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French Yearbook of
Public Law



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Presentation

The objective of the “French Yearbook of Public Law” is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model’s exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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UK

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In 2022, there have been three major crises in the UK:

- An economic crisis precipitated by high inflation, high cost of living, a new trading arrangement with the EU post-Brexit and high levels of public spending during Covid-19 leading to massive public debt.
- A social crisis when it comes to socio-economic inequalities across the UK, which has prompted a political and constitutional focus on devolution and localism and redressing regional disparities.
- A political crisis in the governing party, the Conservatives, because they are torn about how to address the abovementioned two crises, leading to choices of leaders which have resulted into major political upheaval.

This survey illustrates how the UK navigated these three crises in 2022. In an introductory section, we will highlight some key constitutional and public law trends in the UK in 2022. We will then develop some specifics in more detail in later sections. The later sections will focus on the following: the fortunes of the three British Prime Ministers in 2022 and the connection between these fortunes and integrity, competence, and anti-corruption scandals (section II); political and constitutional challenges addressing the economic and financial aftermath of Covid-19 and Brexit (section III); major public law Bills pursued by the government this year (section IV); the government's multi-year judicial review reform (section V) and human rights reform plans (section VI); the civil service reforms and general tensions between the UK government and the civil service (section VII); an overview of the government's post-Brexit public procurement reforms (section VIII); and a look to the future, with the potential for a change in governing party in 2024-25 (section IX).

I. British constitutional developments in 2022: A return to instability

After the tumultuous Covid-19 pandemic years of executive rule by decree and curtailed parliamentary scrutiny of government,² the UK has to some extent experienced a constitutional 'return to normal'. The executive is no longer purely governing by decree, Parliament is operating as usual and able to scrutinise the government, and political debate is not focused only on how to get the country through the pandemic.

While this overview will focus on constitutional, legal and political upheaval, the international news will not have missed sad developments regarding the Royal Family. On 8 September 2022, Her Majesty Queen Elizabeth II passed away at her estate at Balmoral Castle in Scotland. Her late Majesty was the UK's longest reigning Monarch and was a popular figure domestically and internationally. Her son, Charles, previously the Prince of Wales, became King Charles III and Camilla, previously the Duchess of Cornwall, became Queen Consort.³ On 10 September 2022, an Accession Council was held to make a formal proclamation of her late Majesty's death and the accession of Charles III as King.

2 Brown, J., Ferguson, D., Barber, S., Coronavirus: the lockdown laws, House of Commons Library Briefing, 2022. Available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-8875/>.

3 Buckingham Palace, Announcement of the Death of the Queen, 8 Sept. 2022. Available at: <https://www.royal.uk/announcement-death-queen>.

For the first time, the Accession Council was recorded and broadcast live.⁴

A return to normal does not necessarily involve constitutional or political stability, a commitment to maintain and strengthen human rights protections, respect for the international rule of law, or good governance. In the UK, there remains significant political and legal upheaval. In 2022, the UK started the year with Boris Johnson as Prime Minister, who was appointed by Her Majesty the Queen after he succeeded Theresa May as Leader of the Conservative Party in July 2019. Following Mr Johnson's dramatic resignation – or rather removal – as Prime Minister in the summer of 2022, the keys to No. 10 Downing Street were handed to Liz Truss in September 2022. Following a disastrously received 'mini-Budget' involving radical tax cuts, the UK ended the year with a third Prime Minister, Rishi Sunak, who – at the time of writing, at least – remains Prime Minister and seems likely to be so until the next UK general election at the latest in January 2025.⁵

Under the government of Boris Johnson, there were a number of legislative proposals which either intentionally or incidentally strengthened the executive and reduced the political, institutional, legal and judicial accountability of government via both domestic and international law. As one of the authors – Lee Marsons – put it in 2021: 'There has been a string of legislative proposals that enhance executive power, reduce judicial scrutiny and have potentially detrimental consequences for the rule of law.'⁶

On executive power, an example is the Dissolution and Calling of Parliament Act 2022, which returns to the prime minister the prerogative power to dissolve Parliament and call a general election. On reducing judicial scrutiny, examples proposed – but not eventually enacted – include clause 3 of the Draft Fixed-term Parliaments Act 2011 (Repeal) Bill, which prevents judicial review of the 'exercise or purported exercise' of the prerogative as well as 'the limits or extent of those powers', and clause 45 of the then UK Internal Market Bill (as first introduced), which required a court to uphold subordinate legislation 'notwithstanding any relevant international or domestic law with which [it] may be incompatible'.⁷ On the rule of law, examples include the Overseas Operations (Service Personnel and Veterans) Bill and the Covert Human Intelligence Sources (Criminal Liability) Act 2021, both of which provide a degree of immunity from ordinary criminal liability for agents of the executive.

The government also showed a less than stellar commitment to abiding by its international commitments. For example, in 2020, the Secretary of State for Northern Ireland conceded that a government Bill would violate international law – specifically, the UK-EU Withdrawal Agreement – in a 'limited and specific way'.⁸

Though not uniformly, many government measures have related to strengthening

4 Accession Council, 10 Sept. 2022. Available at: <https://www.youtube.com/watch?v=aKci6iKET2Q>.

5 As will be noted in section IV, the UK Prime Minister has the power to initiate an early general election before 2025. See the *Dissolution and Recall of Parliament Act 2022*.

6 Marsons, L., Constitutional change in the UK: Joining the dots, Legal Action Group, March 2022. Available at: <https://www.lag.org.uk/article/210365/constitutional-change-in-the-uk--joining-the-dots>.

7 An ouster clause is the British phrase used to refer to a provision in legislation which excludes or "ousts" the High Court from judicially reviewing the exercise of a public power.

8 Lewis, B., "Northern Ireland Protocol: UK Legal Obligations", House of Commons Hansard, 8 Sept. 2020. Available at: <https://hansard.parliament.uk/commons/2020-09-08/debates/2F32EBC3-6692-402C-93E6-76B4CF1BC6E3/NorthernIrelandProtocolUKLegalObligations>.

immigration control post-Brexit. For example, in April 2022 the Johnson government announced the UK-Rwanda Asylum Partnership Agreement. This is a Memorandum of Understanding between the British and Rwandan governments which allows the UK to transfer asylum seekers to Rwanda to have their applications processed there and to remain in Rwanda if their applications are successful.⁹ In light of human rights concerns about Rwanda, the European Court of Human Rights granted an interim measure preventing deportations prior to the British courts being able to determine the scheme's legality.¹⁰ In response to this, the government added a clause to a draft Bill requiring British judges to ignore all interim measures issued by the Strasbourg Court.¹¹ In that respect a government backbencher later introduced a Private Members' Bill requiring the government to implement the Rwanda scheme in spite of any international court rulings. This Bill was subsequently defeated in the House of Commons,¹² and the government's Bill has yet to complete its parliamentary stages at the time of writing. On 19 December 2022, the High Court decided that the Rwanda scheme was lawful,¹³ but it is expected that there will be an appeal in 2023.

The government also made major procedural and substantive changes to immigration and asylum law through the Nationality and Borders Act 2022. The latter reduced and expedited immigration appeals and introduced a requirement that an asylum seeker must apply for asylum in the first safe country that they arrive at after fleeing persecution. This is widely considered to be contrary to international asylum law, specifically the Refugee Convention 1951.¹⁴

However, none of these reforms could be described as radical, revolutionary or transformative. The proposals pushed constitutional boundaries, undermined political conventions, increased the power of government, reduced parliamentary and judicial scrutiny, relied on tendentious and contested interpretations of international law, and were highly problematic, but none of them on their own radically and systematically transformed the powers exercised by the executive. Taken together, the system was pushed in favour of the executive but the UK remains recognisably a liberal European democracy.

9 Home Secretary, "Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement", 14 April 2022. Available at: <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r>.

10 Pobjoy, J., Bordell, W., Fakhoury, R., "European Court of Human Rights grants interim measures preventing removal of asylum seeker to Rwanda pending determination of judicial review of Rwanda removal policy", Blackstone Chambers, 15 June 2022. Available at: <https://www.blackstonechambers.com/news/european-court-of-human-rights-grants-interim-measures-preventing-removal-of-asylum-seeker-to-rwanda-pending-determination-of-judicial-review-of-rwanda-removal-policy/>.

11 Clause 24 of Bill of Rights Bill. Available at: <https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf>.

12 House of Commons, "Asylum Seekers (Removal to safe countries) – Leave to bring in a Bill", 14 Dec. 2022. Available at: <https://votes.parliament.uk/Votes/Commons/Division/1437>.

13 *R (AAA) v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin).

14 Law Society of England and Wales, "Nationality and Borders Act and Rwanda Asylum Partnership", 26 Aug. 2022. Available at: <https://www.lawsociety.org.uk/topics/immigration/nationality-and-borders-act-and-rwanda-asylum-partnership>.

This gradual change has been called ‘incrementalism’.¹⁵ A government Minister referred to it as ‘eating the elephant in chunks’.¹⁶ As Marsons put it again in 2021:

*Constitutional change is not occurring in a legislative big bang. There are proposals to test the waters, which may then be pursued, withdrawn depending on the pushback, pursued in a limited form or pursued by non-legislative means... There is an obvious interest in judicial review, principally remedies, grounds, judicial discretion, costs, procedure and ouster clauses. The reform strategy variously involves public rhetoric designed to influence courts, the exercise of existing statutory powers and new legislative proposals.*¹⁷

As McHarg and Young described it, these proposals represented a return to the ‘old British constitution’. By this, they mean a focus on so-called ‘political constitutionalism’ as opposed to ‘legal constitutionalism’. Historically, political constitutionalism emphasises the primacy of parliamentary sovereignty in law-making, a strong and decisive executive able to respond to shifting public opinion and changing events, and scepticism of courts making high-level and politically sensitive policy value judgements. By contrast, legal constitutionalism emphasises the need for a codified system of legally enforceable rules and checks on government and parliamentary power. McHarg and Young described: ‘a growing trend towards a weakening of both legal and political checks on Governmental power’.¹⁸

Though this trend was paused for a brief period during the short tenure of Liz Truss who focused on economic policy, it has continued consistently in 2022. Under Prime Minister Rishi Sunak, for example, the government’s Bill of Rights Bill intends to repeal the Human Rights Act 1998, which is the domestic Act of Parliament implementing the European Convention on Human Rights into British law.¹⁹

The political importance of immigration control also continues, particularly asylum-seeking following the successful Strasbourg interim measure and the rising number of small boats reaching British shores.²⁰ In December 2022, for example, the Prime Minister announced that the government would introduce legislation to raise the threshold for a person to be considered a ‘modern slave’ under the Modern Slavery Act 2015 to prevent

15 Harwood, R., “The rise of incrementalism”, 39 Essex Chambers, 22 July 2021. Available at: <https://www.39essex.com/information-hub/insight/rise-incrementalism>.

16 Public Administration and Constitutional Affairs Committee, “Oral evidence: The work of the Cabinet Office”, 10 Dec. 2020, Q601. Available at: <https://committees.parliament.uk/oralevidence/1397/default/>.

17 Marsons, L., “Eating the Elephant in Chunks: Mapping the Judicial Review Bill and other constitutional changes during the Boris Johnson era”, Legal Action Group, Aug. 2021. Available at: <https://www.lag.org.uk/article/211360/-eating-the-elephant-in-chunks---mapping-the-judicial-review-bill-and-other-constitutional-changes-during-the-boris-johnson-era>.

18 McHarg, A., Young, A., “The resilience of the old British Constitution”, UK Constitutional Law Association, 8 Sept. 2021. Available at: <https://ukconstitutionallaw.org/2021/09/08/aileen-mcharg-and-alison-l-young-the-resilience-of-the-old-british-constitution/>.

19 Bill of Rights Bill. Available at: <https://bills.parliament.uk/bills/3227>.

20 Home Office, “Factsheet: Small boat crossings since July 2022”, 2 Nov. 2022. Available at: <https://www.gov.uk/government/statistics/factsheet-small-boat-crossings-since-july-2022/factsheet-small-boat-crossings-since-july-2022>.

asylum seekers from escaping deportation this way.²¹

In other contexts, the new government has taken a less radical approach than its predecessors. As Solon Solomon has put it in relation to the Northern Ireland Protocol Bill, which alters the way that the Northern Ireland Protocol to the UK-EU Withdrawal Agreement is implemented in the UK:

[T]he UK Government has returned to the issue which had in the meantime been frozen, by issuing though this time also a legal statement meant to embalm this initiative to the wider compliance of the UK with international law. Albeit the statement's reference to the doctrine of necessity in international law is not convincing, the issuing per se of such statement, must be heralded as good news. In 2020, when the UK announced that it was ready to revise the Northern Ireland Protocol, the Secretary of State for Northern Ireland stated that the Bill would indeed break international law in a limited way. This time, the Secretary of State has held that the proposed Bill is inside the ambit of international law. Along these lines, it is good that the UK has moved from a position of indifference vis a vis international law to one that tries to take it into account.²²

In sum, in 2022, the government seemed to do what it thought it could accomplish in the context – in effect, going as far as it could ‘get away with’ in the eyes of its international partners, domestic parliamentarians, international and domestic judges, and public opinion. Few, if any, of these increases in executive power are gratuitous or self-serving. These do not benefit the individual Ministers, they are primarily a means to a political end, such as making the immigration system operate in a way that the government believed represented public opinion or reducing post-Brexit tensions in Northern Ireland to prevent a breakdown in law and order.

II. Integrity matters

2022 and the preceding period of the Covid-19 pandemic, has been marked by the rise of political and constitutional strains regarding integrity, political competence, and the development of anti-corruption mechanisms. In a climate reminiscent of the mid-1990s when the then Prime Minister John Major adopted several integrity measures in light of political scandals, Covid-19 has featured a number of political, moral and business scandals. Those were in part due to the long tenure of the government; in part due to the major economic stimulus and government contracting for all kinds of equipment from personal protective equipment to tracing to vaccination; and in part due to the reduced parliamentary scrutiny in consequence of lockdowns and the need to respond quickly to the public health emergency. This all led to government handling money in

21 Prime Minister of the United Kingdom, “Prime Minister’s Statement on Illegal Immigration”, 13 Dec. 2022. Available at: <https://www.gov.uk/government/speeches/pm-statement-on-illegal-migration-13-december-2022>.

22 Solomon, S, “The Northern Ireland Protocol Bill: A comparative perspective on the parliamentary role in the amendment of major international agreements”, *UK Constitutional Law Association*, 21 June 2022. Available at: <https://ukconstitutionallaw.org/2022/06/21/solon-solomon-the-northern-ireland-protocol-bill-a-comparative-perspective-on-the-parliamentary-role-in-the-amendment-of-major-international-agreements%E2%80%9C/>.

ways that were not all formalised and in accordance with established rules and procedures.

This section will therefore focus on three aspects. First, the political developments related to personal integrity at the highest levels of government and how it precipitated the downfall of at least one Prime Minister, Mr Johnson. Second, the questions arising from close connections between money matters and politics. Thirdly, the financial issues arising at local level following long-lasting tensions with the central government.

A. Personal ministerial conduct and constitutional and political uncertainty²³

Discontent had been growing against Boris Johnson in late 2021 and possibly earlier, following his decision to support his colleague, Owen Paterson, a Conservative politician who had been found guilty by a parliamentary ethics committee of improper lobbying. Johnson decided that the government would support a motion, which paused the decision on whether Paterson should be suspended until after the conclusion of a review of the parliamentary ethics system.²⁴ The government was forced by the media and political reaction to reverse this support only a week later.²⁵

In 2022, matters quickly became worse for the Prime Minister. In January of this year, evidence emerged in the form of photographs demonstrating that several social events had been held in the garden of No.10 Downing Street – the Prime Minister’s official grace-and-favour home – during a national lockdown in 2020. The government confirmed that there would be an investigation into Downing Street gatherings during the pandemic carried out by Sue Gray, a senior civil servant, who would establish the facts surrounding these events.²⁶

On 31 January 2022, Mrs Gray subsequently found twelve gatherings and concluded that: ‘[a]t least some of the gatherings in question represent a serious failure to observe not just the high standards expected of those working at the heart of Government but also of the standards expected of the entire British population at the time.’ Embarrassingly, she added that there was evidence of excessive use of alcohol in Downing Street at the time.²⁷ Following this, in April 2022, the Prime Minister and Chancellor of the Exchequer received a fixed-penalty notice – a fine – from the police for breaching Covid regu-

23 For more detailed developments on this, see Marique, Y., ‘Ethical standards between law and politics’ in Gromek-Broc, K. (ed.), *Liber Amicorum Patrick Birkinshaw*, 2023, Kluwer, forthcoming.

24 House of Commons, “Committee on Standards”, 3 Nov. 2021. Available at: <https://hansard.parliament.uk/commons/2021-11-03/debates/EA7E30B2-F0D0-4FC8-A608-9845CE43CF28/CommitteeOnStandards>.

25 House of Commons, “Committee on Standards: Decision of the House”, 8 Nov. 2021. Available at: <https://hansard.parliament.uk/commons/2021-11-08/debates/6E81CD0D-33C6-4796-B224-5D88EFAC8F07/CommitteeOnStandardsDecisionOfTheHouse#main-content>.

26 House of Commons, “Downing Street Garden Event”, 11 Jan. 2022. Available at: <https://hansard.parliament.uk/commons/2022-01-11/debates/DC167E69-D438-4958-A870-7386FE5DD07C/DowningStreetGardenEvent>.

27 Gray, S., “Investigation into alleged gatherings on government premises during Covid restrictions – Update”, Cabinet Office, 31 Jan 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051374/Investigation_into_alleged_gatherings_on_government_premises_during_Covid_restrictions_-_Update.pdf.

lations in Downing Street in 2020.²⁸

On 25 May 2022, Mrs Gray released her full report, confirming her view that social gatherings had taken place in Downing Street during the pandemic lockdowns and criticising the government and civil service leaders.²⁹ The Prime Minister made a statement to the House of Commons, apologising for the event that led to his fixed penalty notice (a lunchtime gathering on 19 June 2020 in the Cabinet Room).³⁰ Almost immediately after, a string of prominent Conservative politicians called on the Prime Minister to resign, which intensified over the summer.³¹ Eventually, Mr Johnson resigned as Prime Minister on 7 July 2022 after multiple resignations among the most senior government Ministers in the Cabinet, including the Chancellor of the Exchequer, the UK's finance minister.³²

What is the takeaway from the investigation by Sue Gray into what was dubbed by the British media as 'Partygate'? These events highlight that the document regulating ministerial behaviour – the Ministerial Code – can be found inadequate at crucial times. The Prime Minister is the ultimate arbiter of potential breaches and their sanctions, even when he himself might be the offender. He is also the person authoring the Code and amending it as, indeed, he did on 27 May 2022,³³ two days after the release of the Gray report.³⁴ The Independent Adviser on Ministerial Interests, the official who advises the Prime Minister on whether the Ministerial Code has been violated,³⁵ and the Committee

28 Osborne, S., "Boris Johnson fined: Prime Minister apologises after receiving fixed penalty notice for lockdown-breaking party", *Sky News*, 13 April 2022. Available at: <https://news.sky.com/story/boris-johnson-fined-prime-minister-apologises-after-receiving-fixed-penalty-notice-for-lockdown-breaking-party-12588712>.

29 Gray, S., "Findings of the Second Permanent Secretary's Investigation into alleged gatherings on government premises during Covid restrictions", Cabinet Office, 25 May 2022. Available at: <https://www.gov.uk/government/publications/findings-of-the-second-permanent-secretarys-investigation-into-alleged-gatherings-on-government-premises-during-covid-restrictions>

30 Johnson, B., "Sue Gray Report", House of Commons Hansard, 25 May 2022. Available at: <https://hansard.parliament.uk/commons/2022-05-25/debates/E888D0F8-37F7-48A5-8598-4449887A0935/SueGrayReport>.

31 Wright, J., "The Prime Minister May 2022", 30 May 2022. Available at: <https://www.jeremywright.org.uk/news/prime-minister-may-2022>.

32 Mason, R., "Boris Johnson resigns as Conservative leader after Cabinet revolt", *The Guardian*, 7 July 2022. Available at: <https://www.theguardian.com/politics/2022/jul/07/boris-johnson-resigns-as-conservative-leader-after-cabinet-revolt>

33 Cabinet Office, Revisions to the Ministerial Code and the role of the Independent Adviser on Ministers' Interests, 27 May 2022. Available at: <https://www.gov.uk/government/publications/revisions-to-the-ministerial-code-and-the-role-of-the-independent-adviser-on-ministers-interests>.

34 Cabinet Office, *Findings of Second Permanent Secretary's Investigation into Alleged Gatherings on Government Premises during Covid Restrictions*, 25 May 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1078404/2022-05-25_FINAL_FINDINGS_OF_SECOND_PERMANENT_SECRETARY_INTO_ALLEGED_GATHERINGS.pdf; Cabinet Office, *Investigation into alleged gatherings on government premises during Covid Restrictions – Update*, 31 Jan. 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051374/Investigation_into_alleged_gatherings_on_government_preemies_during_Covid_restrictions_-_Update.pdf.

35 Independent Adviser on Ministers' Interests, *Annual Report 2021-2022*, May 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1080213/independent-adviser-annual-report.pdf.

on Standards of Public Life³⁶ both believed that the amendments did not go far enough to ensure the highest standards of political integrity.

Having said this, at the moment that it mattered, Sue Gray's investigation did have decisive political implications. Integrity mattered without the need for a court or legal sanctions. The total sum of ways in which the Prime Minister behaved – amending the Ministerial Code, foundering during a liaison committee meeting,³⁷ and apologising for his behaviour for no longer than ten minutes – led to his resignation, an admission that he did not have the confidence of the House of Commons despite having survived a leadership challenge from within his Party a few days before.³⁸

The biggest stumbling block was the allegation that the Prime Minister did not respect the expectation to tell the truth to Parliament. The Ministerial Code requires ministers 'who knowingly mislead Parliament' to resign. Intricate questions of interpretation about the meaning of this expression arose.³⁹ The House of Commons ordered an investigation into the Prime Minister's statements to Parliament⁴⁰ about the non-occurrence of parties in Downing Street to ascertain whether the Prime Minister had misled the House.⁴¹ A positive finding would result in former Prime Minister Johnson being found in contempt of Parliament. The privilege committee, however, flagged that the threshold for this differs from the one set in the Ministerial Code.⁴² In a way, this is effective political constitutionalism, if the standards used by Professor Alison Young are relied upon:⁴³ 'Political constitutionalism requires effective political controls, mutual institutional respect, and institutional self-restraint.'⁴⁴ The political controls worked, and when institutional re-

36 CSPL, "Lord Evans correspondence with Lord True on the Ministerial Code", 30 May 2022. Available at: <https://www.gov.uk/government/publications/lord-evans-correspondence-with-lord-true-on-the-ministerial-code>.

37 Heyward, F., "Boris Johnson's Liaison Committee appearance was a fittingly humiliating finale", *The New Statesman*, 6 July 2022. Available at: <https://www.newstatesman.com/politics/conservatives/2022/07/boris-johnsons-liaison-committee-appearance-fittingly-humiliating-finale>.

38 "Prime Minister Boris Johnson wins Tory confidence vote", *BBC*, 6 June 2022. Available at: <https://www.bbc.co.uk/news/av/uk-politics-61713912>.

39 Gordon, M., "The Prime Minister, the Parties, and the Ministerial Code", *U.K. Const. L. Blog*, 27 April 2022. Available at: <https://ukconstitutionallaw.org/2022/04/27/mike-gordon-the-prime-minister-the-parties-and-the-ministerial-code/>.

40 Committee of Privileges' resolutions. Available at: <https://committees.parliament.uk/committee/289/committee-of-privileges/>; "Privileges Committee publish report setting out processes and procedures for inquiry on Rt Hon Boris Johnson MP", 21 July 2022. Available at: <https://committees.parliament.uk/committee/289/committee-of-privileges/news/172278/privileges-committee-publish-report-setting-out-processes-and-procedures-for-inquiry-on-rt-hon-boris-johnson-mp/>.

41 "Boris Johnson to face probe over claims he misled Parliament about lockdown parties", *BBC*, 21 April 2022. Available at: <https://www.bbc.co.uk/news/uk-politics-61177313>.

42 Sir Ryder, E., "The Privileges Committee is the servant of the House of Commons, and will conduct its inquiry with a commitment to fairness and transparency throughout", 24 Aug. 2022. Available at: <https://committees.parliament.uk/committee/289/committee-of-privileges/news/172837/sir-ernest-ryder-the-privileges-committee-is-the-servant-of-the-house-of-commons-and-will-conduct-its-inquiry-with-a-commitment-to-fairness-and-transparency-throughout/>. For criticism of the procedure, see Bogdanor, V., "This inquiry into the PM is not consistent with natural justice", *Telegraph*, 11 Aug. 2022. Available at: <https://www.telegraph.co.uk/news/2022/08/11/inquiry-pm-not-consistent-natural-justice/>.

43 Young, A., "Why 'Partygate' May Be the Beginning of the End", *Verfassungsblog*, 23 April 2022. Available at: <https://verfassungsblog.de/why-partygate-may-be-the-beginning-of-the-end/>.

44 *Ibid.*

spect (and personal self-respect) broke down, when a government did not practise institutional self-restraint, the political consequences had to be drawn by the Prime Minister.

B. Integrity and Money

The overall emergency linked to the Covid-19 pandemic, the uncertainty linked to the virus at first, the lack of masks and of personal protective equipment, as well as the need to limit freedom of movement to prevent the virus from spreading, created a political context where power, opportunities, boundaries, and risks were blurred. Transparency and accountability of executive action were limited and parliamentary control weakened, especially in the first year of the pandemic.⁴⁵ The aftermath of this situation started to unravel in 2022. It became known, for example, that a former Conservative Prime Minister, David Cameron, lobbied the Department for Business that subsequently demonstrated ‘unusual interest’ in the accreditation of a failing business to obtain financial support during the pandemic.⁴⁶ VIP procedures were set up to procure the much-needed material,⁴⁷ although some of this material ended up not being used.⁴⁸

To help businesses survive, the government radically increased public spending, especially in the Summer 2020 when the then Chancellor, Rishi Sunak, launched the *Bounce Back* loan. The Department of Business, Energy and Industrial Strategy issued 1.5 million loans worth £47 billion to businesses across the UK.⁴⁹ Speed was prioritized over value for money,⁵⁰ with no robust mechanism in place to prevent fraud. Money could be delivered within 24 to 48 hours of the application. All of this led to abuses of the system in all quarters: fraud was so pervasive that the governmental anti-fraud team soared to more than 16,000 staff,⁵¹ with Lord Agnew, a senior government member and Peer, resigning due to the government failing in handling fraudulent Covid-19 business loans.⁵² Local councillors misused the system to their benefit.⁵³ Questions were raised as to how major procurement decisions were made – although the courts dismissed the case, the

45 Cormacain, R., Fox, R., Russell, M. & Tomlinson, J., *The Marginalisation of the House of Commons under Covid Has Been Shocking; A Year on, Parliament’s Role Must Urgently Be Restored*, 2021, London: Hansard Society.

46 NAO, *Investigation into the British Business Bank’s accreditation of Greensill Capital* (2021-22 HC 301), para. 12.

47 Conn, D., “Emails emerge of ‘VIP route’ for UK Covid test contracts”, *The Guardian*, 23 Sept. 2021. Available at: <https://www.theguardian.com/world/2021/sep/23/emails-emerge-of-vip-route-for-uk-covid-test-contracts>.

48 Conn, D., “Half of PPE procured by UK using ‘VIP’ companies has not been used”, *The Guardian*, 11 Feb. 2021. Available at: <https://www.theguardian.com/world/2022/feb/11/half-of-ppe-procured-by-uk-using-vip-companies-has-not-been-used>.

49 Committee of Public Accounts, *Bounce Back Loans Scheme: Follow-up* (2021-22 HC 951).

50 NAO, *The Bounce Back Loan Scheme: an update* (2021-22 HC 861).

51 Gov.UK, *Government Counter Fraud Function and Profession*. Available at: <https://www.gov.uk/government/groups/counter-fraud-standards-and-profession>; <https://www.gov.uk/government/news/joint-taskforce-relaunched-to-protect-against-rise-in-fraud-crime>; Cabinet Office, *Guidance. Fraud control in emergency management*, 26 March 2020.

52 “Conservative minister resigns in anger over Covid fraud”, *BBC*, 24 Jan. 2021. Available at: <https://www.bbc.co.uk/news/uk-politics-60117513>.

53 “Wolverhampton councillor claimed Covid grant for shut takeaway”, *BBC*, 17 Dec. 2021. Available at: <https://www.bbc.com/news/uk-england-birmingham-59701935>; CPS, “Ex councillor and wife convicted for trying to exploit Covid-19 bounce back loans”, 17 Dec. 2021. Available at: <https://www.cps.gov.uk/cps/news/ex-councillor-and-wife-convicted-trying-exploit-covid-19-bounce-back-loans>.

usual rules were not followed due to the emergency circumstances.⁵⁴ Issues also arose in relation to the fraud and error involved in the delivery of employment support schemes in response to Covid-19.⁵⁵ Overall this leads the National Audit Office⁵⁶ and the Public Accounts Committee⁵⁷ to intensify their scrutiny of the mechanisms aiming to combat fraud in general.

During 2022, several parliamentary reports have been published in relation to investigations into the conduct of MPs and Lords for alleged breaches of the House's respective code of conduct.⁵⁸ Some of these investigations pertain to conflicts between public and private interests.⁵⁹ One prominent case related to Covid-19 procurement – that of Baroness Mone – has been publicised in the media and is serious enough to warrant a criminal investigation.⁶⁰ Although there is no official report from the House of Lords Commissioners pending the criminal investigation, this case is discussed here as it directly pertains to the public contracts awarded following the VIP lanes discussed under the heading public contracts below. It also illustrates the general climate of distrust at the highest political level, if nothing else of a more serious nature.

Awarded a peerage in 2015, Baroness Mone is known by the British public thanks to her appearances on the television show, *The Apprentice*. She epitomises business success for somebody without a degree. However, her participation and votes in the Lords have been low. Following past experience with media scrutiny into politico-financial scandals,⁶¹ *The Guardian* investigated in 2020, whether Baroness Mone lobbied officials for public contracts for PPE and similar equipment through the VIP Lane.⁶² There were some anomalies with PPE Medpro, a company she was associated with, as the company did not exist at the moment of the award,⁶³ a major part of the contract (£70 m out of the 100 m) land-

54 *R (on the application of Good Law Project Ltd and another) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC).

55 National Audit Office, *Delivery of employment support schemes in response to the COVID-19 pandemic* (2022-23 HC 656).

56 National Audit Office, *Progress combatting fraud* (2022-23 HC 654).

57 Public Accounts Committee, *Inquiry - Progress combatting fraud, on-going*. Information available at: <https://committees.parliament.uk/work/7020/progress-combatting-fraud/publications/>.

58 For the House of Lords: <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/code-of-conduct-for-the-house-of-lords/>.

For the House of Commons: <https://www.parliament.uk/business/publications/commons/hoc-code-of-conduct/>.

59 Eg., Conduct Committee, *The conduct of Baroness Goudie* (2022-23 HL 121) for facts dating back from 2016-2017.

60 See comments on the website of the House of Lords' Commissioners. Available at: <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/house-of-lords-commissioner-for-standards-/current-inquiries/>.

61 The 'cash-for-questions' scandal was first investigated in 1994 by The Guardian: Hencke, D., "Tory MPs were paid to plant questions says Harrods chief", *The Guardian*, 20 Oct. 1994. Available at: <https://www.theguardian.com/politics/1994/oct/20/conservatives.uk>. In 2009, a parliamentary expenses scandal was exposed by the *Daily Telegraph*, leading to seven parliamentarians being jailed: vanHeerde-Hudson, J. (ed.), *The Political Costs of the 2009 British MPs' Expenses Scandal*, 2014, Basingstoke, Palgrave Macmillan.

62 Available at: <https://www.theguardian.com/uk-news/2022/dec/09/revealed-the-full-inside-story-of-the-michelle-mone-ppe-scandal>.

63 Available at: <https://www.theguardian.com/uk-news/2022/nov/23/revealed-tory-peer-michelle-mone-secretly-received-29m-from-vip-lane-ppe-firm>.

ed offshore, one of the main suppliers had no experience delivering the equipment, and Baroness Mone is said to have received payment from the firm although she did not register any interests with them. By the end of 2022, the National Crime Agency has started investigating the case and Baroness Mone took leave from the House of Lords.

C. Financial problems at local level

The relations between the central government and local government are framed by an ever-extending trend towards centralisation. After the financial crisis of 2007, the *Coalition Government* (2010-15) came in power with a rhetoric of granting more powers to local government to address the local democratic deficit. The reform led, on the one hand, to the *Localism Act* 2011 recognising explicitly that local government has the same powers as a private person. On the other hand, it led to a loosened system of local auditing and control over local finances.⁶⁴ Before the reforms, the Audit Commission had been tasked to investigate both the regularity and the value for money of local government's spending and the Standards Board for England was in charge of regulating conflicts of interests at local level.⁶⁵ The reforms in 2011 and 2014 put an end to these controls, with audit of the regularity of local finance having been reshuffled a number of times since 2014, and the National Audit Office being in charge of reporting on the value for money of local spendings. The major problem is that since the *Coalition Government* came into power, a sustained period of ever-increasing austerity has been heralded, with several National Audit Reports flagging problems with the financial sustainability of local finances (both the finances of local government⁶⁶ and the finances of local NHS trusts⁶⁷) as well as parliamentary reports on the same issues.⁶⁸

These financial constraints are compounded with less funding provided by central government and ever-increasing costs to be shouldered by local government, such as costs associated with fighting Covid-19,⁶⁹ social care and the cost-of-living explosion. This leads to numerous problems. The first nation-wide problem pertains to the inequality between local government and especially the North-South divide, with London being more economically advantaged compared to the North of England. To address this situation, a *Levelling Up* White Paper was published in early 2022.⁷⁰ Yet little progress had been made since its announcement. The second problem pertains to a number of local governments which sought to be 'creative' with local money. After a sustained period of austerity and little control over local spending, a disturbing pattern arises.

In Liverpool, a major UK city, a criminal investigation into the corruption of the Mayor led to the resignation of the Mayor, although the investigation eventually cleared

64 *Local Audit and Accountability Act* 2014.

65 *Part III of the Local Government Act* 2000.

66 Eg., National Audit Office, *The local government finance system in England: overview and challenges* (2021-22 HC 858).

67 Eg., National Audit Office, *NHS financial sustainability*, (2017-19 HC 1867); National Audit Office, *NHS financial management and sustainability* (2019-20 HC 44).

68 Eg., Committee of Public Accounts, *Local Government Finance System: Overview and Challenges* (2021-22 HC 646).

69 National Audit Office, *Local government finance in the pandemic* (2019-21 HC 1240).

70 HM Government, *Levelling Up*, CP 604, 2 Feb. 2022; Gove, M., Government unveils levelling up plan that will transform UK. Available at: <https://www.gov.uk/government/news/government-unveils-levelling-up-plan-that-will-transform-uk>.

him.⁷¹ Yet the financial problems of Liverpool remained, and the local council has been placed under close investigation⁷² and then supervision⁷³ by the central government.⁷⁴ In other local governments, the procedure of section 114 has been triggered. By this procedure, the chief financial officers (CFOs) of local government have a general power to stop a local authority from entering into new transactions and performing some of the existing ones. This power is granted by section 114(3) of the *Local Government Finance Act* 1988. CFOs issue such a notice if they believe that future expenses are out of control, to the point that the local authority to which they are appointed is likely to end the financial year with a budget deficit and that it is impossible to broker a solution without issuing a section 114 notice. Over the recent period, a number of local governments have been put under this procedure, namely the London Borough of Croydon in 2020-21, a local government that remains financially struggling despite the use of the notice; Nottingham in December 2021 following information emerging that the authority unlawfully used funding earmarked for its housing on revenue spending; Slough and Turroch due to failed commercial investments. Turroch was declared 'bankrupt' – as one can put it informally, as technically, UK local government cannot file for bankruptcy - with £500 m deficit in December 2022.⁷⁵

III. Challenges to address the economic aftermath of the Covid-19 pandemic and Brexit

Over the summer of 2022, the Conservative Party held a leadership contest between Liz Truss and Rishi Sunak. The result of the contest was announced on 5 September 2022. The result was that Liz Truss had defeated Rishi Sunak by 57.4% to 42.6% of voting Conservative Party members. Accordingly, on 6 September 2022 Liz Truss became Leader of the Conservative Party and Prime Minister.⁷⁶

This was not the start of a new period of stability. On 23 September 2022, the Chancellor of the Exchequer, Kwasi Kwarteng, delivered a 'mini-Budget'. Styled as the government's 'Growth Plan', the mini-Budget included abolishing the 45% rate of income tax, cutting the basic rate of income tax, freezing alcohol taxes, reversing the previous Chancellor's increase in social security taxes, cutting property taxes, and not implementing the previous government's planned increase in corporation tax.⁷⁷ Kwarteng and Truss had

71 Available at: <https://www.egi.co.uk/news/police-drop-planning-corruption-probe-into-liverpool-mayor/>.

72 Available at: <https://www.gov.uk/government/collections/inspection-into-the-governance-of-liverpool-city-council>.

73 Available at: <https://www.gov.uk/government/publications/liverpool-city-council-updated-directions-8-november-2022>. Add: including the appointment of a financial commissioner at Liverpool to oversee the council's dire financial situation (see https://www.publicfinance.co.uk/news/2022/11/finance-commissioner-appointed-liverpool?utm_source=Adestra&utm_medium=email&utm_term=) following a commissioners' report (see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099138/100622_LCC_Commissioners_SoS_Second_Report.pdf.)

74 In October 2021, the shortfall for the 2022-23 budget was estimated at £33m. By June 2022, this figure had increased to £98.5m to 2025-26, thus justifying the urgent appointment of a financial commissioner.

75 Available at: <https://www.theguardian.com/society/2022/dec/19/thurrock-latest-council-declare-effective-bankruptcy>.

76 Crerar, P., "Liz Truss wins Tory leadership race to become Britain's next PM", *The Guardian*, 5 Sept. 2022. Available at: <https://www.theguardian.com/politics/2022/sep/05/liz-truss-wins-tory-leadership-race-to-become-britains-next-pm>.

77 Kwarteng, K., "The Growth Plan", House of Commons Hansard, 23 Sept. 2022. Available at: <https://hansard>.

been developing these ideas for many years with the support of economic liberal think-tanks close to the Conservative Party, such as the Institute of Economic Affairs (IEA).⁷⁸

However, following a political and public backlash, on 3 October 2022, the Chancellor of the Exchequer reversed his decision to abolish the 45% rate of income tax, arguing that this policy has become ‘a distraction’ to the government’s overall economic agenda.⁷⁹ Interestingly, a major source of criticism of the Chancellor was that he had not consulted an independent expert arms-length body, known as the Office for Budget Responsibility. The Office’s function is to analyse and report on the sustainability of the UK’s public finances – including how specific government measures would affect that sustainability – and the Office was not asked to produce such a report for the mini-Budget.⁸⁰

On 14 October 2022, Kwasi Kwarteng was dismissed as Chancellor of the Exchequer. The same day, the Prime Minister announced that the government was reversing its decision not to increase corporation tax. In place of Kwasi Kwarteng, Jeremy Hunt was appointed as Chancellor of the Exchequer. Moreover, on 17 October 2022, this new Chancellor of the Exchequer reversed much of the former Chancellor’s mini-Budget.⁸¹

On 20 October 2022, Liz Truss resigned as Prime Minister and Leader of the Conservative Party. It was announced that the Conservative Party would hold a brief and expedited leadership contest to replace Liz Truss. Any Member of Parliament wishing to become leader would have to secure the nomination of at least one hundred Conservative Members of Parliament.⁸² On 25 October 2022, Rishi Sunak became Prime Minister, the first person of British Indian origin to hold the office and the first holder of a United States’ Green Card to hold the position.⁸³ At the time, there was also controversy in relation to Mr Sunak’s wife – Akshata Murty – who is a multi-millionaire, regarding her tax status in the UK and her associations with firms connected to the Russian government.⁸⁴

These factors, alongside global factors, have precipitated an economic crisis in the UK. Inflation is the highest it has been for decades (9.2% as of December 2022), there is a ‘cost of living crisis’ so far as energy prices and housing costs, and public finances are in a parlous state given the massive government intervention required as a result of Covid-19.⁸⁵

parliament.uk/commons/2022-09-23/debates/6F82FA4B-DB6B-4E89-BA39-4ABEA1045ABF/TheGrowthPlan.

78 Dyer, H., “Kwarteng IEA fringe event hints at how deeply thinktank is embedded in No 10”, *The Guardian*, 4 Oct. 2022. Available at: <https://www.theguardian.com/politics/2022/oct/04/kwasi-kwarteng-appearance-iea-thinktank-fringe-event-embedded-no-10>.

79 Kwarteng, K., “Chancellor defends income tax cut U-turn”, *BBC News*, 3 Oct. 2022. Available at: <https://www.bbc.co.uk/news/av/uk-63114409>.

80 Office for Budget Responsibility. Available at: <https://obr.uk/>.

81 Hunt, J., “Economic Update”, House of Commons Hansard, 17 Oct. 2022. Available at: <https://hansard.parliament.uk/commons/2022-10-17/debates/68F2BACA-D0F2-4F1C-8A65-8D29D304B6BA/EconomicUpdate>.

82 Walker, P., Crear, P., Elgot, J., “Liz Truss resigns as PM and triggers fresh leadership election”, *The Guardian*, 20 Oct. 2022. Available at: <https://www.theguardian.com/politics/2022/oct/20/liz-truss-to-quit-as-prime-minister>.

83 Thomas, T., “Rishi Sunak to become PM after meeting the king – how the day will unfold”, *The Guardian*, 25 Oct. 2022. Available at: <https://www.theguardian.com/politics/2022/oct/25/rishi-sunak-to-become-pm-after-meeting-the-king-how-the-day-will-unfold>.

84 Boffey, D., Roth, A., “Infosys still operating from Russia eight months after saying it will pull out”, *The Guardian*, 4 Nov. 2022. Available at: <https://www.theguardian.com/world/2022/nov/04/infosys-still-operating-russia-rishi-sunak-akshata-murty>.

85 Office for National Statistics, “Consumer price inflation, UK: December 2022”, 11 April 2023. Available at: <https://>

IV. Major government Bills in 2022

In 2022, the government pursued a number of important constitutional Bills, some of which were enacted into law by Parliament and some of which remain to be enacted. These include: the Northern Ireland Protocol Bill; the Public Order Bill; the Higher Education (Freedom of Speech) Bill; the Retained EU Law (Revocation and Reform) Bill; and the Bill of Rights Bill. Of those enacted, we wish to highlight the Judicial Review and Courts Act 2022; the Nationality and Borders Act 2022; the Police, Crime, Sentencing and Courts Act 2022; and the Dissolution and Calling of Parliament Act 2022. As described earlier, many of these Bills enhance executive power, reduce the protection of human rights, weaken independent scrutiny, and undermine the international rule of law. A number of them also position the government in relation to the so-called ‘culture wars’, between the ‘woke left’ and culturally conservative right.

The Judicial Review and Court Act 2022 and the Bill of Rights Bill will be considered below. For the other enacted bills, we will limit ourselves to the following brief overview.

The Northern Ireland Protocol Bill allows the government to amend the domestic operation of the Ireland-Northern Ireland Protocol to the EU-UK Withdrawal Agreement.⁸⁶ The government’s legal position is that the Bill is compatible with international law under the doctrine of necessity, which is said to permit deviations from international obligations in exceptional circumstances. Article 16 of the Protocol itself permits unilateral deviation from the Protocol’s obligations where ‘serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade’.

*It is the Government’s assessment that the legislation is currently the only way to provide the means to alleviate the socio-political conditions, while continuing to support the Protocol’s objectives, including supporting North-South trade and cooperation, and the interests of both the EU and the UK.*⁸⁷

Notably though, many international law experts regard the government’s legal case as incorrect and tendentious.⁸⁸

www.ons.gov.uk/economy/inflationandpriceindices/bulletins/consumerpriceinflation/december2022.

86 Bill of Rights Bill. Available at: <https://bills.parliament.uk/bills/3182>.

87 Truss, L., “Northern Ireland Protocol Bill: UK government legal position”, Foreign, Commonwealth and Development Office, 13 June 2022. Available at: <https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position>.

88 See eg. Solomon, S., “The Northern Ireland Protocol Bill: A comparative perspective on the parliamentary role in the amendment of major international agreements”, UK Constitutional Law Association, 21 June 2022. Available at: <https://ukconstitutionallaw.org/2022/06/21/solon-solomon-the-northern-ireland-protocol-bill-a-comparative-perspective-on-the-parliamentary-role-in-the-amendment-of-major-international-agreements%EF%BF%BC/>.

The Higher Education (Freedom of Speech) Bill imposes civil liabilities on universities and student unions for failure to uphold certain freedom of speech obligations. The Bill creates a new Director for Freedom of Speech and Academic Freedom to be based in a government body which promotes the interests of students.⁸⁹ This is a heavily contested Bill in that it reflects the so-called ‘culture wars’ which have arisen between academics, activists and commentators. They disagree on competing rights and interests of trans people and biological women.⁹⁰ The government’s Bill, in effect, is hence an attempt to side with so-called ‘gender critical’ women who have been ostracised for expressing the view that biological sex is immutable and who believe that the self-identification of gender will threaten the protection of vulnerable biological women.

The Retained EU Law (Revocation and Reform) Bill significantly reforms so-called ‘retained EU law’. Following Brexit, the UK integrated the entire corpus of EU law and case law into its domestic legal system to be able to revise, replace, or retain the former in due course.⁹¹ This integration was to guarantee legal certainty and stability during the aftermath of Brexit. There are five types of retained EU law: *EU-derived domestic legislation*, where Parliament passed a law to implement an EU obligation; *retained direct EU legislation*, including EU Regulations; *retained directly effective provisions of EU law*, such as Directives; *retained EU case law*, such as cases from the Court of Justice of the European Union interpreting provisions of EU law; and *retained general principles of EU law*.⁹²

The Retained EU Law (Revocation and Reform) Bill underscores the government’s intention to make a decisive political and legal break with the EU, by making all EU-derived subordinate legislation and retained direct EU legislation legally ineffective by the end of 2023. The Bill further abolishes the supremacy of EU law in the UK. Any Act of Parliament which implemented EU law obligations, however, will need to be repealed expressly by Parliament and will not be affected by this Bill. This Bill only affects secondary, subordinate or delegated legislation – that is, legislation produced by Ministers.

The Public Order Bill creates new offences relating to public order. It increases stop and search powers used by the police to regulate disruptive protests, empowers the Secretary of State to bring legal proceedings to limit and regulate protest-related activities, and enables courts to make serious disruption prevention orders setting restrictions on an individual’s ability to carry out disruptive protests.⁹³ This Bill again positions the government in the ‘culture wars’, specifically in opposition to the disruptive and sometimes criminal public protests carried out by organisations such as *Just Stop Oil*, *Extinction Rebellion* and *Black Lives Matter*, about which there has been considerable political and public disquiet and resentment.

89 Higher Education (Freedom of Speech) Bill. Available at: <https://bills.parliament.uk/bills/2862>.

90 Adams, R., “Kathleen Stock says she quit university post over medieval ostracism”, *The Guardian*, 3 Nov. 2022. Available at: <https://www.theguardian.com/education/2021/nov/03/kathleen-stock-says-she-quit-university-post-over-medieval-ostracism>.

91 This was accomplished via the European Union (Withdrawal) Act 2018.

92 Cowie, G., Shalchi, A., “Retained EU Law (Revocation and Reform) Bill”, House of Commons Library Briefing, 17 Oct. 2022. Available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-9638/>.

93 Public Order Bill. Available at: <https://bills.parliament.uk/bills/3153>.

The Dissolution and Calling of Parliament Act 2022 repeals the Fixed-Term Parliaments Act 2011. It returns to the Prime Minister the royal prerogative power to advise the Monarch to dissolve Parliament and call a general election. This means that British general elections may be called earlier than every five years as the Prime Minister decides. This is seen to benefit the governing party as the Prime Minister can call an election whenever he regards political and public opinion to be in his party's favour. The Act further contains a clause that excludes the courts from reviewing the legality of decisions and 'purported' decisions as to the dissolution of Parliament by the Prime Minister.

The Police, Crime, Sentencing and Courts Act 2022 allows police forces to place restrictions on protests that they believe would constitute the offence of public nuisance, including imposing starting and finishing times and noise limits. This would include one-person protests. Protestors disobeying such instructions from the police would commit a criminal offence.

The Nationality and Borders Act 2022 contains a number of provisions which critics have argued violate international refugee law, including a requirement that a person must claim asylum at a 'designated place'; making inadmissible any asylum claim made by EU nationals or persons connected to a safe third country; imposing a requirement on courts to give little weight to evidence provided late by a claimant; increasing the potential term of imprisonment for assisting an unlawful entry to life imprisonment; empowering the Home Secretary to remove a person's British citizenship without notice where that person cannot be reasonably contacted; and expediting removal and appeals processes.

In 2022, at least two important constitutional government reform programmes either reached completion or made considerable progress – one related to the reform of judicial review and the second related to the reform of human rights law. In the two sections that follow, we provide an overview of the stage reached in 2022 and how this compares with earlier years.

V. Judicial review reform

In the UK, judicial review is the process by which the High Court, exercising its common law 'inherent jurisdiction', reviews the legality of the actions of a public authority.⁹⁴

In July 2020, the Secretary of State for Justice announced that there should be an Independent Review of Administrative Law (IRAL). The Review was framed as an attempt to explore the balance 'between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government.' The Review specifically addressed (i) the codification of the grounds of judicial review and the reviewability of public decisions; (ii) the justiciability of certain executive decisions; (iii) the grounds and remedies available and whether these should differ depending on the subject-matter; and (iv) any additional procedural reforms necessary, such as time limits, costs, and standing.⁹⁵

94 The inherent jurisdiction means that no statute provides the courts with this power, it emerges from judge-made common law – from case law.

95 Ministry of Justice, "The Independent Review of Administrative Law", 2020. Available at: <https://www.gov.uk/>

The IRAL examined reforms to judicial review that had not been seriously considered by previous governments. Previous reforms had mainly been procedural or related to costs, whereas the focus of IRAL's questions was constitutional in character. The Review was asked to address fundamental issues concerning the appropriate constitutional place of the courts vis-à-vis the executive and Parliament, including: whether the courts interfered inappropriately with executive decisions and, if so, whether certain types of executive decisions should be immune from judicial review in the first place; whether appropriate tests of justiciability had been adopted; and perhaps most importantly whether judicial review should be based on a statute and whether the grounds for review should be codified.⁹⁶

In March 2021, IRAL's full report was released.⁹⁷ The answers to the four main questions posed to the panel were: no statutory codification of grounds of judicial review; no statutory reform to justiciability; and no statutory reform to the approach of the courts to decision-making. The panel did, however, make two recommendations for legislative reform. The first was to allow judges to suspend the effect of quashing orders and the second was to abolish a specific form of judicial review known as *Cart* judicial reviews.⁹⁸ A quashing order is a judicial order which strikes down and invalidates an unlawful administrative act as though it had not occurred. *Cart* judicial reviews, as developed in *R (Cart) v Upper Tribunal*⁹⁹ involve a person challenging errors made by subordinate statutory tribunals, and usually related to immigration and social security matters. Though this ouster clause does not render executive decisions immune from judicial challenge, the significance of this ouster is that the then Lord Chancellor indicated that the language of the ouster clause would be used in the future to exclude other forms of judicial review where the Government would find it appropriate.¹⁰⁰ This has, in fact, already happened. In 2023, Clause 13 of the Government's Illegal Migration Bill – which in effect is a ban on seeking asylum in the UK unless an individual travelled through approved routes – uses the same language to exclude judicial review of executive decisions to detain asylum seekers for twenty-eight days.¹⁰¹

Concurrent with the release of the report, the Secretary of State for Justice launched a consultation in which he made a number of proposals that went beyond the findings in the IRAL report including: the introduction of legislation for presumptive or mandatory

government/groups/independent-review-of-administrative-law.

96 Konstadinides, T., Marsons, L., Sunkin, M., "Reviewing judicial review: The constitutional importance of the Independent Review of Administrative Law", *UK Constitutional Law Association*, 24 Sept. 2020. Available at: <https://ukconstitutionallaw.org/2020/09/24/theodore-konstadinides-lee-marsons-and-maurice-sunkin-reviewing-judicial-review-the-constitutional-importance-of-the-independent-review-of-administrative-law-2020/>.

97 Independent Review of Administrative Law, "Independent Review of Administrative Law: Final report", 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf.

98 Marsons, L., "The UK's Independent Review of Administrative Law: Findings, recommendations and pleas", *Admin Law Blog*, 24 March 2021. Available at <https://adminlawblog.org/2021/03/24/the-uks-independent-review-of-administrative-law-report-findings-recommendations-and-pleas/>.

99 [2011] UKSC 28.

100 Lord Chancellor, Sir Robert Buckland KC., "Lord Chancellor's keynote speech on judicial review", 2021. Available at: <https://www.gov.uk/government/speeches/lord-chancellors-keynote-speech-on-judicial-review>.

101 Illegal Migration Bill. Available at: <https://publications.parliament.uk/pa/bills/cbill/58-03/0284/220284.pdf>.

suspended quashing orders; legislation for presumptive or mandatory prospective-only remedies; and legislation for a so-called ‘safety valve’ designed to require the courts to give effect to ouster clauses that exclude judicial review.¹⁰²

However, the initial version of the government’s Bill published in July 2021 did not go as far as its consultation. It went beyond IRAL’s recommendations but only modestly so. The initial Bill, for example, contained a ‘presumption’ in favour of suspended or prospective-only quashing orders. This would mean that judges had to suspend or give prospective-only effect to a quashing order unless there was a ‘good reason’. After parliamentary pushbacks against this presumption in the House of Lords, the former was removed from the Bill. In its final version, the Bill hence provides that judges have the power to suspend or make prospective-only quashing orders. However, judges are not obliged to do so.¹⁰³

In April 2022, the *Judicial Review and Courts Act 2022* was formally adopted. It allows courts to grant a suspended quashing order and/or to limit the retrospective effect of a quashing order, and abolishes Cart judicial reviews.

VI. Human rights reform

In December 2020, the Secretary of State for Justice, Robert Buckland, announced that an Independent Human Rights Act Review (IHRAR) would be conducted. The *Human Rights Act* 1998 is the Act of Parliament that implements many of the rights contained in the European Convention on Human Rights into British law. The IHRAR specifically focused on whether and how the *Human Rights Act* had affected the relationship between British judges and the European Court of Human Rights, and how the *Human Rights Act* had affected the constitutional relationship between the government, the judiciary, and Parliament.¹⁰⁴

In December 2021, the Secretary of State released the IHRAR’s report. The report recommended various changes to the *Human Rights Act*. The most notable changes for the purpose of this chronicle were amendments to sections two and three of the Act. On section 2 relating to the duty to take into account Strasbourg case law IHRAR recommended clarifying that fundamental rights as provided for in common law are the first port of call before Convention rights are considered. on section 3, relating to the duty to interpret legislation in conformity with the Convention, IHRAR recommended clarifying that courts should use normal rules of statutory interpretation before turning to the interpretive duty in section 3.¹⁰⁵

102 Ministry of Justice, “Judicial Review Reform: The government response to the Independent Review of Administrative Law”, March 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf.

103 Law Society of England and Wales, “Big win for rule of law as government restores judges’ discretion in judicial review reform”, 28 April 2022. Available at: <https://www.lawsociety.org.uk/topics/human-rights/big-win-for-rule-of-law-government-restores-judges-discretion-in-judicial-review-reform>.

104 Independent Human Rights Act Review. Available at: <https://www.gov.uk/guidance/independent-human-rights-act-review>.

105 Independent Human Rights Act Review, “Independent Human Rights Act Review: Full report”, Dec. 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf.

By this time, a new Secretary of State for Justice, Dominic Raab, had been appointed who was rather sceptical of the *Human Rights Act* and had even published a book against it in the past.¹⁰⁶ Upon becoming Secretary for Justice, Mr. Raab launched a consultation as regards the Human Rights Act in which he introduced proposals that went radically beyond the report's recommendations. Those included: a repeal of the interpretation duty for judges under section 3; the removal of section 2; the introduction of a 'permission stage' for human rights claims whereby an individual would have to prove a 'significant disadvantage' before bringing a human rights claim; and reforms regarding the application of the right to family life enshrined in Article 8 ECHR to foreign offenders.¹⁰⁷

The government's Bill based on this consultation, known as the Bill of Rights Bill, repeals the *Human Rights Act* 1998 and replaces it with a new Bill of Rights. Next to the proposed repeal of section 3 and the removal of section 2, the Bill introduced a prohibition on judges recognising any new positive obligations on public authorities; a restriction on the extra-territorial application of the Bill of Rights; the duty to ignore interim measures issued by the European Court of Human Rights; and a prohibition on British judges to interpret ECHR rights in a more expansive way than the European Court of Human Rights.¹⁰⁸

At the time of writing, the future of the Bill of Rights Bill remains uncertain. The Bill awaits its second reading in the House of Commons but no date has yet been fixed. Rishi Sunak has deprioritised the Bill for now but it is not officially been abandoned.¹⁰⁹

VII. Civil service reforms and a general political malaise reflected in the relationships between the civil servants and their political superiors

The UK civil service is a major arena for political conflict between the government and civil servants. Over time, ministers have sought to exert greater direct control over the most senior civil servants. The last couple of years have seen a number of resignations by senior civil servants due to tensions with their political masters.¹¹⁰ In 2022, the Independent Adviser on Ministerial Interests resigned from his role, publicly venting his frustration at the impossible position the Prime Minister had put him in when it came to the respect of the Ministerial Code during Partygate.¹¹¹

This conflict at the top level is interlinked with a number of attempts to reform the civ-

106 Raab, D., *The Assault on Liberty: What went wrongs with rights*, 2009, Fourth Estate.

107 Ministry of Justice, "Human Rights Act reform: A Modern Bill of Rights – A consultation to reform the Human Rights Act 1998", Dec. 2021. Available at: https://consult.justice.gov.uk/human-rights/human-rights-act-reform/supporting_documents/humanrightsreformconsultation.pdf.

108 Bill of Rights Bill. Available at: <https://bills.parliament.uk/bills/3227>.

109 Allegretti, A., "Sunak's next U-turn may be to ditch Raab's bill of rights", *The Guardian*, 8 Dec. 2022. Available at: <https://www.theguardian.com/law/2022/dec/08/rishi-sunak-next-u-turn-may-be-to-ditch-dominic-raab-bill-of-rights>.

110 For a number of examples, see Marsons, L. and Marique, Y., "The politicisation of the UK civil service: causes, manifestations, and evolutions", *Revista Catalana de Dret Públic* 2022, vol. 65, pp. 93-111. Available at: <https://doi.org/10.2436/rcdp.i65.2022.3879>.

111 See the official resignation letter following a painful parliamentary quizzing: <https://www.gov.uk/government/publications/correspondence-from-lord-geidt-and-the-prime-ministers-response>.

il service over the years. The latest such attempt includes Boris Johnson's plans to reduce the home civil service by 91,000 positions, bringing numbers down to 2016 levels.¹¹² In July 2022, the government announced a review of civil service governance to be chaired by Lord Maude, a former Conservative Cabinet Office Minister.¹¹³ In October 2022, the National Audit Office published a report on leadership development in the UK Civil Service.¹¹⁴ The report outlined reforms which are currently implemented by the Cabinet Office, including the Government Skills and Curriculum Unit (GSCU) which has developed a single curriculum for civil servants based on five strands: public administration, working in government, leading and managing, specialist skills and domain knowledge.

VIII. Public contracts

In the area of public procurement and public contracts, 2022 was a very busy and eventful year in the UK. In particular, there were several important cases regarding the government's approach to procurement during the Covid-19 pandemic and crucial insights into the government's intended post-Brexit procurement regime.

One series of cases is that initiated by the Good Law Project, a non-profit-campaign group. Based on crowdfunding,¹¹⁵ this group initiated a number of judicial challenges¹¹⁶ against contracts awarded during the first wave of the Covid-19 pandemic. One of these challenges was directed against the VIP lane organised to outsource equipment during the Covid-19, as described in section II.B above. The case concerned the procurement of over thirty-two billion items of PPE, with a total value of £14 billion, purchased through more than one thousand directly negotiated and awarded contracts using the negotiated procedure without prior publication (as provided in the *Public Contract Regulations 2015*). This VIP lane triggered political concerns, but here we turn to the judicial challenges against this practice.

The High Court¹¹⁷ held that the 'VIP Lane' established by the government to receive offers of personal protective equipment and medical devices from the onset of the pandemic in March 2020 breached the obligations of equal treatment and transparency on contracting authorities. The VIP lane relied on the negotiated procedure without prior negotiation, with special support granted to prospective contractors by government of-

112 Lee, J. and Rhoden-Paul, A., "Boris Johnson wants to cut up to 91,000 civil service jobs", *BBC*, 13 May 2022.

113 Cabinet Office, *Lord Maude to lead review into Civil Service governance and accountability*, 27 July 2022.

114 National Audit Office, *Leadership development in the civil service (2022-23 HC 798)*.

115 This practice is used in the UK to address the problems of financial access to the courts: Guy, S., 'Mobilising the market: an empirical analysis of crowdfunding for judicial review litigation' *Modern Law Review* 2023, vol. 86, issue 2, pp. 331-363, first published: 3 Nov. 2022.

116 Eg.: *R (on the application of the Good Law Project) v Minister for the Cabinet Office [2022] EWCA Civ 21* and *R (on the application of the Good Law Project and another) v The Secretary of State for Health and Social Care [2022] EWHC 46 (TCC)*; *R. (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care [2021] EWHC 2595 (TCC)*; [2021] 9 WLUK 352 (QBD (TCC)).

117 *R. (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care [2022] EWHC 46 (TCC)*; [2022] P.T.S.R. 644; [2022] 1 WLUK 41 (QBD (TCC)). Henty, P., "Application of the equal treatment and transparency principles to negotiated procedures without prior publication under the Public Contracts Regulations 2015: *R. (Good Law Project and Every Doctor) v Secretary of State for Health and Social Care*", *Public Procurement Law Review (PPLR)* NA92-NA100.

officials and high-ranking individuals, such as MPs, government officials and senior officials. Regulation 18 of the *Public Contracts Regulations* 2015 imposes several obligations of equal treatment and transparency on contracting authorities. To that effect contracting authorities are to treat economic operators without discrimination, act in a transparent and proportionate manner and should not artificially narrow competition by designing procurement with the intention of unduly favouring or disadvantaging certain economic operators. This system is a remainder of European law in that it is based on the Treaty on the Functioning of the European Union (TFEU) and the EU procurement directives.

This VIP lane system – or the use of the negotiated procedure without prior notification – was not unlawful in itself,¹¹⁸ as the circumstances linked to Covid-19 (emergency, need to supply quickly important lacking equipment) justified relying on this procedure. However, the operation of the VIP lane resulted in preferential treatment to suppliers who had been nominated by senior referrers. The VIP lane was better resourced and able to respond to offers more promptly than offers that were received by the regular procurement portal. Given the urgency of securing PPE, the speed with which an offer was considered and accepted improved the chances of securing a contract. This could have been objectively justified, but a senior referrer's endorsement was not one of the factors that constituted an objective justification. The operation of the VIP lane therefore constituted a breach of the principle of equal treatment. Campaigners also used the freedom of information request procedure in an attempt to infiltrate this opaque system. As no information was provided on commercial interests, it was challenged. It was found that in the absence of any evidence of wrongdoing, the balance between the reasons for withholding the information and the reasons for disclosing it was in favour of withholding it.¹¹⁹

Beyond these cases, the government has also initiated proposals to reform the procurement regulation following Brexit. Under the EU system – which follows the World Trade Organisation's Government Procurement Agreement (GPA) –, the UK had adopted a copy-paste approach¹²⁰ to the transposition of the EU procurement Directives 2014/23,¹²¹ 2014/24¹²² and 2014/25,¹²³ with only minor changes in the *Public Contracts Reg-*

118 It was also accepted that the procedure was 'strictly necessary' in *R (on the application of the Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21. Gough, K., Gilbert J. & Milne, A., 'Procurement in times of extreme urgency: *R. (Good Law Project) v Minister for the Cabinet Office*', *PPLR* 2022, NA86-NA91.

119 *Greenwood v Information Commissioner* [2022] UKFTT 333 (GRC); [2022] 9 WLUK 108 (FTT (GRC)).

120 For this approach in the transposition of the 2014 Directives: Henty, P., 'Implementation of the EU Public Procurement Directives in the UK: the Public Contracts Regulations 2015', *PPLR* 2015, NA74-NA80; Sanchez-Graells, A., 'The copy-out of Directive 2014/24/EU in the UK and its limited revision despite the imminence of Brexit', *PPLR* 2019, pp. 186-200. This approach changed slightly in 2015 when the Public Contracts Regulations 2015 departed from the minimum transposition of the 2014 EU procurement directives to include a few additional obligations for contracting authorities: Arrowsmith, S. & Smith, S., 'The 'Lord Young' reforms on transparency of information and selection of firms to be invited to tender under the Public Contracts Regulations 2015: A practical analysis of the legal provisions', *PPLR* 2018, pp. 75-95.

121 Dir. (EU) n° 2014/23/EU, 26 Feb. 2014, of the European Parliament and of the Council on the award of concession contracts OJ L 94, 28.3.2014, pp. 1-64.

122 Dir. (EU) n° 2014/24/EU, 26 Feb. 2014, of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC OJ L 94, 28.3.2014, pp. 65-242.

123 Dir. (EU) n° 2014/25/EU, 26 Feb. 2014, of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC OJ L 94,

ulations 2015, the *Utilities Contracts Regulations* 2016, the *Concession Contracts Regulations* 2016, and a part of procurement also regulated in the *Defence and Security Public Contracts Regulations* 2011. Upon leaving the EU,¹²⁴ the UK became an independent GPA member on 1st January 2021, which means that it needs to respect the obligations resulting from this international instrument, including the principles of non-discrimination, transparency and procedural fairness.¹²⁵ Within the limits of the GPA,¹²⁶ the UK Government seeks to deliver its Brexit promises, especially in terms of cutting red-tape, unleashing innovation¹²⁷ and ‘Buy[ing] British’.¹²⁸

In 2020, the Government launched a Green Paper *Transforming public procurement*¹²⁹ with the purpose of simplifying procurement. The latter relied on six central principles: public good; value for money; transparency; integrity; fair treatment of suppliers; and non-discrimination.¹³⁰ The results of this consultation¹³¹ showed significant support for these principles. One point highlighted by commentators was that the Government intended the *Bill* to be extensively supplemented by guidance, models, templates, and case studies prepared by the executive to explain and interpret the statutes.¹³² However, case law has repeatedly established that public bodies must adhere to guidance or provide good reasons for deviating from them,¹³³ making the quality of these soft law instruments extremely relevant for day to day practice.¹³⁴ In addition, there is a recurring issue as to which material needs to be included in primary legislation as ‘disguised legislation’ appears in tertiary legislation (such as guidance) too frequently according to the House of Lords.¹³⁵

28.3.2014, pp. 243–374.

124 *The Public Procurement (Amendment etc) (EU Exit) Regulations 2020*, SI 2020/1319 provides for an amended continuation of the EU regulation post-Brexit but the EU regulations for contracts below the thresholds did not continue to apply (*Adferiad Recovery Ltd v Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC).)

125 Specific Annexes apply to various GPA Members identifying the entities obligated, the scope of their obligations and the thresholds of the procurement they apply to – see here: https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm.

126 Telles P. & Sanchez-Graells, A., ‘Examining Brexit Through the GPA’s Lens: What Next for UK Public Procurement Reform?’ *Public Contract Law Journal* 2017, vol. 47, issue 1, pp. 1–33; Sanchez-Graells, A., ‘The growing thicket of multi-layered procurement liberalisation between WTO GPA parties, as evidenced in post-Brexit UK’, *Legal Issues of Economic Integration* 2022, vol. 49, n° 3, pp. 247–268.

127 *Conservative Manifesto 2019*, p. 40. Available at: <https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>.

128 *Ibid.*, pp. 42–43.

129 Cabinet Office, ‘Transforming public procurement’, Dec. 2020, CP 353. Available at: <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement>.

130 Cabinet Office, ‘Transforming public procurement’, Dec. 2020, CP 353, para. 27.

131 Cabinet Office, ‘Transforming public procurement: Government response to consultation’, Dec. 2021, CP 556.

132 Arrowsmith, S., ‘Transforming public procurement law after Brexit: some reflections on the Government’s Green Paper’, *PPLR* 2021, pp. 103–123; Arrowsmith S., ‘Reimagining public procurement law: proposals for post-Brexit reform’ *Public Law* 2021, pp. 69–87.

133 *Good Law Project Ltd v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC).

134 Arrowsmith, S., ‘Extended editorial: transforming public procurement in the UK: analysis of the Government’s response to its Green Paper consultation’, *PPLR* 2022, pp. 45–75 & 47–48.

135 Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament* (2021–22 HL 105); Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power*

A *Procurement Bill* was tabled in the House of Lords on 11 May 2022.¹³⁶ Following comments made during the consultation process,¹³⁷ a clear distinction is now made between ‘principles’ and ‘objectives’. Key procurement principles such as non-discrimination and equal treatment – which are key principles in the EU system¹³⁸ – are included in the Bill. Rephrasing the objectives mentioned in the *Green Paper*, the Bill now lists four objectives: value for money; maximising public benefit; transparency;¹³⁹ and integrity. The government’s main objectives are the following:

- to speed up and simplify public procurement processes
- to place value for money at the heart of procurement
- to create greater opportunities for small businesses and social enterprises to innovate public service delivery.¹⁴⁰

According to the Government, this reform will remove 350 existing rules derived from the EU, hence promoting innovation through simplification. It will set up ‘a single digital platform for suppliers to register their details that can be used for all bids, while a single central transparency platform will allow suppliers to see all opportunities in one place’. Such a platform will help SMEs get prompt payment ‘on a much broader range of contracts’.¹⁴¹ Other changes provide for public procurement to be restricted to UK suppliers below certain thresholds so that the government can continue to pursue its employment policies. In addition, the automatic suspension of the procurement and the debarment system are to be adapted.¹⁴² The Bill applies to Wales, England, and Northern Ireland but not to Scotland.¹⁴³

Some of the changes – such as the payment of procurement invoices within 30 days – are definitively good news for contractors, and the e-voicing system that is championed will bring more clarity and recording to the procurement.¹⁴⁴ Early payment has been a long-standing issue in procurement in the UK. However, the claim that the system will be SME-friendly needs to be taken with a pinch of salt. It depends whether SMEs will be the direct contractors of the public authorities, and thus on the overall success of the Bill once adopted. If the main contractor is a major enterprise, it will be paid within 30 days, but the sub-contractor will only be paid subsequently.

between Parliament and the Executive (2021-22 HL 106).

136 Available at: <https://publications.parliament.uk/pa/bills/lbill/58-03/004/5803004en01.htm>.

137 Arrowsmith, S. (2022), ‘Extended editorial: transforming public procurement in the UK’, op. cit., p. 49.

138 De la Rosa, S. & Valcarcel Fernandez, P. (eds.), *Les principes des contrats publics en Europe / Principles of public contracts in Europe*, 2022, Brussels, Bruylant.

139 For a detailed analysis of this principle under the existing system, see Butler, L., ‘Transforming public procurement in the United Kingdom: regulating for open and transparent contracting’, *PPLR* 2022, pp. 120–169.

140 Coleman, C., *Procurement Bill* [HL] HL Bill 4 of 2022–23, Library Briefings, 20 May 2022.

141 *Ibid.*, p. 2.

142 See *Procurement Bill*, clauses 56-61; Hawley, S., ‘What Makes a Good Debarment Regime? Keeping Corrupt and Fraudulent Companies Out of Post-Brexit Public Procurement’ *PPLR* 2021, p. 124.

143 House of Commons Public Administration and Constitutional Affairs Committee, ‘Oral evidence: Common frameworks’, 22 March 2022 (2021-22 HC 1138), Q6 [Jacob Rees-Mogg].

144 Sanchez-Graells, A., Initial Comments on the UK’s Procurement Bill: A Lukewarm Assessment, 19 May 2022. Available at: <https://ssrn.com/abstract=4114141> or <http://dx.doi.org/10.2139/ssrn.4114141>.

Other aspects of the Bill were viewed with caution by commentators. First, it is not certain that with its more than hundred clauses and eleven schedules, and its sometimes uncertain application to utilities, concessions, defence, health care and local government,¹⁴⁵ it will be as easy as the government believes.¹⁴⁶ Secondly, the reforms were an opportunity to push for more digitalisation of the procurement system but this has not been done.¹⁴⁷ Thirdly, as previously discussed, obtaining the suspension of procurement has been problematic. While the consultation had suggested that the test used to award the suspension would be made more procurement specific, the Bill did not seem to have done so.¹⁴⁸ Fourthly, the remedy of ‘ineffectiveness’ was not included in the consultation process, and comments on the consultation indicated that pre-contractual remedies should take precedence over post-contractual remedies.¹⁴⁹ The Bill changed the name of the remedy of ‘ineffectiveness’ to ‘setting aside’ as well as the ground for this remedy. The Bill also provides that the remedy is to be available in case of unlawful contractual modifications. It should also be more accessible, although the Bill introduces discretion as a legitimate exception to the remedy. However, no ineffectiveness remedy had ever been granted in the UK,¹⁵⁰ meaning that some ‘improvements’ on the existing system will necessarily be ‘unchartered territory’.¹⁵¹ A major critique of the Bill relates to this last point, stating that the proposed system under the *Procurement Bill* will be unnecessarily more complicated than the existing system.¹⁵²

IX. Looking to the future

According to consistent opinion polling, there is a strong chance that the Conservative Party, after twelve years in government, will lose the next general election, with the centre-left Labour Party likely to take office. Sir Keir Starmer, a former Director of Public Prosecutions and human rights lawyer, is the Labour Party leader and is likely to be the next British Prime Minister. In 2022, the Labour Party has announced or suggested a number of major constitutional reforms should they be elected into government.

Amongst others, the Party’s programme would foresee a major reform of the House of Lords. The appointed and partly hereditary second chamber of the Westminster Parliament would thereby be replaced with a Senate of Nations and Regions. Currently, the House of Commons – the elected chamber of Members of Parliament – has primacy in that the House of Lords cannot vote on money matters related to tax and spend-

145 Arrowsmith, S. (2022), ‘Extended editorial: transforming public procurement in the UK’, op. cit., p. 56.

146 Though it will probably be a bit simpler than the EU system according to Arrowsmith, S. (Ibid), but the author commented on the Consultation response, not the bill. Add. Sanchez-Graells, A., ‘The UK’s Green Paper on Post-Brexit Public Procurement Reform: Transformation or Overcomplication?’, *EPPPL* 2021, pp. 4-18.

147 Sanchez-Graells, A. (2022), ‘Initial Comments on the UK’s Procurement Bill’, op. cit., p. 4.

148 Coleman, C. (2022), *Procurement Bill*, op. cit., pp. 27–28, reporting Eversheds Sutherland’s comments on the Bill.

149 Christidis, A., ‘What happened to the remedy of ineffectiveness? It was “set aside” - the reform of post-contractual remedies in public contracts in the United Kingdom’, *PPLR* 2023, pp. 44–62.

150 A 2022 case dealt with the ineffectiveness remedy, but the judge decided not to grant it on public interest grounds: *Consultant Connect Ltd v NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board* [2022] EWHC 2037 (TCC); [2022] 7 WLUK 466 (QBD (TCC)).

151 Ibid, p. 49.

152 Ibid, p. 60.

ing. The Commons may in certain circumstances, insist that bills it approves become law without the consent of the Lords. This fundamental legal relationship would not change, but according to some commentators, the very fact that the Senate would be elected would give it a democratic legitimacy that the Lords do not possess and would alter the political and constitutional balance between the two chambers.¹⁵³

It is interesting to note that former Labour Prime Minister, Gordon Brown, was asked to produce a report on constitutional change in the modern UK. Titled *A New Britain: Renewing Our Democracy and Rebuilding Our Economy*, the report recommends comprehensive new devolution to nations, regions and local authorities of the UK, as well as a constitutionalisation of social and economic rights.¹⁵⁴ None of these plans are certain and all depend on the outcome of the next British general election. However, they are legal entrenchments not normally seen in the UK, and hence worth keeping an eye on.

153 Sergeant, J., "Labour's proposals for a reformed House of Lords need more work", Institute for Government, 22 Nov. 2022. Available at: <https://www.instituteforgovernment.org.uk/blog/labours-proposals-reformed-house-lords>.

154 McHarg, A., "The future of the territorial constitution under Labour: The report of the Commission on the UK's Future", UK Constitutional Law Association, 8 Dec. 2022. Available at: <https://ukconstitutionallaw.org/2022/12/08/aileen-mcharg-the-future-of-the-territorial-constitution-under-labour-the-report-of-the-commission-on-the-uks-future/>.