction against judges who returned the question of whether Article 50 should be triggered to Parliament, rather than allowing the government to act alone. In the end, MPs overwhelmingly supported the necessary legislation, but headlines shortly afterwards nonetheless dubbed them '[saboteurs](#)'. As the drama unfolded, particularly when seeking to prevent a 'no deal' exit, parliamentarians continued to attract fury, and labels such as '[wreckers](#)' or '[mutineers](#)'.

Clearly Parliament was divided over Brexit. But so too was government – hence May suffered a historically high level of [ministerial resignations](#). The country was also [deeply polarised](#) by the referendum result,

including increasingly (as explored in John Curtice's contribution) on how the crucial next decisions should be taken. As a representative body, Parliament largely reflected that polarisation. The House of Commons, by design, includes many diverse voices – and policy agreement requires building a majority amongst them. This usually happens relatively easily: when the governing party has a majority, and can largely iron out policy disagreements behind the scenes, it can present a united front. But these standard operating procedures broke down completely over Brexit.

So if Brexit placed government and Parliament at loggerheads, it's important to dig deeper to understand exactly who was at loggerheads with whom. As was emphasised years ago in a [classic article by Anthony King](#), the 'pivotal voters' in Parliament are normally the government's own backbenchers – without their support government policy will fail. On Brexit, backbench rebellion levels were huge, and perhaps counterintuitively, the most determined rebels were largely those most committed to Brexit. As Philip Lynch reports, 28 'Spartans' voted against Theresa May's deal three times, as did her 'confidence and supply' partners the Democratic Unionist Party. Had these groups supported it, her deal [would actually have passed](#) on the third occasion, rather than being [defeated by 58 votes](#).

From May's perspective it thus may have been Parliament that was failing to 'get Brexit done'; but for ardent Brexiteers it was instead her government that was failing to present an acceptable policy. When she departed, Boris Johnson – who had previously quit her Cabinet and voted twice against her deal – took over, putting several of the 'Spartans' on his frontbench. But while the rhetoric was not anti-May, it continued to be anti-Parliament. This reached a crescendo over the prorogation of Parliament (subsequently ruled unlawful), which – as Curtice shows – had strong approval among Leave supporters. It continued during the election campaign, the Conservative manifesto criticising the 'failure of Parliament to deliver Brexit'.

Repeatedly during 2016-19, governments sought to circumvent parliamentary resistance in order to deliver the 'will of the people'. Ministers proposed to sideline traditional parliamentary sovereignty in the name of respecting popular sovereignty, using this to argue for stronger executive powers. In fact, looking back, the key dispute during this period was between Conservative governments and their own backbenchers; the two sides holding conflicting visions of Brexit, and both claiming to speak for 'the people'. But Parliament, as a complex representative body in a divided nation, ended up taking much of the flak.

This last period risks doing lasting damage to the reputation of Parliament, which was [already low](#) following previous events such as the 2009 MPs' expenses scandal. This was a fertile breeding ground for anti-elite rhetoric, which has significantly grown. But the UK cannot be a democracy without a Parliament, and it cannot be a properly functioning democracy without a Parliament that commands public respect. As the nation seeks to enter a new period of post-Brexit '[healing](#)', restoring faith in our Parliament – as a deliberative body with responsibility for navigating difficult policy decisions – should therefore be an urgent priority.

Parliament's legal role

Catherine Barnard and Alison Young

The Westminster Parliament is sovereign. As a result, the UK is almost unique in not having a codified constitution with entrenched provisions. Parliament can enact legislation on any subject matter it likes, but it cannot bind its successors. Hence the ease with which the failed attempts to achieve a two-thirds majority requirement for an early parliamentary general election under the [Fixed-term Parliaments Act 2011](#) could be overridden by the [Early Parliamentary General Election Act 2019](#) when a simple majority of MPs agreed to pass it in October 2019.

The two Miller cases make it clear that courts can be used to protect the powers of Parliament. The second of these also clarified that parliamentary sovereignty means Parliament is more constitutionally important than the government.

In [Miller I](#), the Supreme Court was asked whether the 'prerogative power' – the power of the prime minister, in this case over foreign relations matters – included a power to notify the EU of the UK's intention to withdraw. The court concluded that the prerogative power did not include an ability to modify domestic law – notably the European Communities Act (ECA) 1972, which took the UK into the EU at a domestic level. Nor did it include a power to frustrate legislation, or to remove domestic rights. The court's decision thus reinforced Parliament's role in the constitution. Its first immediate result was that primary legislation was needed to empower ministers to trigger the Article 50 process. This provided Parliament with the opportunity, should it have wished to do so, to set conditions on the exercise of this power.

Second, Miller I implied that Parliament was more important than the executive. The government's use of prerogative powers could not frustrate the will of Parliament as expressed in legislation, and this raises important issues as to the nature of a sovereign Parliament. The Westminster Parliament ('the legislature') consists of the Commons, the Lords and the monarch. Most government ministers sit in the Commons, usually supported by their backbench MPs, as do opposition MPs. Ministers may also be selected from the House of Lords. The problem the Miller I judgment brought up was this: when we refer to the sovereignty of the Westminster Parliament, should this mean the sovereignty of the legislature, more particularly the Commons, or of the government?

[David Howarth](#) refers to this as a contrast between the Whitehall and the Westminster visions of UK democracy. The Whitehall vision places the Crown (whose powers are in practice exercised by ministers) at the centre of the constitution, which favours a strong government. Under this vision, the role of MPs is to shore up the government, or to propose an alternative government.

The Westminster vision instead focuses on the role of Parliament. Under this vision the legislature, in particular the Commons but also the Lords, holds the balance of power and is the final arbiter of policy. Its job is to scrutinise legislative provisions and hold the government to account for its actions.

In autumn 2019, the tension between these two visions played out on both the political and the legal stages. As discussed in Daniel Gover's contribution, there were moments when the government lost its control over parliamentary time. [Standing Order No. 14](#) formally prioritises governmental business, but these events demonstrated that when faced with a combination of a minority government, a Speaker willing to favour the powers of the Commons over those of the government, and an issue that both causes division

within and across parties and is so important that MPs are willing to risk their careers, the legislature can wrestle control of time from the government.

In September 2019, in the shadow of a proposed prorogation of Parliament, a combination of opposition and backbench MPs was able to initiate legislation that progressed through the Commons in one day. This legislation required the Prime Minister to do something to which, at the time, he was adamantly opposed – ask for an extension to the Article 50 negotiation period (unless the Commons quickly voted in favour either of the Withdrawal Agreement, or of leaving the EU with no deal – which it failed to do).

The attempted five-week prorogation of Parliament led to the second [Miller](#) case – the combined appeal from Gina Miller’s legal action in the English courts and Joanna Cherry MP’s legal action in the Scottish courts. The Supreme Court unanimously quashed the prorogation order, concluding that the common law placed limits on the scope of the prerogative (and thus the government’s) power of prorogation, and that these limits had been transgressed.

The Supreme Court relied on the constitutional principles of parliamentary sovereignty and parliamentary accountability. Both [support](#) a Westminster vision of democracy. The Court indicated that parliamentary sovereignty implies that, in a partnership involving the legislature and the executive, the legislature is the senior and the executive the junior partner. Parliament is supreme, not the executive. Parliamentary accountability means that the government is accountable to Parliament; Parliament, in turn, is accountable to the people.

This judgment was a strong assertion of the Court’s role in protecting the UK constitution – but, importantly, through upholding the powers of Parliament. The Court’s view was that any use of the prerogative power of prorogation potentially undermines parliamentary sovereignty and parliamentary accountability. But the courts will intervene only when the breach of these principles is sufficiently serious; and if they do so, the government can set out its justification. In Miller II, no reasons were provided for proroguing Parliament for five of the then eight remaining weeks to exit day, and the prorogation was found unlawful.

Nevertheless, the [Prime Minister](#), while complying with the judgment, asserted that the courts had gone too far. Prorogation, he said, was purely a political matter. But without Parliament having enacted legislation to limit prorogation it remains an act of the executive alone. Moreover, it is hard to see how the Commons can hold the executive to account for its decision to prorogue Parliament. Any prorogation is merely communicated to Parliament, and it then cannot hold the government to account if it is no longer sitting.

What will happen to parliamentary sovereignty in the aftermath of the December general election? A prime minister with a strong Commons majority seems to favour a Whitehall vision of democracy. The EU(Withdrawal Agreement) Act 2020 demonstrated a move in that direction, removing parliamentary oversight over the future trade deal. The promised repeal of the Fixed-term Parliaments Act might see a return to an unlimited governmental discretion to dissolve Parliament. Other constitutional reforms may further limit the powers of the courts to protect key constitutional principles – possibly including parliamentary sovereignty itself.

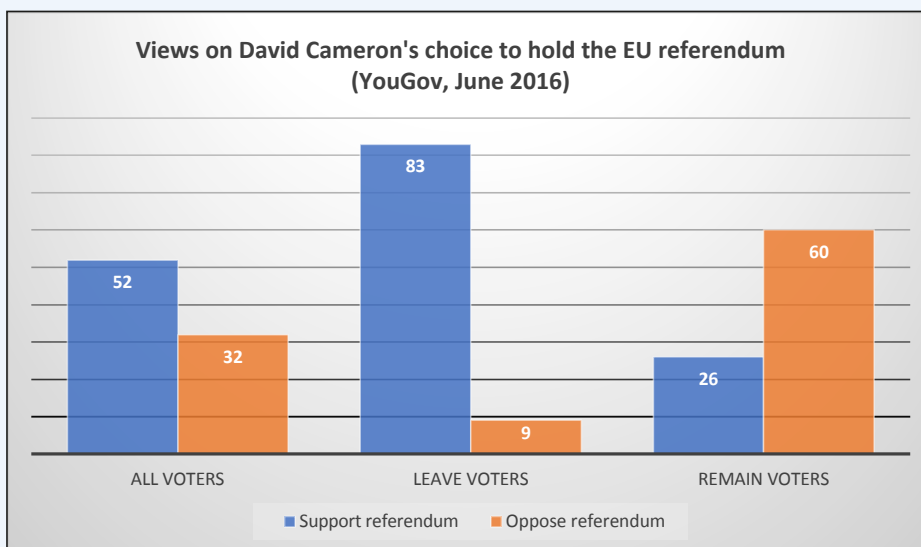
[Dicey](#) saw Parliament as sovereign because, while it enjoyed legal sovereignty, the people enjoyed political sovereignty. He was suspicious of party politics that could weaken the direct accountability of Parliament to the people. In a Westminster democracy, the government is the prime minister and the cabinet, but while they may be formed from the political party with the largest majority, the electorate as a whole does not vote specifically for a particular government. Hence the deeper question – to what extent is sovereignty of the UK Parliament equally justified in a Whitehall, as opposed to a Westminster, vision of democracy?

What do the public think?

John Curtice

Though they have been used various times on constitutional matters in the UK, referendums are often thought to challenge traditional notions of representative parliamentary democracy. In the UK’s version of such a democracy, MPs are sent to Westminster to deliberate and exercise their judgement on their constituents’ behalf. Referendums seemingly usurp this traditional role, in an attempt to ascertain ‘the will of the people’.

Nonetheless, [survey research](#) has long suggested that referendums are popular with voters – as indeed was the June 2016 EU referendum. A fortnight beforehand, 52% told YouGov that David Cameron was right to hold a referendum on Britain’s EU membership, and only 32% said he was wrong. On the very eve

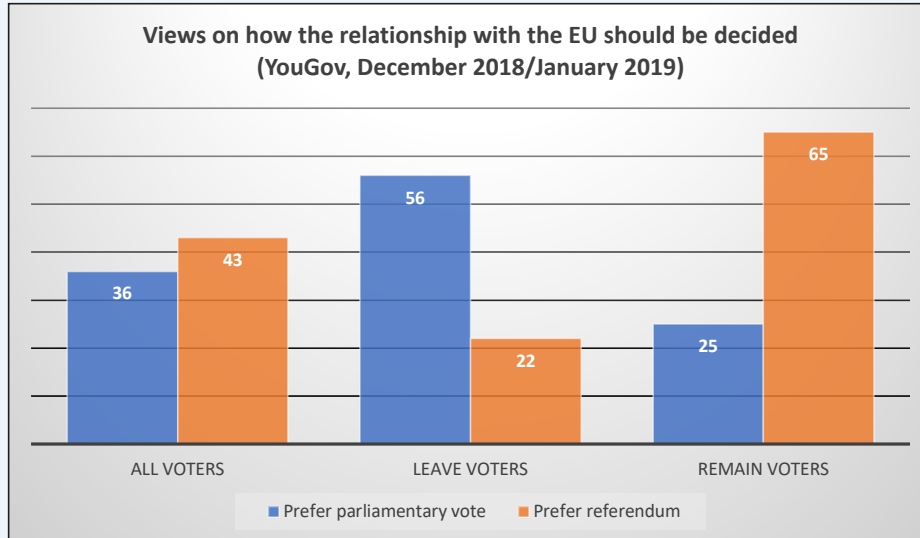


of polling, Ipsos MORI reported that 66% of voters felt the Prime Minister was right to hold a ballot, while only 24% reckoned he was wrong.

Yet, underneath the surface there were already important differences of opinion. As the first chart shows, Leave and Remain backers had rather different views. According to YouGov, 83% of Leave supporters supported Cameron’s decision, and only 9% thought it wrong. In contrast, 60% of likely Remain voters disliked the decision and only 26% approved. Of course, in calling the referendum Cameron had opened up the possibility that the UK might indeed leave the EU, a prospect that Leave voters were more likely to embrace.

However, if we move our focus forward a couple of years to the end of 2018, things look rather different. By then, Theresa May had negotiated a draft withdrawal treaty with the EU. However, many anti-Brexit campaigners were arguing that a second referendum should be held, pitting the terms of this draft treaty against remaining in the EU. They did so in the apparent hope that the original decision would be reversed.

Overall, the idea of putting the decision in voters’ hands was still relatively popular. In two YouGov polls in late 2018/early 2019, 43% on average said that the decision on Britain’s final relationship with the EU should be made by the public in a referendum. But, as the next chart illustrates, the balance of opinion among Remain and Leave voters was now almost the reverse of that in 2016. After the referendum, Leave voters seemed to have rediscovered the virtues of parliamentary democracy.

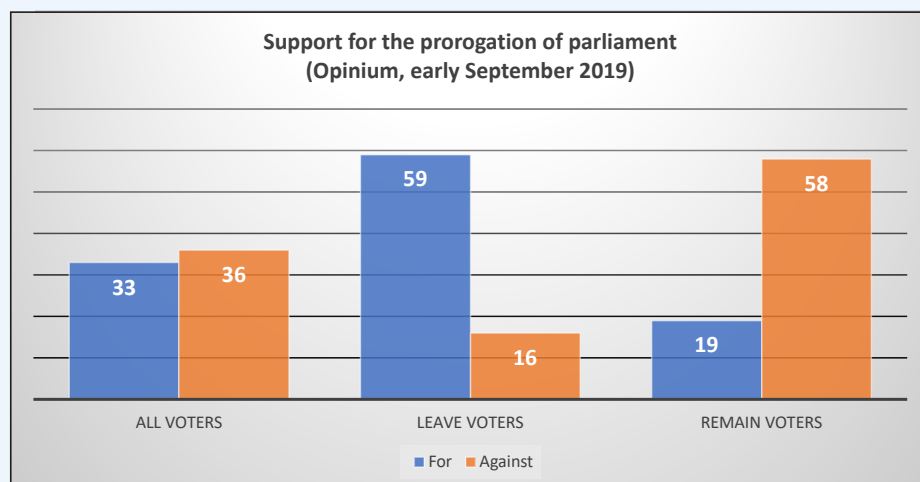


But then things changed again. MPs rejected May’s deal, and proved seemingly unable to agree any alternative course of action – including a further referendum. That did little to enhance MPs’ standing among either Remain or Leave voters.

Thus, by the time the UK failed to leave the EU on the original date of 29 March, many voters of both persuasions were agreeing with negative sentiments about Parliament’s role in the Brexit process. That month ComRes found only 11% agreeing that ‘I trust MPs to do the right thing for the country over Brexit’, while 68% disagreed. Meanwhile, in a poll by the same company in early April, 61% agreed that ‘Parliament seems determined not to implement the will of the electorate on Brexit’, with just 18% disagreeing. This sentiment was especially widespread among Leave voters, with 87% agreeing and only 5% disagreeing; but even 48% of Remain supporters agreed and just 31% disagreed.

Indeed, at this point, Leave supporters were very clearly rejecting MPs’ traditional role in a parliamentary democracy. By 90% to 4% they agreed that ‘MPs should respect the 2016 referendum vote to leave the EU and ignore their own views on Brexit’. In contrast, many Remain voters – who on balance disagreed with this statement by 48% to 35% – still embraced the idea that MPs should exercise their own judgement.

In summer 2019 Theresa May was replaced by Boris Johnson, who feared that Parliament could prove an obstacle to his hopes of securing the UK’s exit from the EU by the now revised target date of 31 October. He sought to stop Parliament from sitting for five weeks by implementing an unusually long prorogation – a highly controversial move which was overturned by the courts (as discussed in Catherine Barnard and Alison Young’s contribution to this report).

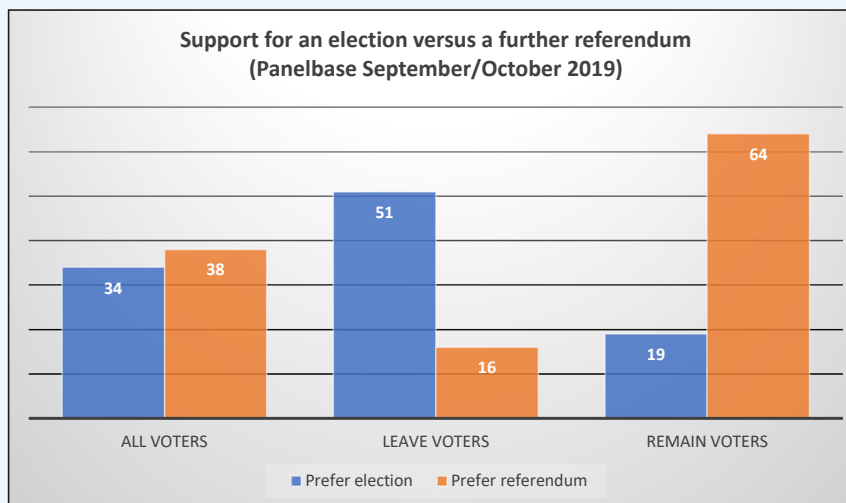


Overall, voters were more or less evenly divided on this issue. But again, as the third chart shows, Remain and Leave voters took very different stances – the former now appeared to be Parliament’s defenders once more, in contrast to the majority of Leave supporters.

True, public opinion appeared to swing against the long prorogation after the Supreme Court issued its adverse judgment. At this point, 47% of voters said that they agreed with the Court’s ruling, while only 31% disagreed. But 62% of Leave voters disagreed with the Court and just 18% agreed, whereas 76% of Remain voters supported the judgment and only 9% disagreed.

There was then a final twist. As autumn set in, the government looked to hold a general election, hoping this would produce a Parliament more supportive of its plans. The opposition parties, in contrast, all argued that there should be another referendum. With opinion polls suggesting that the Conservatives might win a general election, but that a second referendum might produce a Remain majority, there was good reason for Leave voters to prefer the former route to resolving the Brexit impasse.

And that is indeed what the polls suggested, as shown in the final chart. By now, many Leave voters preferred a parliamentary route to Brexit, rather than the path of direct democracy that had made Brexit possible in the first place.



The moral of this tale is clear. Few voters have held a consistent view on the role that Parliament should play throughout the Brexit process. Rather, their views about how political decisions should be made have tended to depend on which answer seemed more likely to favour their side of the Brexit debate.

Having backed the 2016 referendum, whose outcome paved the way to Britain leaving the EU, Leave voters became keener on Parliament rather than the people making decisions – except when Parliament threatened to become an obstacle to their ambitions. Meanwhile, having been reluctant to embrace the idea of a referendum before the 2016 ballot, Remain supporters subsequently seemed keener to revisit direct democracy rather than letting Parliament decide – except when it seemed capable of thwarting the government’s pursuit of Brexit.

The one sentiment that the two sides did have in common was a dislike of the parliamentary impasse on Brexit – but then, at that point, Parliament was not giving either side what they wanted. And getting what they wanted, rather than abstract arguments about the relative merits of direct versus parliamentary democracy, was the central motivation behind many people’s views of the role that Parliament should play in the Brexit process.

The Conservative Party

Philip Lynch

The parliamentary Conservative Party now has a clear majority of MPs who voted Leave in the 2016 EU referendum (see Table 1). Of the 106 new Conservative MPs elected in 2019, some 67 have stated that they voted Leave. Leavers form a majority of both MPs elected in seats gained and those replacing incumbent Conservatives.

The number, and proportion, of Conservative MPs who voted Remain has fallen. Some 48 of the 52 MPs who were elected for the Conservatives in 2017 but did not stand for the party in 2019 had backed Remain. Indeed, 17 were no longer in receipt of the Conservative whip at the dissolution of Parliament – having either defected, resigned the whip or had it removed – and eight of them stood unsuccessfully for other parties or as independents.

Table 1: The Conservative parliamentary party by position taken in the EU referendum, 2016-19

EU referendum position	June 2016		June 2017		December 2019	
Leave	140	42%	140	44%	200	55%
Remain	187	57%	172	54%	145	40%
Undisclosed	3	1%	5	2%	20	5%

There are, of course, problems with classifying MPs by their EU referendum position. Some MPs have not revealed how they voted – possibly because they don't want to be defined by Brexit or because their referendum position differs from that of the majority in their constituency. Meanwhile, many MPs have changed position since 2016. Most Conservative MPs who voted Remain subsequently accepted the referendum result and voted for the Withdrawal Agreements tabled by Theresa May and Boris Johnson. Indeed, some 'reluctant Remainers' now appear every bit as committed to Brexit as those who campaigned for Leave.

The increasing (and increasingly hard) euroscepticism of the parliamentary party was [not reflected](#) in the composition of the Cameron and May governments (see Table 2). Nor, eurosceptics argued, was it wholly reflected in policy even after the 2016 vote to leave the EU, which helped drive the record levels of Conservative dissent on the issue in the 2017-19 Parliament. Under May, some 180 Conservative MPs defied the whip on Brexit votes, the largest rebellion (118 MPs) coming on the first 'meaningful vote' on her Withdrawal Agreement in January 2019.

But under May's successor, things changed fairly rapidly. The 28 'Spartans' from the European Research Group (ERG) who voted against May's deal three times backed Johnson's deal, [arguing that](#) it removed the Northern Irish backstop, signalled future divergence from rather than alignment with the EU, and introduced new protections during the transition period.

Table 2: Conservative governments by EU referendum position of ministers, 2016-20

Government	Leave		Remain		Undisclosed	
Cameron (June 2016)						
Cabinet ministers	5	18%	23	82%	0	-
Junior ministers & whips	13	20%	50	78%	1	2%
TOTAL	18	20%	73	79%	1	1%
May (July 2016)						
Cabinet ministers	6	23%	20	77%	0	-
Junior ministers & whips	13	19%	52	78%	2	3%
TOTAL	19	20%	72	77%	2	2%
May (June 2017)						
Cabinet ministers	7	26%	20	74%	0	-
Junior ministers & whips	15	23%	49	74%	2	3%
TOTAL	22	24%	69	74%	2	2%
Johnson (July 2019)						
Cabinet ministers	14	44%	18	56%	0	-
Junior ministers & whips	26	41%	36	56%	2	3%
TOTAL	40	42%	54	56%	2	2%
Johnson (February 2020)						
Cabinet ministers	11	44%	14	56%	0	-
Junior ministers & whips	30	43%	39	56%	1	1%
TOTAL	41	43%	53	56%	1	1%

Note: Cabinet ministers includes the Chief Whip and those ministers permitted to attend Cabinet although not full members.

Meanwhile, Johnson initially required ministers to agree that the UK would leave the EU with or without a deal by 31 October 2019, and some Leave-supporting MPs who had resigned under May returned to the frontbench. Any change, however, has been far from wholesale: although Johnson's February 2020 reshuffle placed Leavers in key government departments, it will inevitably take some time before newly elected eurosceptic Conservatives reach ministerial rank.

Nevertheless, dissent has been muted in the early stages of the new Parliament. All Conservative general election candidates pledged to support Johnson's deal and the EU (Withdrawal Agreement) Bill duly passed without a single Conservative rebellious vote being cast in the House of Commons. Having left the EU, the government aims to lower the salience of Brexit issues and focus elsewhere. Loyalty to Johnson and hopes of future promotion should also help to keep new MPs in line.

Tellingly, perhaps, while the European Research Group (ERG) recruited new members from the 2019 cohort – 25 of whom signed the [‘Stand up 4 Brexit’ pledge](#) backing ‘no deal’ should Johnson's deal fail – the group has lowered its profile. And while the One Nation Conservative parliamentary caucus has also seen an increase in membership, it, too, has [sought to defuse the Brexit issue](#) and its latest [declaration of values](#) makes no mention of Europe.

Majority government in any case arguably offers [fewer opportunities for game-changing dissent](#) on core Brexit questions, not least because clauses relating to parliamentary scrutiny were removed from the post-election version of the Bill (such as on approval of the government's negotiating objectives), and – as Jill Barrett discusses in her contribution to the report – Parliament has a limited role in overseeing new treaties.

That said, Conservative dissent may well return – albeit in less dramatic fashion, and with a majority government better equipped to absorb it – when final decisions about the future UK-EU relationship are eventually taken.

Should no free trade agreement be in the pipeline as the transition period nears its end in December 2020, for example, we can expect a return to conflict between ERG stalwarts and 'soft' Brexiteers over leaving without a deal. In contrast to 2017-19, however, Parliament's limited role in approving the future relationship means that the two sides would have little more than heated debate at their disposal – though this could still prove embarrassing for the government. Tensions may also arise over specific issues such as tariffs, fisheries and financial services. As discussed in Jill Rutter and Joe Owen's contribution, there is still more detailed Brexit legislation to come – to which concerned MPs could choose to table amendments.

Conservative divisions over Brexit-related issues are also likely to develop a more pronounced constituency dimension. The diversity of seats represented by Conservative MPs is even more apparent since the general election, and MPs will come under pressure from local employers across different economic sectors who experience Brexit in different ways. Notably, the economic costs of a harder Brexit are most likely to be felt in those regions where the Conservatives made gains in 2019.

Hence steering a course between constituency and party demands could prove difficult for some Conservative MPs. Smooth sailing from here on in, then, is by no means guaranteed.

The Labour Party

Richard Whitaker

The tensions between national sovereignty and the desire to open up markets in Europe that follow from European integration have not plagued Labour to anything like the same degree as they have the Conservative Party. Indeed, since the late 1980s most Labour MPs have supported integration as a means of regulating markets and working conditions.

Yet divisions have persisted within the Parliamentary Labour Party (PLP) – most obviously since June 2016 on whether a second referendum should have been held and on precisely what kind of relationship the UK should pursue with the EU. These divisions have been partly about differences between representatives and those that they represent.

In its 2017 manifesto, Labour pledged to respect the referendum result while opposing ‘no deal’ and aiming to capture the benefits of the single market and customs union in a withdrawal agreement. At the 2019 election, however, the party’s position changed, offering voters instead a re-negotiated EU withdrawal agreement followed by a referendum which would include an option to remain. This shift reflected a compromise between different views within the PLP, as well as divisions among putative Labour voters – three-quarters of whom were self-reported Remain supporters and one-quarter Leavers.

If we go back to the 2016 referendum, [data on MPs’ referendum positions](#) show that just 10 of Labour’s then 232 MPs voted Leave in the referendum. However, [estimates of the Leave vote](#) in each constituency suggest that 148 of those 232 Labour seats saw a majority vote Leave.

While Labour was not alone in experiencing MP-versus-constituency differences, the proportion of seats in which a majority voted a different way from their MP was higher for Labour than for the Conservatives. In 142 constituencies the Labour MP voted Remain while the majority of their constituents voted Leave; in only four cases was it the other way around.

This tension was played out in votes in the Commons over the period following the referendum. In February 2017 a total of 47 Labour MPs chose not to follow the party whip and instead voted ‘no’ to the second reading of the EU (Notification of Withdrawal) Bill – the legislation authorising the UK government to notify the EU of its intention to trigger Article 50 of the Treaty on European Union.

In most cases, these 47 Labour MPs represented constituencies where more than half of those who voted in the referendum had backed Remain. However, seven of them were in seats where a majority of those voting had supported Leave.

Looking at the justifications offered for these decisions on MPs’ websites and via their contributions to House of Commons debates shows some arguing that they could not support triggering Article 50 until they knew more about the government’s negotiating priorities. Others either did not believe that leaving the EU would be in their constituents’ interests and/or explained that their belief in the need to remain in the EU was not something they were prepared to abandon.

The 2017 election did not see the arrival of any ‘Leavers’ among Labour MPs who were new to Parliament. Nine of the ten Labour Brexiteers from the previous parliament, however, were still present, comprising just 3% of the PLP. This did not mean, though, that Labour was entirely united in its voting on Brexit-related issues over the subsequent two years.

The tensions between constituents' views and those of MPs, along with different opinions about what a future UK-EU relationship should look like, led to resignations from the Shadow Cabinet and 128 Labour MPs rebelling at least once on Brexit-related votes.

Three votes during the passage of the EU (Withdrawal) Act 2018 highlighted the scale of Labour divisions. In all three cases, Labour MPs had been whipped to abstain – perhaps in itself an indication of the difficulties that the party was facing in reaching a unified approach. In a vote on staying in the customs union in December 2017, 63 Labour MPs voted in favour and four against. A month later, in January 2018, 48 Labour MPs voted in favour of keeping the UK permanently in the single market and customs union (with four voting against) while later on, in June 2018, some 73 supported membership of the European Economic Area.

The PLP also suffered divisions in the March 2019 indicative votes on different options for a UK-EU relationship. The proposal to hold a second referendum saw 198 Labour MPs vote in favour and 27 against – a significant split, given the option's similarity to Labour's 2019 election promise.

But what of the future? After the 2019 general election, only two of the Leavers who had been present in the 2015-17 Parliament were still on the Labour benches. That left them vastly outnumbered by the 79 MPs (including nine of Labour's 26 new MPs) who had signed the [Remain Labour](#) campaign pledge – committing themselves to campaigning for Remain if a second referendum were secured. When the EU (Withdrawal Agreement) Bill reached second reading in late December 2019, only six Labour MPs voted in favour, although more than 30 opted not to vote.

Going forward, the limitations on Parliament's role in approving any future agreement establishing a UK-EU relationship, combined with a substantial Conservative majority, mean that Labour, and its new leader, will struggle to influence EU-UK relations in the short term.

Of the three leadership contenders, none signed the Remain Labour pledge. Keir Starmer was very closely associated with Labour's call for a second referendum but this is unlikely to damage him with what is now an overwhelmingly pro-European party. Were his Corbynista rival Rebecca Long-Bailey to become leader, however, then there is some speculation that tens of Labour MPs might leave Labour – although whether her more ambivalent views on Europe would be the primary cause of their putative departure is surely debateable.

Whoever wins, though, the PLP is more likely to be united on some areas of policy that were previously in the realm of the EU than on others. Given the range of seats represented by Labour MPs, immigration may well be one to watch.

The SNP and Plaid Cymru

Louise Thompson

The 2017 Parliament was characterised by intra-party splits and factions within the two main political parties over the UK's withdrawal from the EU. In contrast, the Scottish National Party and Plaid Cymru were both remarkably united on the issue.

Both parties were clear in their 2017 election manifestos that they needed to give their countries a stronger voice at Westminster, to '[protect](#)' Scotland' and '[defend](#)' Wales from the Brexit fallout.

The SNP not only reaffirmed this as its flagship policy pledge in the [2019 manifesto](#), but also outlined its ambitions to ensure that Scotland could 'escape from Brexit'. The party's strategy now has two main thrusts: a push for a second Scottish independence referendum and preventing the UK leaving the EU without a trade deal by the end of 2020.

Plaid Cymru has, by contrast, taken a much less combative approach, with party leader Adam Price stating that the party will now be seeking to [make the best of Brexit](#) rather than actively blocking it.

This divergence in the two parties' approaches reflects their [national political contexts](#). Holding the majority of Scottish seats the SNP, with its 47 MPs, is an anti-Brexit party representing an anti-Brexit country (62% of Scottish voters chose to remain in 2016). By contrast, Plaid Cymru's four MPs represent a country which narrowly voted to leave.

The parties' different approaches also reflect their very different parliamentary positions within the House of Commons. The SNP's 'third party' status affords its MPs a whole set of parliamentary rights which their Plaid Cymru counterparts do not possess. SNP MPs can be much more proactive in the Commons, be it through parliamentary questions and a guaranteed set of questions to the Prime Minister, opposition day debates, or guaranteed select committee places – including committee chairs.

This is not to say that SNP MPs are always successful: Commons Speaker Lindsay Hoyle [failed to select](#) any of their amendments on the EU (Withdrawal Agreement) Bill, for instance. But their visibility is guaranteed and they have used PMQs in particular to raise key post-Brexit concerns. In the last such exchange before exit day the party's Westminster leader Ian Blackford asked the EU to '[leave a light on](#)' for Scotland and to push for the devolution of powers over [immigration rights](#) so as to mitigate the impact of Brexit. He later focused on [trade deals](#) with the US – an issue which will no doubt feature prominently in SNP contributions over the coming months.

By contrast, Plaid Cymru MPs may find themselves excluded from discussion altogether. No Plaid MP was called for instance during the Foreign Secretary's recent [statement](#) on 'Global Britain'. At PMQs they rely on informal arrangements with the Speaker to ensure they are called to speak semi-regularly. At PMQs on 29 January, they asked the Prime Minister for a meeting to discuss how '[to forge a better future](#)' for Wales. So, while Plaid will occasionally [join the SNP](#) in opposition manoeuvres, its strategy in the new Parliament is likely to be less combative and to feature more subtle, positive questioning.

In the previous Parliament both the SNP and Plaid demonstrated that they could utilise parliamentary procedure to hold the government to account and try to force its hand. Working together, alongside other opposition parties, was key to their success. But this activity was carried out under a minority government

which lacked a firm hold over its MPs. The majority government context of the 2019 Parliament presents a far greater challenge.

BBC presenter Gordon Brewer [highlighted this](#) when he asked Ian Blackford to explain precisely how the SNP would push the government into allowing a second independence referendum. Blackford's failure to give any substantial suggestions was telling.

Taken together, the size of the two parties is not insignificant, accounting for 13% of MPs in the Commons. But this is unlikely to be sufficient to cause any real headaches for the government as it pushes forwards with its post-Brexit transition legislation. The [Agriculture Bill](#) represented one early test. The SNP's [reasoned amendment](#) objecting to the bill made no progress and the bill [passed its second reading comfortably](#) with the support of Conservative and DUP MPs. Plaid also highlighted concerns about the bill, stressing that it could be 'damaging to Welsh agriculture'. They pressed for changes at the bill's committee stage, but found themselves with [no representation](#) on the resulting public bill committee; a contrast to the SNP's two places.

Both parties will, of course, have hoped for places on influential select committees. Here once again, the SNP has the advantage. Angus MacNeil was recently re-elected as chair of the International Trade Select Committee and his colleague Pete Wishart continues to chair the Scottish Affairs Committee. Plaid Cymru have no entitlement to chairs here; the Welsh Affairs Committee is chaired by Conservative MP Stephen Crabb. The new [European Scrutiny Committee](#), however, would be a valuable weapon for both Plaid and the SNP to ensure they have a front seat in the scrutiny of post-Brexit legislation during the transition period. Going forward, the committee is likely to have a say in determining how the Commons will scrutinise EU legislation and its effects on the UK. Again though, only the SNP have a place here.

Certainly, the use of multiple parliamentary forums and mechanisms to press the same key messages will help to improve visibility. And we can see the SNP doing this already: Patricia Gibson's recent adjournment debate on the [claim of right for Scotland](#), for instance, re-emphasised an argument about Brexit laying waste to the devolution settlement which had been made by her leader during a previous session of PMQs.

With the [rejection of the EU \(Withdrawal Agreement\) Bill](#) by both the Scottish Parliament and the Welsh Assembly in January, we can also expect to see SNP and Plaid MPs working more consistently with their counterparts in the devolved legislatures. In the context of the majority Johnson government, such methods may help to ensure a stronger parliamentary voice. There is no guarantee, however, that the government will necessarily pay it any heed.

The parties from Northern Ireland

Katy Hayward

In both the present Parliament and the one that preceded it, seven of the 18 constituencies in Northern Ireland have not had an MP sit in the Commons or participate in committees or legislative processes. Why? Because they have returned a Sinn Féin representative.

Sinn Féin's policy of abstentionism arises from the principle that the [parliamentary oath of allegiance to the Crown](#) is incompatible with its view that, not only should there be no Westminster rule over Northern Ireland, Northern Ireland itself should not exist as a region of the UK. This commitment held firm in the 2017-19 Parliament despite arguments from outside the party (not least from commentators and politicians in the Republic of Ireland) that, as a pro-Remain party, Sinn Féin's seven votes in a fractured Parliament could have made a significant difference to the course of Brexit. Instead, compromise, when it came, focused on Stormont and the [New Decade, New Approach](#) agreement which saw enough softening of the red lines of both the Democratic Unionist Party (DUP) and Sinn Féin to have them recommence power-sharing.

The influence of Sinn Féin in Westminster has come instead from the use of 'coffee cup diplomacy' (using informal networking for influence) and canny use of the parliamentary privileges that the party enjoys regardless of its MPs not taking their seats. The party is experienced in making best use of the access it has to Commons resources and evidence, and makes sure that its MPs and advisers are well-briefed, clear and consistent in presenting the party line.

Sinn Féin, we should not forget, is managing representation – and managing to coordinate its party position very effectively – in no fewer than four legislatures: Westminster, Stormont, the Oireachtas and the European Parliament. Indeed, the leverage that it wishes to use on the issues it values most will be greatest outside Westminster rather than within it. The Commons has long been less of a priority for the party than Dáil Éireann and this was in part reflected in its contrasting fortunes in the UK general election of December 2019 and the Irish general election a month or so later.

The success of Sinn Féin in the 8 February Irish general election has unsurprisingly '[spooked](#)' unionists (and not just Unionists with a capital U). Given the possibility that Sinn Féin might end up exercising far more influence in Dublin than the DUP did in London during its confidence and supply arrangement with the Conservative Party between 2017 and 2019, it is little wonder that they are concerned.

For most of that time, the DUP seemed secure in its position as the voice of unionism and of Leave in Westminster – a card it played for all it was worth, much to the chagrin of nationalists and Remainers in Northern Ireland. However, when the party proved unwilling to supply the votes that had been promised, it lost the confidence of the Conservative Party in very dramatic fashion.

That the Protocol on Northern Ireland/Ireland in Johnson's Withdrawal Agreement was seen as the British government 'selling out' Northern Ireland was nothing unexpected in Irish nationalist circles. But for unionists it was a fresh blow to their confidence in the Westminster Parliament. The DUP at this point faces a stark moment of decision over its strategy. Does it push forward in resistance to the Protocol, in the hope that British MPs will finally wake up to what it sees as the 'betrayal' of the union? Or else does it swerve to develop a never-before-seen collaborative effort with other Northern Ireland MPs and parties to defend the common interests of the region vis-à-vis Britain at this critical juncture?

Much depends on how relations between the parties are managed within the Northern Ireland Executive and, more broadly, on the tone and tenor of the British-Irish intergovernmental relationship which underpins the peace process. Ultimately, what the DUP decides to do will follow from what it sees as best securing Northern Ireland's position in the union, and this is likely to depend on the machinations of the Conservative government rather than a premeditated party line from the DUP itself.

The option – if not the imperative – of collaboration between Northern Ireland's 18 MPs is made a feasible proposition following the 2019 general election, which saw the re-emergence of a centre ground in the region.

When the Good Friday (Belfast) Agreement was originally concluded, it was presumed that the moderate middle ground would continue to grow and form a solid basis for future reconciliation in Northern Ireland. Instead, we saw a polarisation of discourse and an incentive to pursue conflictual (albeit non-violent) politics. At the 2019 general election, however, both the DUP and Sinn Féin were punished for their three-year long refusal to share power as public services fell into crisis. On the other hand, the pro-Remain and pro-cooperative stances of the moderate parties (the SDLP and Alliance) resulted in strong performances from them and sent three new 'centre ground' MPs to the Commons.

Whilst those parties are inevitably hindered by lack of numbers – by the way Commons procedures are arguably biased against smaller (especially regional) parties, and by the sheer size of Boris Johnson's majority – those three MPs are widely respected as among the most effective political actors in Northern Ireland. Their mettle will, of course, be tested. But perhaps the biggest difference they can make is in forming the cartilage between the two grinding bones of the DUP and Sinn Féin.

Although the impact of Northern Ireland's MPs is unlikely to be as high-profile or as disproportionate as it was felt to be in the previous parliament, their role may in fact prove more critical now than it has been for a generation.

At its heart, peace in Northern Ireland depends on people of all political views believing that democratic representation works and is worthwhile – including at UK level. If the Johnson government responds favourably to what may turn out to be an unprecedented willingness of the part of Northern Ireland's parties in Westminster to work together and speak in common cause, it will be an important means of welding together the pillars of peace and stability amid what looks set to be a period of extraordinary political turbulence across these islands.

Opposition cooperation then and now

Tim Bale

In the autumn of 2019, parliamentary parties opposed to Boris Johnson's government were able to cooperate, with the help of Conservative backbenchers, to prevent a 'no deal' Brexit and force the Prime Minister to ask for a second extension to Article 50. But the idea that, in this Parliament, they might be able to build on such cooperation to effectively oppose what is now a majority government is a chimera – at least when it comes to the House of Commons, if not the House of Lords.

Biologically-speaking, a chimera is a single organism composed of cells with more than one distinct genotype. Mythically-speaking, it's a fire-breathing monster composed of a number of different animals. Metaphorically-speaking, it's a dream that's often chased but unlikely ever to come true. In this case, all of these definitions apply.

In practice, the putative 'Remain majority' in the previous House of Commons was always rather weaker than many supposed. This was in part because many of the MPs who had originally campaigned to stay in the EU back in 2016 (see the contributions by Philip Lynch and Richard Whitaker) decided – either from a principled commitment to honour the results of the referendum or from an understandable desire to save their seats – to support a government determined to leave.

Nevertheless, by the late autumn of 2019, there was at least an outside chance that said majority, which managed to come together sufficiently to prevent a 'no deal' departure and force an extension, might have gone even further. It could perhaps have forced the government into a second referendum, or even toppled the Johnson government and replaced it with a 'government of national unity'. Instead, the coalition fell apart over the determination of most of the parties involved that Jeremy Corbyn should never be allowed anywhere near Number 10. And anyway, two of them – the Liberal Democrats and the Scottish National Party – had, whether owing to hubris or to higher priorities, set their sights on a general election.

All of which is a salutary reminder that the incentives for opposition cooperation in the UK, at least beyond the very short term, often prove weaker than the temptation to abandon cooperation and seek partisan advantage. That will very likely remain the case unless and until parties are prepared to put together pre-electoral pacts to mitigate the disadvantages that they face under first past the post – or until a government genuinely committed to replacing that system with a more proportional one finally comes to power.

That's not to deny that there are reasons for the opposition parties to cooperate at Westminster or that we will see examples of this in the coming months and years – and not just in the House of Lords where such cross-party cooperation is commonplace. After all, recent research suggests that, even under majority governments, the UK Parliament is not as toothless as is often assumed. This is true even when it comes to [amending legislation](#) – let alone ensuring scrutiny and accountability through the [select committee system](#).

If only to boost their personal profiles, or to send a signal to the electorate that 'it doesn't have to be this way', opposition MPs from different parts of the Commons are sometimes willing to work together. Cross-party cooperation is also worthwhile if they can make the Prime Minister publicly squirm and even (maybe with help from disgruntled government backbenchers) perform a full-blown u-turn.

Much will depend, however, on the issues in play.

For instance, negotiations with the EU on a free-trade agreement could well have a tangible impact on

opposition parties' voters, and indeed, potential future voters. So it's easy to see Labour, Liberal Democrats, SNP, Greens, and the various regional parties (even, as Katy Hayward's contribution points out, the DUP) coordinating their efforts. This will serve, at the very least, to distance those parties from an outcome which they are convinced will prove deeply damaging.

Even there, however, doubts may soon creep in. For instance, many Labour MPs are clearly desperate to follow Keir Starmer's lead and insist that, now the UK has left the EU, the main task is to move on and make the best of it. Do they really want to be too closely associated with parties that voters (or at least the newspapers they read) may well write off as, at best, fringe outfits or, at worst 'Remoaners' or separatists bent on the UK's destruction?

On other issues – including those which on the face of it might lend themselves to such cooperation – things could turn out to be trickier still.

Take the environment. The kinds of criticism and solutions proffered by the UK's sole Green MP Caroline Lucas might not be so radically different from, say, those proffered by the Liberal Democrats, who have long seen themselves as ecologically concerned. But Green or Liberal Democrat criticisms and solutions will be significantly more robust and far-reaching than those advocated by some other parties. Labour and the SNP, for example, are both keen to court voters whose livelihoods depend on sectors that could struggle or even sink as we move towards carbon neutrality.

And then there is the sheer size of the government's majority. If the arithmetic were tighter, then there would be at least a chance that a united opposition might not only embarrass Johnson and his colleagues but actually defeat them in the Commons division lobbies.

But the arithmetic isn't tight, so the opportunities and incentives are limited. For the opposition parties, then, working together to plan ambushes on fiendishly clever legislative amendments, or to haul ministers and civil servants over the coals in committee, will pale in comparison to the incentive to build their individual electoral brands.

Some sort of anti-Conservative parliamentary popular front has its appeal. It even has a rationale. But – in the Commons rather than in the Lords anyway – neither looks entirely convincing, either to an outside observer or to potential participants. This is a chimera that is unlikely to catch, let alone breathe, fire.

The Exiting the European Union Committee

Hilary Benn

Now that the Withdrawal Agreement has entered into force and the UK has left the EU, it is a good moment to pause and reflect on the experience of the House of Commons Committee on Exiting the European Union – now the Committee on the Future Relationship with the European Union – which I chair. Since its original establishment in the autumn of 2016, how did it contribute to the wider Brexit process?

The Committee's main areas of enquiry (the government's Brexit negotiating objectives, the progress of the negotiations and the legislative path to implementing a Withdrawal Agreement) were set with a likely course of events in mind. Others will debate the extent to which the Committee's work helped to shape the narrative surrounding Brexit, but I think we did shed light on a hugely complex process, and the choices that it presented the country, which will touch all our lives and shape our politics for years to come. And of course, it also underlines the critical role that Parliament played as events unfolded after the 2016 referendum.

Published in December 2017, the Committee's [second report](#) examined the key areas of contention as the UK and EU negotiators continued to wrestle with the terms of withdrawal: the rights of citizens (people who have worked hard, paid taxes, integrated, raised families and put down roots), the financial settlement, and, most acutely, the implications of Brexit for the island of Ireland. [Our visit to Armagh](#), to take evidence and see the border where people and goods pass freely across thanks to the Good Friday Agreement, was very important. And it informed the conclusions of our report in which we pointed out the impossibility of maintaining an open border at the same time as leaving the customs union and the single market.

Back in Westminster, we asked questions about the government's objectives, and the economic analysis that underpinned them. Following a humble address [agreed by the Commons](#) – formally, a petition to the Queen – which called for the government to make public its Brexit impact assessments, the Committee published [material](#) from government 'sectoral analysis' documents. It subsequently held a [memorable evidence session](#) on their contents with then-Secretary of State David Davis in December 2017.

When the negotiations were ultimately given the green light to move on to the second phase, many detailed questions about the UK's future relationship with the EU remained unclear. As 2018 unfolded, the Committee continued to press the case for more clarity, more certainty, and an acceptance that ultimately, trade-offs would be required if we were to depart in an orderly fashion.

In March 2018, the first draft Withdrawal Agreement was published. The following month, the Committee outlined a [series of tests](#) by which any agreement on the future relationship should be judged. These ranged from the need for the border on the island of Ireland to remain open, with no physical infrastructure or checks of any kind, to continued UK participation in EU agencies and research programmes. As I argued at the time, the 15 tests represented a high bar but were based on the then-Prime Minister's vision for our future outside the EU and the assertion that any new deal would be at least as good as the status quo.

In the end, of course, Theresa May's Chequers plan disintegrated in the face of vociferous internal and external opposition, and Parliament rejected her Withdrawal Agreement and Political Declaration on three separate occasions. Even a committee with as broad a range of views on Brexit as ours was unanimous in its verdict, [published in December 2018](#), that the documents offered only uncertainty, not clarity. The

sequence of failed attempts to secure approval that then followed, in a Parliament with no government majority, was therefore pretty inevitable.

As the March 2019 deadline drew ever closer, the threat of a ‘no deal’ departure became increasingly real. The Committee’s [call for a series of indicative votes](#) to establish Parliament’s view on a set of options complemented [our January warning](#) that a so-called ‘managed no deal’ was unrealistic and could not constitute the policy of any responsible government. Our [February 2019 evidence session](#) with former Irish Taoiseach Bertie Ahern provided a particularly powerful body of evidence on the latter point.

The decision by the EU27 to agree to an extension until the end of October, preventing a ‘no deal’ departure on 12 April, saw a call made in our [March report](#) granted. But despite having averted the damage of no deal at the eleventh hour, the government continued to set its collective face against any serious reassessment of its red lines. Our work leading up to the summer recess was therefore focused on two key things: the [negative consequences of ‘no deal’](#) for a host of the UK’s key economic sectors, and analysing the various proposals aimed at breaking the parliamentary impasse. The [August leak](#) of the ‘Operation Yellowhammer’ documents, and subsequent [appearance before the Committee by Michael Gove](#) to discuss their contents, did little to assuage our concerns.

What unfolded in the final quarter of 2019 has been widely examined elsewhere. The sheer speed at which events took place – combined with Parliament’s sidelining at various points in the process that ultimately led to what was widely dubbed a ‘flection’, and the general political turmoil – undoubtedly affected the Committee’s contribution in the run-up to the decisive European Council in October. [Our final session](#), fittingly, sought to both assess recent events and examine their possible consequences.

Moreover, although the December 2019 election result did bring to an end the first stage of Brexit, we now move on to the next bit – the future relationship negotiations. Looking back at the transcript of that final evidence session, my closing words were ‘to be continued’. And even as the heat and light of 31 January fades into the rear-view mirror, they seem as appropriate now as they did then.

Key Brexit bills: the EUWB and the WAB compared

Lisa James

On the face of it, the two arguably most significant pieces of Brexit legislation passed in the last few years look rather similar. Both are lengthy and complex: their first published drafts run to 62 and 100 pages respectively. Both implement aspects of withdrawal: the [EU \(Withdrawal\) Act 2018](#) brought EU law onto the UK statute book, whilst the [EU \(Withdrawal Agreement\) Act 2020](#) implemented the Withdrawal Agreement. They are similar enough in topic that large portions of the 2020 Act directly amend the 2018 text.

The stories of their progress through Parliament, though, are very different. The 2018 Act (the EUWA or, before Royal Assent, the EUWB) took 11 months to pass through Parliament. The government suffered multiple defeats and made major concessions; the bill was amended so heavily that its final text was [two-thirds longer](#) than its first version.

Initially, it looked as though the second bill (the WAB – after Royal Assent, the WAA) would have a similar experience. The first [WAB](#) was introduced in October 2019: it passed its second reading, but the government abandoned the bill after its programme motion was defeated. A second version, introduced after the 2019 general election, had a far smoother passage through Parliament. It passed in just five weeks, including a two-week recess. A handful of defeats in the House of Lords were easily overturned in the Commons and, remarkably for a bill of such complexity and constitutional significance, not a single amendment made it into the final text.

The circumstances of the two bills were, of course, very different. Theresa May introduced her EUWB into Parliament mere weeks after the 2017 election, with her majority gone and her personal authority severely compromised. It was always likely that she would have to offer substantial concessions to get her legislation through Parliament – and indeed, much of her other Brexit legislation, including bills on [trade](#), [immigration](#) and [agriculture](#), stalled as the government ran into increasing difficulty. Boris Johnson, conversely, introduced his second WAB immediately after a landslide election victory, at the probable height of his popularity in his party, and claiming a strong personal mandate for his version of Brexit.

The time pressures of 2017-18, too, were fundamentally different to those of early 2020. The EUWA's passage [nine months](#) before the original exit day of 29 March 2019 may have seemed tight at the time, but it was nothing compared to the WAB's December introduction, a mere six weeks before the 31 January 2020 deadline. With a swift parliamentary timetable, there was little opportunity for would-be amenders of the bill to canvass support. And with the Commons select committee system not yet up and running after the election a key source for expert analysis was missing. In this context, it is hardly surprising that the WAB passed unamended.

But what did the nature of their passage mean for the final contents of these two Acts? Perhaps the most striking [difference](#) between them lies in their approach to Parliament's future role.

The final provisions of the EUWA reflected a Parliament which was increasingly in revolt against Theresa May's '[no running commentary](#)' approach to Brexit scrutiny. The statutory meaningful vote, forced upon the government by Conservative backbenchers in both Houses, gave Parliament an unprecedented role in ratifying an international agreement – an area where its influence has, traditionally, been very limited. When the Commons rejected May's deal, the meaningful vote mechanisms contained in the EUWA then

laid the ground for further procedural innovation which resulted, ultimately, in Parliament legislating against the government's will (as discussed in Daniel Gover's contribution). And this was not the only area in which Parliament asserted itself in the EUWA: it also, unusually, put negotiating objectives (on a [customs arrangement](#) and [unaccompanied child refugees](#)) into statute, as well as establishing new scrutiny mechanisms for delegated legislation (for which, see Brigid Fowler and Ruth Fox's contribution).

The first version of the WAB, published under minority government, afforded Parliament a similarly central formal role. It included a parliamentary vote on both the negotiating mandate and the final treaty on the future relationship, and committed the government to give Parliament regular progress updates during the negotiating period. Indeed, in key respects it actually gave Parliament a more significant role than had the EUWA – building in ongoing parliamentary oversight presumably to reduce the risk of Parliament ultimately rejecting the deal, as had happened with May's Withdrawal Agreement. The second, post-election version of the WAB, however, stripped out these provisions – and none appear in the final Act.

In formal terms, then, the difference between the two Acts is stark. The negotiation has been taken back into executive hands. Parliament will have little formal say in shaping the mandate or monitoring the negotiations – though select committees will certainly play a role – and there will be no meaningful vote on the future relationship.

Such a conclusion, though, would be too simplistic – even accounting for the very different circumstances in which the Acts were passed. By the time the EUWB was making its way through Parliament, trust between May and her backbenchers was at such a low ebb that Conservative backbenchers forced the meaningful vote into statute – bringing their disagreements with May, at the time and thereafter, into the public arena of the Commons chamber. The WAB's smooth passage may, by contrast, appear to herald a return to a 'normal' state of affairs in which the government inevitably gets its way. But the reality of backbench influence [has always been more complex](#).

Much parliamentary influence takes place behind closed doors, not least through the crucial negotiations between a government and its own backbenches. Public dissent over the [Huawei](#) and [HS2](#) decisions has shown that the parliamentary Conservative Party, notwithstanding Johnson's large Commons majority, has more diverse views than might have been assumed. And, as Philip Lynch's contribution notes, decisions about the future relationship could have a major economic impact upon some Conservative constituencies – meaning that government backbenchers will almost certainly want to have their say. The WAA may not give Parliament a formal role in shaping or approving the future relationship. But behind closed doors backbenchers will, as always, no doubt be keen to exert pressure – and may have more opportunity for influence over ministers than some external observers might assume.

Procedural innovation

Daniel Gover

Normally a distinctly niche interest, parliamentary procedure became headline news during the 2017-19 Parliament. In their efforts to influence the Brexit process, MPs adapted various procedural mechanisms to demand information, take control of the Commons agenda, attempt to forge a consensus, and ultimately to impose their will on reluctant ministers. These initiatives captured significant media attention, though they encountered varying degrees of success.

An early focus of procedural innovation was on securing the release of information. Under ‘Standing Order No. 14’, most time in the Commons chamber is by default controlled by the government, potentially enabling ministers to restrict the topics that other MPs can debate and vote on – but one exception is for ‘opposition day’ debates. In late 2017 Labour began using these opportunities to deploy the ancient parliamentary mechanism of [‘motions for return’](#) (or ‘humble addresses’), including to force the publication of internal government Brexit analyses. Yet the amount of opposition time available is limited, and its timing depends on scheduling by the government. This restricted its usefulness during the Brexit process.

Following the second rejection of Theresa May’s Brexit deal in early March 2019, MPs therefore [backed a move](#) – by amending a government motion – to ‘take control’ of the Commons agenda by temporarily suspending Standing Order No. 14 altogether. This paved the way for further innovation, with MPs staging a series of ‘indicative votes’ to attempt to break the Brexit impasse. The initiative was not entirely unprecedented: similar votes have in the past been facilitated by the government, most notably (and unsuccessfully) [in 2003](#) on Lords reform. In the event, the Brexit indicative votes also ended in failure. In the first round MPs [rejected all eight options](#), which included various forms of ‘soft Brexit’ and a second referendum. The referendum option received the highest absolute support, while a permanent customs union came closest to a majority. A second round produced [a similar outcome](#).

A key reason for this failure was that the voting system incentivised tactical and insincere voting ([as was also observed in 2003](#)). For each option MPs could vote either for or against (or abstain). This gave MPs favouring a particular outcome an incentive to vote against compromise positions, in an attempt to ensure that their preferred option achieved a relatively higher number of votes. Hence, many pro-EU MPs rejected or abstained on ‘soft Brexit’ positions in the hope of securing a second referendum. As suggested in advance by [numerous observers](#), different sequencing of the votes (like separating questions of process from Brexit outcome) or a different voting system (such as preferential voting) would have been more likely to facilitate compromise.

After the failure of the indicative votes process, MPs turned to another major focus of innovation: passing primary legislation to compel government action. While parliamentarians possess several other mechanisms for pressuring ministers – including debates, questions, and committee inquiries – none of these are legally binding. Faced with the possibility that ministers might allow the UK to exit the EU without a deal, Parliament moved in April 2019 to pass the ‘Cooper Bill’, backbench legislation requiring the government to seek an extension to the Article 50 process. Later that year, in September, parliamentarians repeated the trick with the ‘Benn Bill’ – the effect of which was to force Boris Johnson, plainly against his will, to seek an extension until 31 January 2020.

Securing legislation against tight deadlines and government resistance required significant procedural novelty. Traditionally, backbench bills have faced an uphill struggle to become law, requiring at least ministerial acquiescence to pass. This is in part because only ministers can provide the necessary agenda time, but also because only they can propose ‘programme motions’ to impose a strict Commons timetable for the bill’s passage. In contrast, backbench bills are susceptible to filibustering. MPs used their control of the timetable to overcome both barriers, approving what were in effect Commons programme motions on the [two bills](#). In the Lords, where programming is entirely absent even for government legislation, peers broke with precedent [to authorise such a timetable](#) on the Benn Bill. This was a major development in Lords procedure: when in 2011 the coalition government had threatened a similar move, it [sparked outrage](#) among peers.

Additional procedural creativity was also needed to kickstart the whole process of the Benn Bill. Johnson, unlike May, had not been obligated to table an ‘amendable’ Commons motion, meaning that MPs had no obvious mechanism to hijack proceedings and ‘take control’. The solution (further discussed in Jack Simson Caird’s contribution) was for the Speaker to grant [an ‘emergency debate’ on a substantive motion](#) – itself a noteworthy evolution of procedural practice.

Given Brexit’s domination of parliamentary business during the 2017-19 Parliament, formal procedural reform was, unlike ad hoc innovation, largely absent. One notable exception – the introduction of ‘proxy voting’ for new parent MPs, after [years of campaigning](#) – was at least partly provoked by tightly-fought Brexit votes in which the usual ‘pairing’ arrangements had [broken down](#). This change at least is likely to have lasting effect.

But what lasting legacy will there be of the various other innovations witnessed during the 2017-19 Parliament? Much of what occurred was a direct consequence of unique political circumstances: minority government and deep Brexit divisions. MPs were undoubtedly successful in adapting procedure to take control of the Commons agenda and pass legislation, but the election of a majority administration in 2019 makes further such moves unlikely for the foreseeable future. Nor are innovations around emergency debates or motions for return likely to succeed against a government with a cohesive Commons majority.

Nonetheless, some lessons could be learnt from this period. Although they ended in complete failure on Brexit, a revised process for indicative votes could have significant value, even under periods of majority rule, in helping MPs to navigate contentious issues. Thought could also usefully be given to how agenda time is apportioned under future minority governments. Notably, the House Business Committee proposed by the [Wright Committee](#) in 2009 might have eased the Brexit procedural battles considerably. The uniqueness of Brexit means that the levels of conflict experienced during 2017-19 may never be repeated. Yet the future of parliamentary politics remains unpredictable, and some procedural precedents, and new innovations, could have lasting consequences.

The Speaker's role

Jack Simson Caird

[The Speaker](#) of the House of Commons is the chamber's chief officer and highest authority. The Speaker's roles include making rulings on procedure and deciding which amendments get selected for debate and decision by MPs. During the height of the parliamentary dramas over Brexit in the 2017-19 parliamentary session, the decisions of Speaker John Bercow were often high-profile and controversial. To some he became the champion of the rights of the legislature, but to others he was guilty of politicising the office and breaking established conventions.

What is beyond dispute is that the government's lack of an overall majority after the 2017 general election put the Speaker in a powerful position. It is also true that some of his high-profile procedural decisions showed that he was willing to depart from established precedent in order to ensure that the House of Commons, rather than the government, prevailed. Now that the UK has left the EU, it is possible to take a step back and examine the impact of the Speaker's decisions.

Initially the government's position on the House of Commons' role over Brexit, in the aftermath of the referendum, was noncommittal. The Prime Minister indicated that MPs would have the final say, but avoided saying more. The Withdrawal Agreement is an international treaty and this meant that there was no established parliamentary process for MPs to supervise ministers' approach to the negotiations or to approve the final deal. Through parliamentary pressure, the government was eventually forced to concede to a more structured process for Commons approval, which became known as 'the meaningful vote'. Throughout these debates, the government wanted MPs to face a simple take-it-or-leave-it vote. Ministers resisted proposals that would have allowed the House of Commons to pass amendments [that could 'direct' their approach to negotiations](#).

This was challenged by the meaningful votes process which parliamentarians sought to impose on the government during the debate on the EU (Withdrawal) Bill. In June 2018, the government argued that the 'next steps' motion, in the event that the Commons rejected the Brexit deal, should be unamendable, meaning that MPs could not put forward alternative propositions to shape the government's response. This approach sought to limit the House of Commons' ability to express its view on the Brexit deal, thereby also limiting the role of Speaker in selecting which amendments should be debated. Even though amendments to a government motion might not be legally binding, they could have far-reaching political impact. This seemed to be precisely what the government was seeking to prevent.

But in late 2018 and early 2019, the government's position was unravelled through a series of decisions made by the Speaker. On 4 December, he made a bold decision to select an amendment from former Conservative Attorney General Dominic Grieve, which on its face was outside of the scope of the Business of the House Motion which it sought to amend. This amendment, which was passed against the government's wishes, ensured that any 'next steps' motion could be amended. Hence MPs gained the potential to direct, at least in political terms, the government's approach to the negotiations.

On 15 January the government's motion on the deal was indeed roundly defeated by MPs in the first meaningful vote, leading to debate on 29 January on the 'next steps' motion. Following fairly standard practice, the Speaker selected seven of the 15 amendments tabled. This was done on the basis of the scale of support from MPs, indicated through signatories to the amendments, and on the basis of their

substance, so as to avoid overlapping amendments. The order of decision was also important, to prevent the House making contradictory amendments. These selections by the Speaker were not controversial, but were nonetheless significant in facilitating debate about MPs' substantive concerns over Brexit. Two amendments tabled by Conservative backbenchers were agreed: Caroline Spelman's rejecting no deal, and Graham Brady's calling for an alternative to the Northern Ireland backstop. Both proved to be important in setting the government's future direction.

The Speaker made various other controversial rulings. Arguably the most controversial was his decision on 3 September 2019 to allow MPs to take control of the timetable. Standing Order No. 24 allows the Speaker to grant 'emergency debates' – which the government, crucially, cannot prevent. Such debates have traditionally been held on 'neutral' motions, which have no substantive effect. The Speaker decided to break from tradition and to allow an emergency debate on a motion to take control of the order paper. This decision facilitated the passage of the 'Benn Act' which was designed to stop a 'no deal' exit on 31 October 2019 (as discussed in Daniel Gover's contribution). It is impossible to know whether the UK would have left with no deal in October but for the Speaker's decision; however this is certainly a possibility.

The long-term implications of the Speaker's most contentious rulings is not yet clear. There is a risk that the principle arguably upheld by his decisions, that the Commons, as the democratic elected legislature, should decide the country's future, will be overshadowed by accusations that he was motivated by his opposition to Brexit.

Overall I suggest that there is a positive story to tell about Bercow's role in facilitating MPs' scrutiny of Brexit. The Speaker's contribution should not be judged solely on his perceived or real political motives. In the context of a legislature of 650 MPs, which takes decisions by majority vote, this risks overstating the importance of one individual. In reality, in the 2017-19 parliamentary session, the effects of the Speaker's routine and non-controversial decisions in facilitating MPs' decisions over Brexit were often equally significant to his most controversial rulings. On his own he could only ever enable decision making, with the final policy choices left to the majority of MPs.

Commons select committees

Alan Wager

The House of Commons select committee system is a parliamentary success story. But it is a success story about to come under a period of sustained pressure. The influence and public profile of the committee system has been boosted by a reputation as a generator of agenda-setting policy discussion, and a vehicle for genuine cross-party scrutiny. The new political environment since the 2019 general election provides a test of whether these factors can be sustained. In an environment where the government is explicitly setting out to reduce the level of parliamentary scrutiny around Brexit and its consequences, select committees face the challenge of maintaining the levels of influence they enjoyed during the 2017-19 Parliament.

Some government decisions that inhibited select committee scrutiny at the start of Boris Johnson's tenure are temporary. The attempted prorogation, actual prorogation, dissolution and the slow start after the general election, combined with the distraction of the Labour leadership contest, have disrupted committee activity. The Liaison Committee has yet to question Boris Johnson, who [cancelled an agreed appearance](#) in October, having postponed twice previously. All this at a critical time when negotiating mandates and opening positions are being fleshed out.

Yet there are other substantive and long-term problems for scrutiny, resulting directly from government decisions, which will continue to impact throughout the transition period. As discussed in Lisa James' contribution, government revisions to the post-election EU (Withdrawal Agreement) Bill ([WAB](#)) reduced MPs' ability to scrutinise the next steps on Brexit on the floor of the House of Commons – including the negotiating mandate and updates on negotiations. This means that MPs (and watchers of BBC Parliament) will be denied those pinch points of high drama – and, more importantly, high scrutiny – that shaped government strategy throughout the last Parliament. The question is whether select committees – with their proven capacity to generate moments of scrutiny and expose the government of the day – can partly fill the gap.

Hence, perhaps the most important role for select committees in the next stage of Brexit will be in what Marc Geddes [describes](#) as the drama or spectacle of accountability that they create: making sure that the government (and its ministers) are forced into the public arena to publicly spell out the trade-offs inherent in forging a successful path outside the European Union. This will depend on their capacity to act as genuinely cross-party bodies which, in turn, will be shaped by their internal dynamics and composition. The election result means that this composition will change from an even split between the two largest parties along with smaller party representation, to a Conservative majority on most committees.

Select committees will also be reliant upon assertive and independent leadership. The willingness of high-profile politicians to view chairing a select committee as a career stepping-stone is seen as a symptom of the system's success – particularly since the Wright reforms introduced select committee elections in 2010. Key players on the Labour side such as Yvette Cooper and Hilary Benn have played important roles as select committee chairs, though some might now be tempted back to the frontbench after Corbyn's term as leader is over. Most recently there has been a trend of newly ex-ministers on the Conservative side seeking election as committee chairs. This raises the question of whether these MPs will feel insulated enough from party political pressures – the original purpose of those Wright reforms – to act in ways that will displease their former ministerial colleagues.

There are some reasons to think that committees might rise to the occasion. Partly as a function of the personnel changes that Johnson made upon becoming Prime Minister, many select committee chairs in areas highly relevant to Brexit are independent-minded Conservative MPs who did not support him in the leadership contest: Tom Tugendhat in Foreign Affairs, Tobias Ellwood in Defence, Greg Clark at Science and Technology, Huw Merriman at Transport. Notably, just one of the [28 select committee chairs elected](#) on 30 January 2020 – William Wragg, who replaced veteran Brexiteer Sir Bernard Jenkin at the helm of the Public Administration and Constitutional Affairs Committee – campaigned for Leave in the 2016 EU referendum.

While parliamentary scrutiny was a loser from the revisions to the WAB, the European Scrutiny Committee (ESC) was a winner. The committee has long been seen as a hotbed for euroscepticism: in the previous Parliament, all 10 of its Conservative members had supported Leave in 2016. The committee now has a statutory role in scrutinising EU law during the transition period. Principally, the ESC will have the ability to trigger votes on the floor of the House of Commons if new EU law is deemed to raise issues of ‘vital national interest’. This would in turn create pressure on the government to raise these issues at the Joint Committee, which has been set up to manage disputes throughout the next stage of Brexit negotiations. As the [Institute for Government](#) has pointed out, if the UK and EU agree on a treaty by December 2020 this system could well be seen as a prototype for how MPs could have continuing oversight over the UK-EU relationship in the future. Given its potential increased importance over the long term, it is notable that the ESC is still chosen by party whips.

The [government’s statement](#) on the UK’s approach to the negotiations was in one sense the first sign of declining legislative influence. It was quietly tabled as a ministerial written answer on the same day that Boris Johnson delivered a speech outside parliament, leaving MPs with no voice and no vote. Yet this statement also demonstrated that the nature of the future relationship will have a knock-on impact for almost all areas of public policy. Across these areas, given the more limited opportunities to question the Prime Minister on Brexit on the floor of the House, it will be up to departmental select committees to pick up the slack.

New parliamentary structures

Maddy Thimont Jack and Hannah White

Brexit means that the UK government will take on new responsibilities. In some instances existing scrutiny bodies within the UK's legislatures will be able to assume the role of [scrutinising how the government discharges these responsibilities](#); in others new parliamentary structures may be required.

The government has already begun to negotiate trade deals – so far it has focused on 'rolling over' trade agreements to which the UK was party as an EU member. But the government will also be free to negotiate treaties that cover areas beyond trade, such as security cooperation. This is not entirely new – the UK has always been able to negotiate treaties in areas of national competence – but it will have much greater freedom to do so now.

The UK government will also be required to manage certain areas of domestic policy for the first time in over 40 years, with knock on implications for Parliament's scrutiny structures. The government's new policy responsibilities will also put pressure on intergovernmental cooperation. As discussed in more detail by Sheldon and Phylip, the governments of the UK [have agreed](#) to work together on [new 'common frameworks'](#) in some devolved policy areas, including agriculture, the environment and fisheries – either through legislation or intergovernmental agreements.

Some existing public bodies will take on new functions after Brexit. For example the Competition and Markets Authority will be required to oversee the government's subsidy regime. In other instances the government is forming new bodies to take on roles previously exercised by the EU institutions; thus the Office for Environmental Protection established in the Environment Bill will take on the Commission's previous regulatory function, in response to concerns raised by environmental NGOs about a possible post-Brexit 'governance gap'.

Parliamentary scrutiny will be vital as the UK and devolved governments adapt to all of these new roles – and decisions taken in one area will have an impact on others.

Historically, Parliament has shown little interest in scrutinising treaties. The only formal mechanism is a weak form of sign off at the end of the process under the Constitutional Reform and Governance Act 2010. But there is no obligation on the government to involve Parliament before or during the negotiations on a treaty. The House of Lords EU Committee has taken the initiative in scrutinising the trade deals that the UK is currently 'rolling over' – but the House of Commons has so far taken very little interest.

In future, departmental select committees may wish to take on treaty scrutiny where an agreement covers areas relevant to their remit. The problem with this could be coordination – multiple select committees might have an interest in some wide-ranging agreements, particularly for example any broad Free Trade Agreements. An alternative would be for Parliament to adopt the Australian model of a standing 'treaties' committee – possibly set up jointly between Commons and Lords – responsible for triangulating scrutiny of all agreements. As explored in Jill Barrett's contribution, such an arrangement has been proposed by several parliamentary committees. An arrangement of this kind would still need to draw on the expertise of staff and members of subject-specific select committees in order to judge which treaties might require more attention.

But it is not just the detail of treaties which will need scrutiny. Parliament must also consider how to scrutinise the governance structures that oversee these. The recently-concluded Withdrawal Agreement with the EU illustrates this point. The Agreement's implementation will be monitored by a Joint Committee which can take decisions that are binding on the EU and the UK – including on how the UK implements the Northern Ireland Protocol. Currently, there is no obligation for the government to share any papers relating to the Joint Committee with Parliament – or to give any updates on the floor of the two chambers. Precedents set in relation to the Withdrawal Agreement could have implications for scrutiny of any similar Joint Committee overseeing aspects of the future relationship with the EU – or other treaties. In short, more thought is needed about Parliament's role in scrutinising treaty governance.

Progress on developing common frameworks has been slow – intergovernmental working focused on preparations for 'no deal' from autumn 2018. But access to information has also been difficult for parliamentarians: intergovernmental forums often lack transparency. For example, the communiqués from the existing Joint Ministerial Committees currently indicate next to nothing about what was discussed by UK and devolved ministers. And although the Welsh and Scottish governments have a commitment to share information on common frameworks with their respective legislatures, no such agreement exists for the UK Parliament.

The Interparliamentary Forum on Brexit (which brings together the chairs of the relevant committees in UK's legislatures, as further discussed in the contribution by Sheldon and Phylip) has demonstrated how informal networks can provide a way to manage coordination on issues which cut across the UK Parliament and devolved legislatures' interests. Something similar should be the absolute minimum required in future.

Parliament will need to be prepared to scrutinise the new public bodies that the government is establishing, and the expanding remit of others. For example, with respect to the Office for Environmental Protection, Parliament should be looking at whether the body is set up in a way that makes it robust enough to act as an independent monitor of the government's decisions, as well as how it fulfils its role once it is up and running. It seems likely that this scrutiny of new public bodies will be taken on by the relevant Commons departmental committees.

These new scrutiny challenges will require a proactive approach from Parliament to avoid unwelcome precedents being established. While there was some work before Brexit on some of these issues, including reviews of the [Commons](#) and [Lords](#) committee systems by their respective Liaison Committees, little yet seems to have changed. 'Taking back control' was a key message during the referendum campaign; Parliament will need to be sure that – where appropriate – control returns to the UK's legislatures, not just its governments.

Devolution and interparliamentary coordination

Jack Sheldon and Hedydd Phylip

The existing devolution arrangements developed within the framework of EU membership, and many devolved policy areas have a European dimension. Agriculture and environmental standards are good examples, and as the UK leaves the EU's regulatory regimes powers should – at least in principle – return to the devolved level as well as Westminster. The next phase of the Brexit process will therefore be of considerable interest not only to members of the UK Parliament, but also to members of the devolved parliaments in Northern Ireland, Scotland and Wales.

The UK's future trading relationships with the EU and with non-EU countries will be of crucial importance to key industries in the devolved territories, will require implementation by the devolved governments, and will play a part in determining the future scope of devolved powers. Given this, parliamentary committees in [Scotland](#) and [Wales](#) have argued that devolved institutions should have a significant input into the UK government's negotiating positions. In addition, it is envisaged that by the end of the implementation period 'common frameworks' will have been agreed by the UK and devolved governments to govern policy divergence in those areas that are devolved but were previously subject to and constrained by EU law. There has already been a significant amount of [intergovernmental work](#) on these among officials, but further – potentially tricky – negotiations involving ministers will be needed before they are finalised. There is also a major devolved interest in the details and administration of the '[Shared Prosperity Fund](#)', due to replace EU structural funds – which have been an important source of funding for the devolved governments.

With the implementation period due to last less than a year, Parliaments will need to be pro-active if they want to influence decisions that will have substantial consequences for the UK's territorial constitution. It can be expected that scrutiny of the respective governments' positions will be initiated in each of the legislatures. But as these issues will lead to unprecedented levels of joint working between the four governments, there is a strong case, previously made by committees in each of the [Commons](#), [Lords](#), [Scottish Parliament](#) and [National Assembly for Wales](#), for the work of individual parliaments to be supplemented by interparliamentary coordination. This could strengthen the collective voice of parliaments vis-à-vis governments, avoid excessive duplication, and help to draw the attention of Westminster politicians to important issues that they might otherwise overlook. But to get buy-in from across the different parliaments it is essential that any interparliamentary work respects the autonomy of each Parliament, and is conducted in a way that is genuinely reciprocal and without hierarchy.

The most readily available vehicle for interparliamentary work is the [Interparliamentary Forum on Brexit \(IPFB\)](#), established on an informal basis in 2017. The IPFB's meetings are attended by members of committees from across the UK's parliamentary chambers with remits covering constitutional issues, EU affairs and delegated legislation. Between 2017 and 2019, it met eight times, with the location rotating. It initially concentrated on the [devolution issues that arose during the passage of the EU \(Withdrawal\) Bill](#), but more recently its agenda has broadened to include common frameworks and the role of devolved institutions in future trade negotiations. It is in the spirit of information exchange and knowledge building that the IPFB has thrived. Reflecting this, it does not undertake any formal scrutiny and meets in private – including with ministers. It has started to develop something of a common voice for parliaments – through sending letters to UK government ministers highlighting areas of joint concern following its more recent meetings.

While IPFB participants are positive about its role to date, the new phase is an opportunity to consider whether there is now a case for developing a scrutiny dimension to Brexit-related interparliamentary relations. Common frameworks are likely to be particularly suitable for this. It is [envisaged](#) that some frameworks will be legislative (requiring primary legislation at Westminster, and subject to [legislative consent motions](#) in the devolved parliaments), but the majority will take non-legislative forms and so not be subject to any formal scrutiny process. As these will apply across the UK (or in some cases Great Britain), consideration might be given to establishing an interparliamentary dialogue to coordinate scrutiny as negotiations take place among governments and drafts are published. Its role could be analogous within the UK to that of [COSAC](#) (the EU body which brings together the EU committees of the parliaments of the member states) in relation to EU affairs. This could emerge informally, building on the relationships that have developed through the IPFB.

Some individual frameworks, or the frameworks process as a whole, are likely to be suitable subjects for joint evidence sessions, inquiries and/or reports involving individual committees from across the different legislatures. There is precedent for committees from the [Scottish Parliament](#) and [National Assembly for Wales](#) undertaking such joint activities with House of Commons committees. In the Commons, arrangements have [recently been introduced](#) to enable a member of one select committee to attend meetings of another as a guest where there are overlapping interests. This model could be extended to include guests from equivalent committees in the devolved parliaments as a low-resource form of interparliamentary cooperation. If this happened, it would make sense for the arrangement to be reciprocated, allowing members of Westminster committees to also attend devolved committees.

There have previously been calls for a more formal interparliamentary body. This was [championed by the Commons Public Administration and Constitutional Affairs Committee \(PACAC\)](#) when chaired by Sir Bernard Jenkin, as well as by the House of Lords [Constitution](#) and [EU](#) committees. The IPFB itself has [suggested formal structures should be explored](#). However, there is not yet agreement among all of the key actors. Within the devolved parliaments, in particular, there is some concern that this might constrain the ability of committees in each Parliament to conduct their own scrutiny. There are also [unresolved questions](#) about exactly how a formalised interparliamentary body would be structured and composed, what roles it would perform and how it would be staffed and funded. It therefore seems unrealistic that any such body will emerge during the next phase of Brexit; though in the context of the expected increase in joint policy-making among governments, calls for such a body are unlikely to disappear in the longer term.

The Sewel convention

Nicola McEwen

There are four legislatures in the UK, but only one of these is sovereign. The sovereignty of the Westminster Parliament, as discussed in this report by Catherine Barnard and Alison Young, remains one of the most important principles of the UK constitution. Each of the devolution statutes made clear that conferral of law-making powers on the devolved institutions ‘does not affect the power of the Parliament of the United Kingdom to make laws’ for Scotland, Northern Ireland and Wales – including in areas of devolved competence. But Westminster’s parliamentary sovereignty is offset by the constitutional convention that it will not *normally* legislate in areas of devolved competence, or alter the competences of the devolved institutions, without their consent.

That convention, commonly known as the Sewel convention, has become an important principle underpinning UK devolution. It represents a tacit understanding that the devolved institutions, each of which was founded on popular consent in a referendum, have primary democratic and political authority over laws within their areas of competence.

From the outset, the scope of the Sewel convention was ambiguous. The UK and devolved governments have frequently disagreed on the extent to which UK legislation necessitates legislative consent from the devolved institutions. When tasked with determining its status following its inclusion in the Scotland Act 2016 and the Wales Act 2017, the Supreme Court in [Miller I](#) concluded that it remained a convention rather than a legal rule, therefore ‘the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary’. The Court thus left it to politicians and Parliament to determine the operation and interpretation of the convention.

Analysis by the [Institute for Government](#) suggests that at least 202 Acts of Parliament have been subject to a legislative consent motion since 1999 in at least one of the devolved territories. For the most part, these have been uncontroversial and to the mutual convenience of each legislature. Withholding consent has been rare and does not amount to a constitutional veto. Rather, it represents a device inviting the UK Parliament to reconsider those elements of its legislation that affect devolved matters. It is for Parliament – and the government of the day – to decide whether to heed the concerns of the devolved institutions, either by amending the legislation or removing the offending clauses. In a forthcoming overview of the Scottish constitution, Alan Page notes that a striking feature of successive UK governments has been their unwillingness to proceed with laws affecting devolved matters without the agreement of the devolved legislatures. This has given the devolved institutions some leverage in seeking to influence UK legislation. Equally striking, however, has been the extent to which, in the context of Brexit legislation in particular, the UK Parliament has been prepared to proceed despite consent being withheld.

In its legislative preparations for Brexit, the UK government had conceded that key elements of its EU (Withdrawal) Bill engaged the Sewel convention and it therefore sought due consent from the devolved legislatures. In a coordinated attempt to prevent what they regarded as a ‘power grab’ by the UK government, the devolved institutions in Scotland and Wales withheld their consent and instead introduced their own ‘continuity’ legislation. Both bills were referred to the UK Supreme Court to test whether they were beyond devolved competence before they could secure Royal Assent (the referral of the Welsh bill was later withdrawn following the Welsh Assembly’s consent for the UK bill). The Scottish continuity bill was rendered largely beyond competence by the protected status given to the 2018 EU (Withdrawal) Act.

Despite this, the process of withholding consent, and the intense intergovernmental negotiations that followed, resulted in significant changes to the devolution clauses of the legislation.

The passing of the [EU \(Withdrawal\) Act 2018](#) without the Scottish Parliament's consent marked the first time that the convention had been set aside by the UK Parliament. It wouldn't be the last. In the case of the [EU \(Withdrawal Agreement\) Act](#), passed in January 2020 to give effect to the UK-EU Withdrawal Agreement in domestic law, all three devolved legislatures withheld their consent. As well as some opposition that strayed into the largely reserved matter of EU exit itself, the devolved institutions shared concerns that the legislation gave UK ministers powers to make decisions on devolved matters, and on the balance of devolved powers, without their agreement. The potential for the legislation to alter devolved competence, including via delegated powers, also raised concerns in the Lords – [Crossbencher Lord Thomas of Cwmgiedd](#), former Lord Chief Justice of England and Wales, warned that this would set 'a terrible precedent'. Defending the decision to proceed without the consent of any of the devolved legislatures, the Chancellor of the Duchy of Lancaster, [Michael Gove](#), acknowledged that it was:

“a significant decision and it is one that we have not taken lightly. However, it is in line with the Sewel convention... The Sewel convention—to which the government remain committed—states that the UK Parliament ‘will not normally legislate with regard to devolved matters without the consent’ of the relevant devolved legislatures. The circumstances of our departure from the EU, following the 2016 referendum, are not normal; they are unique.”

One of the problems with the convention as it stands is that the scope and application of the word 'normally' has never been determined. Deciding that circumstances are unique and 'not normal' only after consent has been sought and refused undermines the status and significance of the convention. With sufficient political will, it should be possible to remove some of these ambiguities. What constitutes the abnormal circumstances, under the terms of the convention, when consent need not be sought? In situations where it has been sought and withheld, what steps should the UK Parliament take to recognise the concerns of the devolved institutions without introducing a constitutional veto?

Numerous Brexit-related bills, as outlined in Jill Rutter and Joe Owen's contribution, are now before Parliament or in planning, and there are concerns about their impact on devolved competences. The practice of withholding consent is likely to produce diminishing returns for the devolved institutions if the UK Parliament proceeds without their consent. If that may seem like a bonus to some UK parliamentarians, they would be wise to consider the potential consequences of setting aside such a totemic symbol of devolution. To do so is unlikely to sustain trust and confidence in the capacity of the UK to respect the status of each of its legislatures – and of the territorial communities that they represent.

Brexit legislation

Jill Rutter and Joe Owen

On 23 January the EU (Withdrawal Agreement) Bill (WAB) became an Act. Just shy of three years after Parliament legislated to give Theresa May powers to notify the EU that the UK intended to leave, Parliament agreed to the terms of the UK's departure. In the meantime, Parliament has transferred the EU statute book into UK law (see Adam Cygan's contribution), with tweaks made through secondary legislation to ensure a functioning statute book.

But there is still a lot more Brexit legislation to come – and in substance, at least, it could prove controversial. Most of it is not new (Theresa May's government introduced a raft of Brexit bills) but the major ones got stuck, as her precarious parliamentary position left them vulnerable to amendment.

Apart from the WAB, the [Queen's Speech](#) listed another [six Brexit bills](#): on agriculture, fisheries, immigration, trade, financial services and private international law. Since then the government has introduced a stopgap bill to allow it to make [payments to farmers](#) for 2020 – payments that need to be made before the new Agriculture Bill may be on the statute book. Most people would add another bill to the Brexit list: the 130 clause (and 20 schedule) [Environment Bill](#) developed in Defra under Michael Gove.

The passage of the WAB (as discussed in the contribution by Lisa James) shows that the government is in no mood to see its legislation amended: it has a Commons working majority of 87, a pretty united party and is determined to use it. So it's a fair bet that all of these bills will end up on the statute book looking much like they did when first drafted. But there is a danger of ramming legislation through Parliament and ignoring parliamentary concerns: they just could come back to bite government down the line.

The last Parliament tried to use these bills as vehicles either for preventing a Brexit outcome it didn't like or to limit the government's room for manoeuvre on future trade agreements. But with the battle over whether or not Brexit will happen now over, MPs need to focus on what these bills will do to set the framework for UK policy for years (and perhaps decades) to come.

The Trade Bill is needed to enable ministers to implement existing trade deals which are rolled over after we leave the EU – and to run the UK's own trade defence policy through establishing the Trade Remedies Authority. Both of these have been the exclusive competence of the EU since we joined in 1973, which makes the provisions clearly necessary. But [parliamentarians](#) were concerned that they would have little say over the deals that the UK government negotiated, so moved amendments to assert parliamentary control. This is likely to be an issue again, but the government's approach to the WAB – where it stripped out provisions for parliamentary oversight – suggests that it is likely to insist on a free hand. That would leave MPs relying on the weak provisions of the 2010 Constitutional Reform and Governance Act to object to any future deals.

The [Agriculture Bill](#) is a vehicle for radical overhaul of the way in which payments are made to farmers after we leave the Common Agricultural Policy (CAP) – in England at least. It opens the way to link payments to the provision of public goods, rather than to simply holding land. The bill has been slightly modified since its purist version under Theresa May, under pressure from farmers concerned at the absence of mentions of food production or food security. But in the last Parliament MPs saw the bill as a [vehicle](#) to insist that the UK should not draw back from high animal welfare or environmental standards in future trade deals.

Ministers have said that they will not do deals that reduce standards – but they may be reluctant to tie their own hands in a way that makes a deal with the US harder to secure.

The [Fisheries Bill](#) is designed to give government the powers it needs to ‘take back control’ of UK fishing waters. The powers themselves are not a big deal: what matters is what deal the UK negotiates with the EU. The EU is looking for an early agreement on continued access to UK waters after Brexit for EU fishing fleets, perhaps as a precondition of a wider trade deal. We don’t yet know how the UK government plans to play this, but Parliament may try to influence the negotiations through the bill. Again the government is likely to resist, unless it sees advantage in being able to cite parliamentary pressure in the negotiations.

The [Immigration Bill](#) is needed to end free movement. But the real detail of the new migration system will – as always – be enacted through regulations, which will implement the government’s new points-based system. But Parliament might try to revive some of the amendments tabled and defeated during the passage of the EU (Withdrawal Agreement) Bill – to give EU citizens already here rights to apply if they miss the settled status deadline and some physical proof. The government was unconvinced then, and is unlikely to be convinced in the future.

The final big bill is the blockbuster [Environment Bill](#) which puts the targets in the government’s 25-year plan into law, and sets up a new Office for Environmental Protection (OEP) with oversight and enforcement powers, designed to fill what environmental groups call the ‘governance gap’. This is a key part of the post-Brexit supervision machinery – and may be important in reassuring the EU of the UK’s commitments to maintain standards. Expect a battle, especially in the Lords, about how to make the OEP as independent of government as possible.

One common theme of all of this legislation is the broad powers that the government plans to take in order to carry out policy changes. These are framework bills, which leave a lot of the detail out – to be filled in by secondary legislation. This will likely be a big feature of the debate – particularly in the Lords.

There is one final area of controversy. These are all UK bills, but they all impinge on the powers of the devolved administrations. The UK government enacted the WAB despite all the devolved legislatures refusing legislative consent – the first time that has ever happened. The same may happen with these bills as a further test of strength between Whitehall and Westminster and Holyrood, Cardiff and Belfast – as Nicola McEwen discusses in her contribution to the report.

On all of these issues, dissenting MPs, peers, and the devolved governments will struggle to assert their will against the Johnson juggernaut. Majority government seems likely to be back with a vengeance.

Delegated legislation

Brigid Fowler and Ruth Fox

Brexit has posed a legislative challenge unique in nature and scale. The combination of the exit deadline and protracted uncertainty over the negotiations made it unavoidable that many of the legislative changes required to prepare the statute book for the UK's departure from the EU would be made not through Acts of Parliament but through [Statutory Instruments \(SIs\)](#), a form of delegated or secondary legislation. These included SIs made using notably broad delegated powers.

The next stage of the Brexit process is unlikely to be much different.

Although the flow of future Brexit-related SIs may not be as heavy as it was prior to the UK's departure from the EU, their content is likely to be just as politically contentious.

For example, EU citizens' rights enshrined in the withdrawal agreement will be implemented in the UK largely through SIs. The same will apply to the complex provisions in the agreement's Northern Ireland Protocol, and to 'common framework' policies affecting the devolved nations.

As discussed in the contribution by Jill Rutter and Joe Owen, new bills for agriculture and fisheries are also replete with broad delegated powers, and the same is likely to apply to the expected Immigration Bill. From these powers will flow a large number of SIs implementing new, complex policy arrangements in detail.

The record since passage of the EU (Withdrawal) Act in July 2018 gives good grounds for concern about these prospective SIs. Some Brexit SIs, so far, have gone well beyond the correction of technical deficiencies in retained EU law to make major changes to public policy, particularly in immigration. [Other SIs](#) in areas such as the environment, animal welfare and chemical controls have weakened standards, and eliminated important administrative functions and processes. There has been a relatively high error rate in both SIs and their explanatory memorandums, and the government has routinely failed to provide impact assessments.

The political salience of the large body of Brexit-related SIs so far has focused attention on the parliamentary scrutiny procedures that accompany them. In doing so, it has exposed more widely the deficiencies in the process.

SIs are broadly of two types:

- Those subject to the 'negative' procedure become law on a given date unless a motion is passed in either House within 40 days annulling or rejecting the instrument. Many negative SIs become law before the 40 days are up. In the House of Commons, MPs must 'pray against' negative SIs via Early Day Motions (EDMs), which do not have guaranteed debating time. The government thus controls whether and when MPs debate the SIs concerned.
- Those subject to the 'affirmative' procedure must be debated and secure the active approval of both Houses before they either become or can remain law. In the House of Commons, affirmative SIs are mostly considered in temporary Delegated Legislation Committees on the basis merely of a motion that the committees have considered the SI, rather than a motion allowing them to express a substantive view. No SIs can be amended. With at most an 'all or nothing' proposition at the end of the process, these existing procedures give parliamentarians almost no meaningful voice, and largely waste their time.

In the Brexit context, the combination of broad delegated powers and inadequate scrutiny procedures has limited, and will continue to limit, parliamentarians' ability both to influence some of the UK's post-Brexit policy choices and to hold the government to account.

The prospect of MPs having little effective say on an SI implementing the Northern Ireland Protocol or a trade agreement could heighten the pressure for procedural reform during the post-Brexit transition period and beyond.

There is even a risk that the SI scrutiny process could become a constitutional flashpoint. During passage of the EU (Withdrawal Agreement) Act, some peers floated the possibility that if the government rejects attempts to constrain very broad and potent delegated powers, the Lords should reject SIs made under them. Since 1950, the Lords has only rejected five and delayed two SIs (of which the most recent instance was over George Osborne's proposed reform of tax credits in 2015, which sparked a [formal review](#) of the House of Lords' powers). So any such move in future could generate a new constitutional stand-off.

Similarly, in the absence of mechanisms for inter-parliamentary consultation and scrutiny between Westminster and the devolved legislatures (a topic discussed more fully in Jack Sheldon's and Hedydd Phylip's contribution), any attempt to legislate via SI in devolved policy areas will exacerbate tensions within the Union.

The Brexit process has driven just two modest but useful reforms to the SI scrutiny process so far:

- First, to manage the flow of Brexit-related SIs across government, a minister responsible for SIs was designated in each department, and a coordinating Statutory Instruments Hub was established in the Cabinet Office.
- Second, the EU (Withdrawal) Act 2018 introduced a new SI sifting process. For SIs under the Act which the government proposes should be subject to the negative procedure, a sifting committee in each House has ten sitting days to consider whether it should be subject to the affirmative procedure instead.

The [new sifting process](#) is far from perfect, particularly as it is simply bolted onto the front of the existing inadequate procedures. But crucially, such benefits as it does bring have not been, and are not being, extended to SIs made under other Acts.

The quality of policy and law is shaped by the scrutiny that they receive. Parliament can and does make a difference to legislation, often through minor but significant changes. However, in order to do this, parliamentarians must have the necessary procedural tools and legal and policy resources at their disposal.

In the House of Commons, in place of its current unsatisfactory SI scrutiny mechanisms, what is needed is a single, permanent [Delegated Legislation Committee](#) to sift and scrutinise all SIs. This committee should have the powers and resources of a select committee, enabling MPs to call on expert advice to support their scrutiny. The committee could pass any SI of concern to the whole House for further consideration, with procedures in place to ensure meaningful debate and decision.

For their part, peers could be granted the power to send an SI giving rise to concerns back to the Commons and to ask MPs to think again.

Finally, members of both Houses could be granted a 'conditional amendment' power, enabling them to withhold their approval of an SI until ministers had addressed their concerns.

Without these kinds of changes, much of the detailed implementation of Brexit will be done by the executive with limited parliamentary oversight. When constituents raise concerns about how these post-Brexit policies are to be implemented, MPs will find themselves frustrated, unable to challenge poorly conceived plans effectively because they lack the scrutiny mechanisms to do so.

Regulatory alignment and divergence

Adam Cygan

On 31 January 2020, the UK left the EU and, in the words of the 2018 [White Paper on the Future Relationship](#), ‘took back control of its money, laws and borders’. Under the terms of the [EU \(Withdrawal\) Act 2018](#) (EUWA) the [European Communities Act 1972](#) (ECA) was repealed on exit day, thereby ending the supremacy of EU law in the UK. The EUWA avoided a regulatory cliff-edge by domesticating EU law, as far as possible, into UK law – into a category known as ‘[retained EU law](#)’. But, significantly, at least in the longer term, UK courts will exclusively interpret and apply retained EU law.

Nonetheless, formal exit from the EU does not mean an immediate end to the regulatory effect of EU law within the UK, due to the transition period – and after that, it opens up difficult political questions about the extent of future UK-EU regulatory alignment. The [Conservative Party](#) election slogan – ‘Get Brexit Done’ – oversimplifies the Brexit process and its legal consequences. Brexit may be ‘done’ to the extent that UK has formally left the EU institutions, but the influence and reach of EU law in the UK did not end on 31 January 2020 – and it may have a lasting influence long after that.

During the transition period (currently set to end on 31 December 2020), EU law continues to have supremacy. Section 1 of the [EU \(Withdrawal Agreement\) Act 2020](#) (WAA), which gives effect to the Withdrawal Agreement in UK law, effects this by [reviving](#) certain provisions of the ECA. So until the transition period ends, the UK will be fully bound by all EU laws ‘as if it were a member state’, must implement all new EU laws into UK law, and remains subject to the jurisdiction of the Court of Justice of the European Union. However, once the transition period ends those obligations will lapse, leaving Parliament free to repeal or amend retained EU law. This opens up the possibility of UK divergence from EU regulatory standards – for example, in UK employment, environment or consumer law.

UK and EU law have undergone substantial cross-fertilisation during EU membership, and general principles integral to single market governance, such as proportionality, have impacted domestic law and practice. This is reflected in the regulatory solution offered by the EUWA and WAA: [Schedule 1](#) of the EUWA retains these general principles of EU law and provides that they remain relevant in the interpretation of retained EU law by UK courts. Hence, these Acts entrench what could be described as an ‘Europeanised’ regulatory framework into UK law for the foreseeable future, albeit with possibility of amendment by the UK Parliament.

Crucially, neither the EUWA nor WAA defines the [regulatory framework](#) for the future UK-EU relationship. The legislation enables, but does not prescribe, changes to retained EU law; post-transition, any changes will ultimately be a political choice for government and Parliament. This choice will be materially influenced not only by domestic political concerns, but also by the depth and obligations of the future UK-EU relationship.

Beyond transition, the regulatory framework of the future UK-EU relationship thus remains uncertain. The key question is to what extent the UK will have to maintain exit-day regulatory standards of retained EU law (and keep pace with future EU laws) in return for single market access. This will mean difficult decisions for both government and Parliament, including for example whether to adopt a [common rulebook](#) as part of the future trade relationship, which could make Parliament a perpetual ‘rule taker’ of EU laws.

In contrast, a Canada-style [free trade agreement](#) may not formally require more than minimal [regulatory alignment](#) with EU laws and would therefore maximise regulatory sovereignty, but regulatory divergence would almost certainly come at the expense of single market access. The imperative for single market access – for example, in the form of just-in-time supply chains – suggests that even under a Canada-style agreement Parliament would have good reasons not to depart rapidly from the regulatory framework and standards within retained EU law. But, as Lisa James’ contribution emphasises, Parliament will have little formal influence over the executive in the future relationship negotiations.

Legally, ‘taking back control’ suggests that only laws passed by the UK Parliament and enforced solely by UK courts will be applicable in the UK. The trade-offs entailed in the various options for the future relationship show that a diverse range of economic and political factors will influence regulatory choices for both government and Parliament. As Philip Lynch argues in his contribution, Conservative MPs, elected in so-called ‘Red Wall’ seats in 2019, may yet face difficult decisions between constituency and party demands when it comes to the future relationship.

Because the government has [refused](#) to extend the transition period, these choices will also need to be confronted soon: the UK avoided a regulatory cliff-edge [no-deal Brexit](#) on exit day, but a regulatory cliff-edge caused by the failure to agree a future trade relationship by the end of the transition period would not be much different in its effects. Hence, Parliament should take this prospect equally seriously.

Despite the difficulty of determining the depth and scope of the future relationship, the challenges of passing Brexit-related legislation will be minimal compared to in the [2017-19 Parliament](#): as discussed in the contribution by Jill Rutter and Joe Owen, given the government’s large parliamentary majority, it is likely to secure its aims. Yet, in taking back regulatory sovereignty, Parliament must also be conscious that in the course of exercising that sovereignty it will assume sole political responsibility for its decisions. In this sense, taking back control should also mean that, in future, MPs blaming Brussels for the regulatory consequences of laws voluntarily adopted or rejected by Parliament will no longer be an option.

EU trade negotiations

Ewa Zelazna

While Parliament played a prominent role in the ratification of the [Withdrawal Agreement](#), its position with regards the future UK-EU relationship is considerably weaker. As discussed by Lisa James, the [EU \(Withdrawal Agreement\) Act](#) (WAA) does not require a meaningful vote by Parliament on the future relationship agreement. Furthermore, Jill Barrett's contribution highlights how existing procedures for approval of treaties under the [Constitutional Reform and Governance Act 2010 \(CRAG\)](#) provide insufficient mechanisms for effective parliamentary accountability of the government. Nonetheless, this should not make effective scrutiny impossible and opportunities for this still exist with respect to the future relationship negotiations. In this context, the engaged and proactive position of the European Parliament in international treaty negotiations provides an interesting comparison.

In the EU, a [non-binding framework agreement](#) governs communications between the European Parliament and the Commission in treaty negotiations. It promotes a positive working environment between the institutions and fosters a spirit of cooperation whereby Commission officials regularly attend plenary debates and committee meetings at the European Parliament updating on the progress of negotiations. In relation to transparency, in the 2014-19 term, the European Parliament persuaded the Commission to extend openness by publishing negotiating mandates in advance of trade negotiations.

Once agreed, a negotiating mandate is available to the European Parliament as soon as a proposal for its adoption is transmitted to the Council. A proactive attitude of the European Parliament from the start of negotiations improves the level of scrutiny, particularly with regard to complex agreements that contain deep commitments and cover a broad range of sectors. In relation to the UK-EU negotiations, the European Parliament, unlike the UK Parliament, has expressed its view, in advance of the negotiations, on the EU's draft negotiating mandate. For example, the [non-legislative resolution](#), in which the European Parliament stated its position, highlighted a potential incompatibility between the UK data protection legislation and the relevant EU regulation. Safeguarding high standards of data protection for the EU citizens is one of the priorities of the European Parliament and a potential non-compliance of the UK legislation with EU law could become a stumbling block in future negotiations. As the consent of the European Parliament is required for conclusion of the UK-EU agreement, its views are likely to be considered by the Commission throughout the course of negotiations.

In the absence of a formal commitment to transparency during the negotiations by the UK government, Parliament should consider how it could maximise its influence within the confines of the WAA and parliamentary procedures. While mirroring the practice of the European Parliament of passing non-legislative resolutions may not be appropriate, a select committee scrutinising the negotiations does have a degree of autonomy to develop its scrutiny modus operandi. In producing reports on the progress of negotiations, it would be open to a select committee to engage in a dialogue with the European Parliament, for example by [calling MEPs](#) to give evidence, as the [Exiting the European Union Committee](#) did during its scrutiny of the Withdrawal Agreement negotiations.

Notwithstanding the Department for Exiting the European Union having been [shut down](#) at the end of January, the Committee on the Future Relationship with the European Union (previously called the Exiting the European Union Committee), to which Hilary Benn was [re-elected chair](#), will continue to operate for a 12-month period and will undertake the task of detailed scrutiny of the future relationship negotiations.

No longer shadowing a department, the committee will [prioritise](#) oversight of the future relationship negotiations and is likely to produce regular reports on the progress of the negotiations – as Hilary Benn’s contribution describes took place during the withdrawal agreement negotiations. But to maximise future scrutiny, the committee could, for example, consider how it could take into account other inquiries that may concern the negotiations and draw upon the expertise of other select committees.

During the 2017-19 Parliament there were [66 Brexit-related inquiries](#) conducted by various departmental committees, which highlights the level of capability and capacity within Parliament which could be turned to conducting scrutiny of international treaty negotiations. [Coordinating a response](#) within Parliament across select committees that engage in scrutiny of the negotiations would be one means of improving the coherence of Parliament’s response and strengthening its voice. In the European Parliament, the committee responsible for scrutinising an international agreement will request opinions on specific issues from other committees with relevant expertise, which, in turn, are incorporated in a report provided to MEPs before the Parliament approves a treaty.

Although there will be no meaningful vote by Parliament on the final UK-EU agreement, Parliament may need to adopt further legislation to give effect to its provisions. This could give it power to indirectly veto the agreement by refusing to enact implementing legislation. However, such a decision would need to be considered carefully, as it could result in the UK breaking its international commitments. Moreover, with a large Conservative majority in the Commons, it is unlikely that Parliament would jeopardise the government’s negotiating efforts.

The current constitutional framework puts Parliament in a weak position with regard to scrutiny of the UK-EU negotiations in comparison with the prerogatives that can be exercised by the European Parliament. But during the negotiations, select committees have a vital role to ensure that scrutiny takes place, and the Committee on the Future Relationship with the European Union is well placed to undertake and possibly coordinate scrutiny within Parliament. The practice adopted in relation to the scrutiny of the future UK-EU relationship will also impact the position of Parliament in negotiations on future international trade agreements.

As the number of new treaties to be negotiated increases, arguments in favour of establishing a separate select committee responsible for scrutiny of international treaties are likely to increase. A [report](#) of the House of Lords Constitution Committee concluded that distributing workload among existing committees was not an adequate solution (see Jill Barrett’s contribution). To this extent the oversight experience of Hilary Benn’s committee with respect to the future relationship negotiations, and its ability to use existing procedures, powers and opportunities at its disposal in such scrutiny, will be important. Going forward, this experience could provide a blueprint for other committees, or any new committee scrutinising treaty making, to maximise the impact of their scrutiny activities at a time when government has sought to limit parliamentary oversight of treaty negotiations.

Treaties beyond the EU

Jill Barrett

Leaving the EU means the UK is not only leaving the EU trading bloc and negotiating a new future relationship with the EU, but also leaving the EU's global network of trade treaties – which consists of [41 trade agreements](#) covering 72 countries. All of these will cease to apply to the UK at the end of the transition period (31 December 2020, unless extended by agreement). The UK's trade with other World Trade Organization (WTO) member countries will then take place on [WTO terms](#), except where there is a new trade agreement in place.

The UK government is seeking to '[roll over](#)' the 41 existing EU agreements, by negotiating similar new agreements with the third states concerned. So far, only 19 replacement agreements have been signed and a further 16 are 'still in discussion'. In some cases, notably Japan, the other state is not willing simply to replicate the terms that it has with the EU, but is seeking further concessions from the UK. Achieving a deal in all cases by the end of 2020 will be extremely challenging, and some may well take considerably longer.

Now the UK has an independent trade policy it can also seek new trade relationships with states that are outside of the EU's treaty network. The government [has announced](#) that its priority is to negotiate bilateral trade treaties with the USA, Australia and New Zealand, and one may expect the next phase to include negotiations with major emerging economies such as China and India. All of these will raise matters of intense interest to Parliament and the public.

What is Parliament's role in relation to the making of treaties? Treaties are negotiated, adopted, signed and ratified by the government using Royal prerogative (executive) powers. In legal terms, Parliament has two distinct roles. First, the government is obliged to lay a new treaty before Parliament for 21 sitting days prior to ratification, under the Constitutional Reform and Governance Act 2010 (CRAG). In theory, this gives Parliament the opportunity to scrutinise the treaty and object to ratification, by passing a resolution. An objection by the House of Commons (but not by the Lords) would block ratification. Secondly, if implementation of the treaty requires new legislation, Parliament has the power to pass or defeat that legislation (or amend it, if it is a statute). If essential implementing legislation is blocked, this would normally stop the government ratifying the treaty.

In practice Parliament's scrutiny of treaties is woefully inadequate. This is partly because its powers are limited but also because Parliament does not make effective use of the powers that it has. The House of Commons has never used its power under CRAG to veto ratification of a treaty. The main deficiency is that there is no mechanism to ensure that a debate and vote take place. The government controls the parliamentary timetable and can deny time to debate a treaty. Even when a select committee has examined and reported on a treaty within the laying period, the government can still refuse time for a debate, or insist that it can only be held in the very limited time allocated to the opposition or backbenchers.

The House of Lords EU Committee decided in January 2019 to undertake [scrutiny](#) of Brexit-related treaties and in June 2019 published a report on [lessons learned](#) from this process. Several other parliamentary committees have realised that the capacity of Parliament is not currently adequate to the task of scrutinising the much greater number of treaties that the government expects to conclude as a result of Brexit, and have conducted (or [launched](#)) inquiries into scrutiny arrangements. Their recommendations invariably

centre on the need to establish a new treaty committee, preferably a joint committee of both chambers. In its April 2019 report the [House of Lords Constitution Committee](#) stated that in order '[t]o address the shortcomings in Parliament's scrutiny of treaties, we recommend that a new treaty scrutiny select committee be established. This committee should sift all treaties, to identify which require further scrutiny and draw them to the attention of both Houses'.

A Treaty Committee could develop institutional improvements in treaty scrutiny across all committees, for example by establishing requirements for the government to provide timely access to accurate information. It could also be given the power to call or request a debate. Its role need not be confined to treaties laid under CRAG prior to ratification. It could also establish, in dialogue with government, new standards for the provision of information about treaties under negotiation, and opportunities for Parliament to consider the government's negotiating aims and priorities. A Treaty Committee could improve dialogue between Parliament and treaty-makers in the government, increase the body of parliamentarians with experience of treaty scrutiny, and develop good practice – without preventing other committees from scrutinising treaty actions. A Treaty Committee could also provide a useful focal point for dialogue with devolved legislatures about trade treaties, to help remedy the lack of interparliamentary mechanisms outlined by the contribution of Jack Sheldon and Hedydd Phylip.

The process of making new trade treaties will need much more intense scrutiny than most treaties have received in the past. Trade treaties can take various forms, such as free trade agreements or trade provisions contained within association agreements that cover cooperation on other matters such as security, immigration, human rights or labour standards. These are subjects of intense concern to parliamentarians, businesses, pressure groups and the general public, to a greater degree than many other treaties that function only at the inter-governmental level. They will concern a range of select committees – not only those dealing with trade – and so central coordination of parliamentary scrutiny will be essential, as also highlighted by the contribution of Maddy Thimont Jack and Hannah White.

The UK has not negotiated its own trade treaties for 50 years. The government therefore lacks experience and expertise in this area. The risks of poor or suboptimal outcomes are high. Public expectations and concerns will be difficult to manage, as experience of other countries in trade negotiations has shown. Early and proactive engagement by Parliament in interrogating the government's approach could strengthen the government's position in negotiations and help to achieve outcomes that will be acceptable not only to Parliament, but also to the wider public.

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