



UK IN A
CHANGING
EUROPE

BREXIT AND BEYOND:

GOVERNMENT & LAW
AND EXTERNAL RELATIONS

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THE CONSTITUTION

Joe Tomlinson

WHERE HAVE WE COME FROM?

In most states, the basic rules for the exercise of political power are written down in a constitutional text and assigned some fundamental status above other laws. In the UK they are not. The British constitution has traditionally emphasised the sovereignty of Parliament, allowing it to make or unmake any law. This authority has been exercised over the centuries to generate legal frameworks that change the shape of government and provide rules which constrain it. But the fundamental character of the constitution is such that Parliament remains central and, as a result, more emphasis is placed on political controls than legal rules.

Brexit exerted great pressure on the constitution. Governments usually have a majority and can thus exercise control of Parliament and the laws it makes, unless backbenchers rebel. The Brexit referendum result, however, opened up new political divisions between and within parties. For much of the time since the referendum, the Government had no working majority on the key policy questions around Brexit. The various withdrawal processes were time-limited, often forcing confrontations. All of this was underpinned by a national referendum result that was the opposite of what most MPs had hoped for: direct democracy proving awkward in a system of representative democracy. At the same time, the complexity of the EU/UK relationship meant that Parliament was presented with a string of questions that were legally, institutionally, and politically difficult. This all generated a sense of Parliament having extensive constitutional authority but not being able to ‘get Brexit done.’

Many political actors came to think that their cause was so important that any lawful action was justified, no matter how constitutionally problematic: constitutional hardball in action. From long-serving MPs being quickly removed from parties for failing to follow the whip to a Lord Chancellor being silent in the face of three High Court judges being described as ‘enemies of the people’, the norms of our constitution were tested. At times, political strategies even strayed beyond the law. The high-water mark came when Boris Johnson prorogued Parliament — a move which was, within days, ruled unlawful by the Supreme Court.

WHERE ARE WE NOW?

By late 2020 and with a Conservative majority in Parliament, our constitution is still feeling the effects of the Government’s continuing hardball tactics. The UK Internal Market Bill, proposing egregious violations of basic rule of law principles, is one example. Another is how the Government twice breached the Sewel convention — under which the UK Parliament does not normally pass legislation on devolved matters without the consent of the institutions in Edinburgh, Cardiff and Belfast.

Beyond Brexit, the 2019 Conservative manifesto pledged ‘to look at the broader aspects of our constitution’ and, within their first year of office, establish a ‘Constitution, Democracy & Rights Commission.’ There are rumours that the Commission has been shelved. Yet, important changes are occurring. Perhaps the most obvious recent example is the Independent Review of Administrative

Law, to consider changes to judicial review—the process through which challenges to the legality of government decisions can be brought. The terms of reference for the Review are skewed towards considering restricting access to the courts and curtailing the legal grounds for challenge — underlined by a Call for Evidence principally interested in hearing Government officials’ views on the process. The Lord Chancellor has now set up a similar review of the Human Rights Act (see the discussion by Conor Gearty in this volume). Meanwhile, various Bills moving through Parliament include provisions that are hostile to the role of the courts. The Draft Fixed-term Parliaments Act (Repeal) Bill contains an unnecessary but constitutionally provocative provision excluding the courts from reviewing certain decisions.

WHERE ARE WE HEADING?

From the future of devolution to reform of the Human Rights Act, the list of specific issues on the constitutional reform agenda is vast. Politics, society, and the economy can change rapidly and, if recent years have taught us anything, it is that grand predictions are unwise. But we leave this period not just with economic and social challenges, but with a constitution at risk of looking unfit for purpose. In such an environment, it is likely that many will ask if the time has come for fundamental constitutional reform.

The Brexit process will eventually end, but a critical question is whether the constitutional hardball tactics that accelerated due to Brexit will become a routine feature of our political culture. There are already signs that there has been a spill-over. A clear example is the refusal of the Home Secretary, Priti Patel, to resign in the face of a report establishing she bullied civil servants — a breach of the ministerial code. While the Prime Minister was within his authority to retain her, this episode, as one [commentator](#) put it, made the constitutional convention of ministerial responsibility appear as a convention of ministerial irresponsibility. This is not an isolated incident. Indeed, by the end of 2020, at least three Cabinet Ministers are still in office when, on earlier constitutional norms, they might have resigned.

If the proliferation of such conduct continues beyond Brexit, more doubts will likely arise about the wisdom of a constitutional system which emphasises political control and adherence to convention instead of legal rules. Calls for fundamental constitutional reform are unlikely to be far behind. As such, while there may be many specific issues on the constitutional reform agenda, the ultimate question will be whether our form of constitution can maintain its authority. For those who think it has lost its authority, the pathway of advocating for a more modern, law-based constitution — based on a central, written text — may seem attractive. However, that pathway brings many of its own challenges.

CABINET GOVERNMENT

Nicholas Allen

WHERE HAVE WE COME FROM?

Ahead of the 2016 referendum, David Cameron relaxed [collective responsibility](#), the convention that ministers must voice support and vote for government policy, and allowed ministers to campaign against the government's position of remaining in the EU. It was a necessary recognition of Conservative divisions. Theresa May, reinstated collective responsibility and, briefly, the outward appearance of cabinet unity. But that vanished along with her party's parliamentary majority in the 2017 General Election. Thereafter, 'collegiality', cabinet government's chief organising principle, was honoured more in the breach than the observance.

Brexit contributed to a [record number](#) of resignations during May's premiership. No fewer than 22 ministers resigned, five from cabinet-level posts, over the Government's Brexit policy. Ministerial indiscipline became endemic. Supposedly private cabinet disagreements were [played out in public](#). Even the rule that ministers must vote for government policy eventually broke down. A day after MPs defeated the Withdrawal Agreement for a second time in March 2019, 13 ministers [abstained](#) on a three-line whip to vote against rejecting a no-deal Brexit. None resigned or was dismissed, the usual sanction. In a rare media interview, May's chief whip, Julian Smith, described the period as 'the [worst example of cabinet ill-discipline](#) in British political history'.

WHERE WE ARE NOW?

Boris Johnson introduced a different style of government in the pursuit of 'getting Brexit done'. A [brutal reshuffle](#) and the appointment of an undistinguished but loyal and pro-Brexit cabinet restored ministerial discipline. [Another reshuffle](#), conducted in the wake of the triumphant December 2019 election, weeded out ministers who insisted on a degree of independence, notably Sajid Javid, the Chancellor of the Exchequer, who objected to Downing Street's plans to appoint a joint team of economic advisers for Numbers 10 and 11.

Downing Street's reach was extended in other ways. Dominic Cummings, Johnson's senior special adviser, enjoyed and wielded [authority](#) over all special advisers, who usually reported to their ministers. Senior civil servants, including the Cabinet Secretary, [were purged](#). Plans were made to [centralise](#) government communications. In September 2020, senior Downing Street aides, including Cummings, took up [residence](#) in the Cabinet Office, increasing their ability to monitor and influence Government departments.

The Government's [response](#) to the coronavirus pandemic greatly exacerbated unease at these developments. The most common complaints were that Johnson was too tolerant of impropriety, that there were too many [U-turns](#), and that Downing Street was too detached from its parliamentary base. Cummings' decision to quit following an internal power struggle was hailed by some Conservative MPs as a [chance](#) to 'reset' government. Supportive commentators suggested it was time to decentralise power to departments, appoint [more competent](#) ministers and restore '[proper](#)' cabinet government.

WHERE ARE WE HEADING?

The character of cabinet government ultimately depends on how prime ministers and their principal advisers want it to operate, and whether they have the authority to make it operate that way. Theresa May's premiership illustrated how assertive ministers can undermine collegiality in the absence of prime ministerial authority. The first 18 months of Boris Johnson's premiership have illustrated how a dominant prime minister can undermine both collegiality and ministerial autonomy.

Johnson's disinclination to run cabinet as a genuine decision-making body is unlikely to change. The cabinet will remain, constitutionally, the most authoritative decision-making body in government, and its committees will continue to coordinate policy. It will also continue to serve as an important forum for sharing information, talking politics and potentially fashioning agreement. But in keeping [with long-term trends](#), most decisions will continue to be taken in other forums, and policy-making influence will continue to be concentrated at the centre.

Johnson's general orientation towards leadership is also unlikely to change. His laziness and preference for delegating is [well established](#). As London mayor, he relied on trusted deputies. As Prime Minister, he has relied on a number of loyal aides and ministers. The organisation of the [cabinet-committee system](#) reflects this style. Johnson chairs a number of committees that focus on 'strategy' but leaves others, notably Michael Gove, to chair their corresponding 'implementation' committees. That is unlikely to change. Johnson's choice of aides, though, will be crucial. Cummings' successor(s) will determine not only the effectiveness of the Downing Street machine but also wider trust and confidence in it.

Johnson's authority and ability to make the system operate in the way he wants, like all prime ministers', [is highly contingent](#). Ministers grow more confident and assertive with experience. Johnson's colleagues have already regained [authority](#) over their special advisers, and they are likely to become more assertive as economic conditions force them to fight hard for departmental budgets. Downing Street may hope that another cabinet reshuffle will reaffirm Johnson's primacy, but making space for new talent risks adding to the number of disenchanted backbenchers.

Ministers will also be aware that Johnson's public standing has fallen from its post-election heights and may fall further. Public consciousness of government blunders and impropriety, as well as prime ministerial gaffes tends to accumulate. Johnson can claim a personal victory in securing a post-Brexit trade deal with the EU, but the financial, employment and public-health costs of the pandemic are likely to sour the public mood. His authority could collapse if ministers come to regard him as an electoral liability and see a better prospect. Indeed, there is already much [speculation](#) about Rishi Sunak's long-term ambitions.

Cabinet government is ultimately party government. The outcome of the 2019 General Election and Britain's departure from the EU removed the immediate fault line that created the anarchy of May's premiership. But Tory MPs have learned a valuable lesson from the European Research Group's success in promoting a hard Brexit: organisation means influence. 'Red-wall' Conservatives are [finding their voice](#), while the pandemic has exposed [tensions](#) between those with more and less libertarian instincts. Cabinet government ultimately rests on the unity and discipline of the governing party, and its willingness to be led. The latter already seems to be in short supply.

THE CIVIL SERVICE

Jill Rutter

WHERE HAVE WE COME FROM?

On 24 June 2016, civil servants woke confronting their biggest challenge (at least until Covid-19 struck) since the second world war — the need to disentangle the UK from its 47-year membership of the EU and to establish a new relationship with it. What is more, it faced the prospect of doing so with a new prime minister possessing what turned out to be a contested mandate as to what Brexit meant.

There were immediate changes: new departments created, Brexit teams established in all key departments; a handbrake turn in the civil service headcount reduction underway since 2010. Civil servants embarked on the triple task of supporting the Government as it negotiated with the EU, legislated to prepare for non-membership and built the machinery to operate after Brexit. Taking back control — depending on the final shape of Brexit — meant developing new capacity to regulate and new capabilities, for example, to run an independent trade policy.

WHERE ARE WE NOW?

Four and a half years on, the civil service is bigger, with some 30,000 Brexit-related jobs created. It has become more agile and delivered some significant successes — not least the EU Settled Status scheme, for which four million EU/EEA citizens have already registered.

However, it has been battered not just by four years of Brexit preparations, which involved trying to navigate through the hopelessly divided May cabinet, but also by juggling the competing demands of finalising Brexit and trying to deal with a global pandemic in 2020. Either on its own would be a massive preoccupation. Departments moved Brexit staff to Covid-19 in March and then moved them back as they realised the Government was intent on ploughing on.

Meanwhile, the civil service has been battling a government led by Vote Leave veterans who have always liked to portray it as a bastion of Remain and in need of a serious overhaul. Individual relations at the top have frayed. A record number of top officials have been moved aside, including the Cabinet Secretary. One is suing his former Secretary of State for unfair dismissal.

WHERE ARE WE HEADING?

This year will mark the beginning of an extended test of the quality of those preparations, and civil servants will fear a blame game whenever the inevitable hiccups occur. The fallout of the summer exams fiasco has shown this to be a Government happy to pass the buck. Civil servants, and public servants more widely, will start to operate new systems; new regulators will spring into life and the border will work, somehow. Meanwhile, the new trade policy profession will see if it can finally land some big new trade deals. For many civil servants, this should be a year of opportunities.

The departure of Dominic Cummings may change the style of the central operation but it is not clear whether it will change the agenda on civil service reform. The official version of civil service reform was set out in Michael Gove's [speech](#) to Ditchley earlier in the year. It rehearsed some well-worn diagnoses and its prescriptions were pretty standard too: more commercial, data and digital skills, greater emphasis on delivery, incentives for civil servants to stay longer in post to reduce churn, and more dispersion to the regions to reduce metropolitan bias. His Cabinet Office colleague, Lord Agnew, has declared a war on consultants so civil servants can do more interesting work — despite the fact that Covid-19 and Brexit have both driven up dependence on consultants to [record levels](#). If the Government can make these reforms happen, it should be uncontroversial and indeed welcome.

But the reform agenda does not stop there. The 'hard rain' Dominic Cummings threatened seems much more personal. Earlier in the year, newspapers were briefed that there was a 's**tlist' of permanent secretaries, and three out of four of those named have been summarily despatched. Sir Philip Rutnam resigning from the Home Office, and Sir Simon McDonald and Sir Mark Sedwill standing down, makes clear the Government no longer wants their services. Intriguingly, the fourth name on that list, Treasury Permanent Secretary Sir Tom Scholar, seems to have rehabilitated himself through his department's successful early response to Covid-19. He is now part of the triumvirate leading the civil service with new Cabinet Secretary Simon Case and Chief Operating Officer Alex Chisholm.

And it is that new leadership that will now be facing its biggest test. Case was picked out of relative obscurity and even he admits that he lacks the experience of many of his predecessors. He needs to show ministers that the civil service is capable, not just of helping the country through Brexit but also helping them get on top of the pandemic. The danger is that the willingness of ministers to dispense with the services of top mandarins has a chilling effect on the advice they are prepared to give.

Case also faces another big test. He needs to show the 400,000 civil servants he now leads that he is prepared to stand up to ministers when they push the limits of their powers. He will face increasing numbers of challenges over the way in which ministers are approaching ad hoc appointments and handing out contracts. 2021 will show whether there is real steam behind the Government's civil service reform agenda and whether the civil service values of integrity, objectivity, honesty, impartiality can survive the promised onslaught.

And Whitehall will also have to put flesh on the Government's levelling up and wider reform agenda, help the Government make a success of COP26 and set the UK on a path to net zero, and continue to try to manage relations with the devolved Governments. All the while, the new UK-EU Trade and Cooperation Agreement means that time and effort will need to be put into making new structures work, ensuring all levels of government understand their new obligations and help ministers understand how and how far they can exercise their regained powers. The risk is that EU expertise — already a niche interest in Whitehall — will diminish further as the UK Government seeks to put the 47 years of UK membership behind it.

PUBLIC BODIES

Felicity Matthews

WHERE HAVE WE COME FROM?

For more than a decade, since David Cameron first pledged a ‘bonfire of the quangos’, the prevailing orthodoxy has been to limit the growth of the delegated state. However, following the transition period, arm’s-length public bodies will assume a diverse range of policymaking and regulatory responsibilities previously exercised by their EU counterparts. In addition, the scope for policy divergence will provide opportunities for public bodies to take on new functions or extend into new areas.

WHERE ARE WE NOW?

Four new public bodies have been announced by the UK Government to date. The [Office for Environmental Protection](#) (OEP) will be formally established following the passage of the [Environment Bill](#), and the process to [appoint its inaugural chair](#) was launched in August 2020. The OEP will oversee environmental performance in England and Northern Ireland. Scotland will set up its own body, and the Welsh Government has yet to finalise its plans.

The Trade Remedies Authority (TRA) will protect UK industries against unfair trading practices. It currently exists in ‘[shadow form](#)’ as the Trades Remedies Investigations Directorate within the Department for International Trade whilst the [Trade Bill](#) passes through Parliament.

The [Independent Monitoring Authority \(IMA\)](#) will oversee the way in which the UK fulfils its obligations to protect the rights of EU and EEA EFTA citizens. Its chair was only nominated in November 2020. It will need to move quickly to establish itself in the public mind.

Most recently, the Government was forced to concede that the temporary [Trade and Agriculture Commission](#) would be put on a statutory basis, to scrutinise future trade agreements for their impact on farming and animal welfare.

In addition, existing public bodies will [absorb](#) many of the functions that return to the UK. Responsibility for nuclear safeguards, for example, will pass from Euratom to the Office for Nuclear Regulation; and responsibility for aviation safety will pass from the EU Aviation Safety Agency to the Civil Aviation Authority.

Other public bodies will plug the ‘regulatory gaps’ that have become apparent during the transition period. The passage of the [Medicines and Medical Devices Bill](#), for example, will equip the Medicines and Healthcare Products Regulatory Agency and the Veterinary Medicines Directorate with greater powers of regulation and enforcement.

In terms of divergence, many of the functions transferred back to the UK relate to devolved matters, in particular agriculture and the environment. As mentioned above, new bodies are likely to be established to oversee environmental governance; and the Scottish Government has set out its [plans](#) to establish the Environmental Standards Scotland (ESS) watchdog. In addition, existing public

bodies, such as the [Scottish Environment Protection Agency](#) and [Natural Resource Wales](#), will be required to respond to any future divergence in regulatory standards that occur within the UK.

WHERE ARE WE HEADING?

As this brief overview suggests, public bodies will play a vital role in the post-transition policy landscape. They will be required to develop and deepen their expertise in areas where EU agencies had previously taken the lead.

However, preparedness varies significantly. Few of the new public bodies were fully ready for business on 1 January 2021. Delays to the passage of their establishing legislation has left the OEP and TRA without statutory authority. Moreover, whilst the European Union (Withdrawal Agreement) Act 2020 equips the IMA with statutory authority, it has not articulated its strategy for protecting citizens' rights, resulting in a significant governance gap in a highly sensitive policy area.

The ability of existing bodies to prepare has depended upon the degree of clarity and extent of forewarning about their post-transition remit. Whereas the Office for Nuclear Regulation had over two years to prepare for the UK's departure from Euratom, the decision to leave the EU Aviation Safety Agency was formally announced in March 2020. Uncertainty about the shape of future trade relationships has also affected bodies responsible for regulating manufacturing and commerce.

There are also critical differences in the wider operating environments of EU agencies and UK public bodies, which may affect the capacity of the latter to dispatch their newfound functions effectively. Whereas EU agencies have their own [legal identity](#) and are often set up for an indefinite period, the majority of UK public bodies are creatures of the Government. Even those that exist on a statutory footing are vulnerable to repeal or may be subject to regular review: the Trade and Agriculture Commission, for example, is subject to review every three years.

This has led to concerns that some public bodies will be insufficiently independent from the Government. Many environmental campaigners, for example, have argued that the OEP will lack bite because of its dependence on Defra for its budget and personnel; and the Environmental Audit Committee has [recommended](#) that Parliament should have statutory functions to 'set its budget, scrutinise its performance and oversee its governance.' Whilst the Government has [stated](#) that 'establishing the OEP as an emanation of Parliament is not necessary', it has promised additional safeguards to ensure the OEP's independence.

Parliament has also sought to gain a bigger say over appointments to the OEP and the IMA. The Environmental Audit Committee has [demanded](#) that Parliament have greater involvement in top-level appointments to the OEP, a call that has been echoed by the [Exiting the European Union Committee](#) in relation to the IMA. The Government has rejected those calls, although chairs of both will be subject to pre-appointment hearings by select committees.

Finally, public bodies will require adequate resources. However, although the UK will not have to contribute to EU agencies that it has left, it may prove [more expensive](#) to deliver these functions without the benefits of pooling resources. The delayed three-year [Comprehensive Spending Review](#) will provide sponsor departments with much greater clarity about the resources available to fund public bodies, but the longer-term financial implications of the response to the Covid-19 pandemic may mean that good news is thin on the ground.

DELEGATED LEGISLATION

Ruth Fox and Brigid Fowler

WHERE HAVE WE COME FROM?

To deliver Brexit the Government had to undertake the largest legislative exercise ever in the UK. The burden of this exercise was borne by the system of delegated legislation — via the delegation of powers to ministers in Acts of Parliament and then through the making of regulations (in the form of Statutory Instruments (SIs)), using the powers conferred in those Acts.

The Government had first to create a UK legal order that could operate independently of the EU — initially after ‘exit day’, and then, after the Withdrawal Agreement was secured, after the end of the transition period. The 2018 EU (Withdrawal) Act saved EU law as a new category of UK law, and then ministers used SIs to address ‘deficiencies’ in that body of ‘retained EU law’ to make it work in a UK-only context.

In parallel, ministers have legislated through a series of Acts in areas as varied as customs, sanctions, agriculture, fisheries and immigration, creating powers to provide for UK policy beyond the end of the transition period. Both the EU (Withdrawal Agreement) Act 2020 and EU (Future Relationship) Act 2020 also gave ministers extremely broad powers to implement the Withdrawal and future relationship treaties with the EU.

The nature of the Brexit process lent itself to the use of delegated legislation: there was a need to elaborate complex and technical detail, deploy flexibility and adaptability, and act quickly in times of crisis.

But the conjunction of some of the broadest, most constitutionally-important powers ever seen on the statute book with inadequate scrutiny of the ways these powers might be exercised has constituted a toxic mix for the balance of power between executive and legislature, driving a coach and horses through the core principle of accountability of Government to Parliament.

WHERE ARE WE NOW?

Most of the Brexit Acts and Bills still to be passed are ‘skeleton’ ones in which, in the [words](#) of three House of Lords select committee chairs, “broad delegated powers are sought in lieu of policy detail”. Such Bills are problematic, because Parliament is asked to approve powers without knowing how they might be used, and because the true impact of the provisions is unknown. The majority of the legislative content — both principle and policy — will be left to delegated legislation. But this legislation, in the form of SIs, will attract only limited parliamentary scrutiny, especially in the House of Commons.

By the end of 2020, ministers had laid around 960 Brexit-related SIs before Parliament. The powers in the various Brexit Acts will mean more are laid in 2021 and beyond. These SIs are not amendable. Many are subject to the ‘negative procedure’ and so do not require active parliamentary approval; most of these are ‘made’ — that is, they are already ‘laws’ — before they are laid before Parliament, and can be brought into force before parliamentary scrutiny is complete. There is no

guarantee of a debate if an MP objects to a ‘negative’ SI, as the Government decides whether to allocate time for consideration. Most ‘affirmative’ SIs, which require active debate and approval, usually by both Houses, are considered in often-perfunctory meetings of delegated legislation committees, where MPs are appointed by the whips, which have no dedicated parliamentary staff, and where decision takes place on the basis of a pointless ‘consideration’ motion before the formality of approval by the whole House.

Despite the exceptional nature of the Brexit legislative exercise, only one limited reform of this delegated legislation scrutiny process has been secured. The European Statutory Instruments Committee (ESIC) can review negative SIs laid using powers in the EU (Withdrawal) Act 2018 and recommend they be upgraded to the affirmative procedure. It is a toothless advisory body bolted onto inadequate scrutiny procedures.

WHERE ARE WE HEADING?

In practice, coronavirus may have a greater impact than Brexit in pushing a sufficiently large number of MPs finally to demand reform of the process. Disquiet over the slew of lockdown and other coronavirus-related measures being implemented through SIs, often at very short notice, saw Conservative backbenchers threaten rebellion in the face of government by ‘diktat’. The combination of Brexit and coronavirus has also significantly raised media and public awareness of the inadequate and undemocratic nature of the system.

Now the transition has ended, some factors might be helpful for a delegated legislation scrutiny reform effort. As MPs move through 2021, the most acute phases of both Brexit and the pandemic will be over, potentially freeing up some parliamentary attention. The claim that the Government must act through SIs because it needs to make law quickly will fall away.

Most importantly, the scope of the post-Brexit policy making that the Government will be able to carry out through SIs is likely to be even more fully exposed, as the Government uses its new powers to develop the UK’s post-Brexit statute book. The ongoing use of SIs to enact legal divergence between Britain and Northern Ireland could be particularly controversial, as could their use to constrain the pursuit of policy choices by the Scottish and Welsh devolved administrations that differ from those of the UK Government.

However, its concession over the process for major lockdown SIs notwithstanding, the Government has shown no signs of wishing to pursue reform. Indeed, it appears to have a strongly majoritarian concept of Government, in which constraints on an administration with a House of Commons majority are largely to be resisted. The Government’s control of the Commons’ time, legislative agenda, and Standing Orders make it extraordinarily difficult to advance changes. The Opposition, with an eye on the prospect of forming a future Government, are content to criticise but not to advance reforms which may circumscribe their future legislative powers. And, despite Conservative backbenchers’ success in forcing minor concessions over lockdown SIs, there is little sign yet of the necessary coalition of MPs willing to devote significant political capital to a thoroughgoing reform of the delegated legislation system.

HENRY VIII POWERS

Alison Young

WHERE HAVE WE COME FROM?

When we think of ‘law,’ we normally think of Acts of Parliament. Statutes agreed to by the House of Commons, the House of Lords and the Monarch are the highest form of law in the UK.

‘Henry VIII powers’ potentially undermine legislation. They empower ministers to enact measures — delegated legislation — which can modify, amend or even repeal Acts of Parliament. Delegated legislation is subject to less democratic scrutiny than primary legislation which goes through multiple stages in the Commons and the Lords and can be amended. Most delegated legislation becomes law unless Parliament votes against it coming into force: the negative resolution procedure. Some delegated legislation requires Parliament to vote in favour of its provisions: the affirmative resolution procedure. As we have seen with the recent Health Protection Regulations to tackle the pandemic, delegated legislation may need only to be presented to Parliament, not even requiring a vote, and can even [come into force before](#) being shown to Parliament.

WHERE ARE WE NOW?

As their name suggests, Henry VIII powers are nothing new. However, governments have used them more often recently, arguing these powers are needed to deal with urgent issues, or when so much legislation is required that there is insufficient time for it to be enacted by Parliament by the primary route.

Henry VIII powers erode parliamentary sovereignty, as ministers can use them to override the will of Parliament. Whilst you might argue that this is unproblematic, as Parliament enacted legislation that included the power in the first place, they undermine democracy and parliamentary accountability. Even when Parliament has to approve delegated legislation, it only has a veto. It cannot propose amendments, and democratic scrutiny is reduced further if these measures are put through the negative resolution procedure. How can the Government be accountable to Parliament if ministers can overturn legislation without full parliamentary scrutiny?

The House of Commons has not voted against delegated legislation since 1979. When the House of Lords exercised its powers to delay voting on delegated legislation, this led to the Government initiating the [Strathclyde Review](#), which recommended that the House of Lords should only have the power to delay, not to veto, delegated legislation. Following criticism from the House of Commons [Public Administration and Constitutional Affairs Committee](#), the veto power of the Lords remains.

Recent legislation surrounding Brexit includes a plethora of Henry VIII clauses. The hastily enacted [European Union \(Future Relationship\) Act 2020](#) contains six specific Henry VIII powers, as does the [UK Internal Market Act 2020](#). The most controversial Henry VIII clause included in the original Internal Market Bill — the power to enact measures which contravened domestic and international law — was dropped by the Government. Section 56(2), however remains. This enables ministers to use any of the law-making powers found in the Act to modify legislation.

Some of these powers are incredibly broad. [Section 41](#) of the European Union (Withdrawal Agreement) Act 2020 empowers a minister to ‘make such provision as the minister considers appropriate in consequence of this Act’, including using this to overturn legislation enacted before transition ended on 31 December 2020. Section 31 of the European Union (Future Relationship) Act 2020 includes a power to make regulations a national authority considers appropriate to implement the Agreement, requiring only a negative resolution. Section 39 empowers a minister of the Crown to ‘make such provision as the minister considers appropriate in consequence of this Act’, including modifying legislation, although an affirmative resolution is required.

WHERE ARE WE HEADING?

This is a worrying direction of travel. In a [joint letter](#) written to the Minister for the Cabinet Office and the Leader of the House of Commons, the chairs of three House of Lords Select Committees remarked on how recent bills ‘have been extraordinary in terms of the extent to which they have permitted a shift of power from the legislature to the executive.’

There is some evidence of the Government responding to such parliamentary criticism. The original Agriculture Bill, for example, was widely criticised for its broad transfer of powers to the Government. The second Bill, which became the Agriculture Act 2020, responded to some of these criticisms, including ensuring that Henry VIII clauses were subject to the affirmative and not the negative resolution procedure.

In his [reply](#) to the joint letter, Jacob Rees-Mogg stated that he was ‘happy to consider’ communicating to Secretaries of State to encourage them to minimise the use of delegated powers. However, this was tempered by his expression of the need for the Government to rely on delegated powers, particularly in matters of urgency. In her [reply](#) to Jacob Rees-Mogg, Baroness Taylor, chair of the Constitution Committee, suggests that instructions could be issued to Parliamentary Counsel, who draft the bills, to ‘resist attempts by Government departments to include wide-ranging Henry VIII powers in bills’.

Could courts do more to restrict the use of these powers? The Supreme Court in [R \(Public Law Project\) v Lord Chancellor](#) stated that, when interpreting Henry VIII clauses, ‘the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature’s contemplation’.

It is hard to know how this cryptic wording applies in practice. However, it may be that, with a growing use of Henry VIII powers, courts will use [the prorogation case](#), in which the Supreme Court recognised parliamentary accountability as a fundamental constitutional principle. If Henry VIII powers are used to undermine key principles of the constitution, or make sweeping constitutional changes, courts are likely to quash them, being beyond the scope of the minister’s powers.

Henry VIII powers strengthen the Government and weaken Parliament. Their use should be restricted to when they are strictly necessary. They should never be subject to the negative resolution procedure. Moreover, Parliament should be able to amend as well approve delegated legislation modifying Acts of Parliament. Only time will tell whether, when the need for expedient legislation subsides, they will only be used as a last resort.

THE COURTS

Catherine Barnard

WHERE HAVE WE COME FROM?

The courts assumed a prominent role in the course of Brexit. Those who thought they were losing the political argument turned to the courts to fight their corner — the right to vote in the Brexit referendum, how to start the process for departure from the EEA and, most importantly, in [Miller I](#), whether an Act of Parliament was necessary before the Prime Minister could trigger Article 50. The Supreme Court said yes. The lower, Divisional Court had also said yes and the judges had their pictures emblazoned across the front pages of the [Daily Mail](#), and were described as ‘Enemies of the People’. This attack on the judges was one of the most extraordinary in modern times; the failure by the [Lord Chancellor](#), Liz Truss, or any Cabinet minister to fulfil their obligation to defend the independence of the judiciary only exacerbated profound concerns about how the rule of law was being undermined in the UK.

But this front page also served as a vivid reminder of the culture wars that Brexit had unleashed. It revealed the growing chasm between the ‘establishment’, on the one hand, and the ‘people’ on the other. With the Brexit vote, the people had defeated the establishment. According to the Daily Mail and many of its readers, the establishment, including the courts, now had to recognise where power lay.

The courts lack democratic legitimacy and they possess, in the famous words of US Justice [Felix Frankfurter](#), ‘neither purse nor sword’. Their legitimacy comes from upholding the rule of law, by being independent, and by deciding cases based on law and not politics.

This legitimacy was put to the test in [Cherry/Miller II](#) where the Supreme Court decided that the advice given by the Prime Minister to the Queen in August 2019, that Parliament should be prorogued for five weeks, was unlawful. The Court ruled that an unlimited power of prorogation was incompatible with the legal principle of Parliamentary sovereignty; and that a decision to prorogue Parliament was unlawful if the prorogation frustrated the ability of Parliament to carry out its functions supervising the executive. Lady Hale and Lord Reed, giving the unanimous judgment for the Court, were at pains to point out ‘the courts have the responsibility of upholding the values and principles of our constitution and making them effective. ... The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.’

WHERE ARE WE NOW?

There was an increasing sense in some quarters that the courts and Parliament were conspiring to block Brexit. On 15 November 2020 the Sunday Telegraph reported that Jacob Rees Mogg, the leader of the Commons, had privately accused the Supreme Court of a ‘constitutional coup’ following the *Cherry/Miller* ruling. In its election manifesto, there were hints that the Conservative Party wanted to look at a range of constitutional issues including the role of the courts and judicial review.

In July 2020 the Government established its ‘independent’ [review](#) of judicial review, chaired by Lord Faulks QC who had already gone on record to express his opposition to the decision in *Cherry/Miller*. It is likely that the Government will try to remove the power from the courts to decide what they see as political rather than legal cases.

For all the attacks on the courts, the Government will be heavily reliant on them to make the post-Brexit legal system work. The EU (Withdrawal) Act 2018, as amended, is a complex piece of legislation which both delivers Brexit (by turning off the European Communities Act 1972 which took the UK into the EU), implements the Withdrawal Agreement, and retains existing EU law. The courts (Supreme Court and the Court of Appeal) will also have the power to decide when to depart from pre-Brexit EU case law which would otherwise be binding on the judiciary. The courts will also have to interpret the much under-scrutinised EU (Future Relationship) Act 2020, passed in a day, implementing the UK-EU Trade and Cooperation Agreement (TCA), an agreement which bends over backwards to disassociate itself from EU law and thus not giving a role for the Court of Justice (except in respect of participation in programmes such as Horizon Europe).

In Northern Ireland, the picture is more complex still, with a multilevel legal arrangements, involving UK law, the Northern Ireland Protocol and parts of EU law, which the courts will have to make work. In Northern Ireland, the Court of Justice of the European Union will retain a continued role over matters relating to the Single Market for goods.

This is a reminder that, despite the protestations, the Court of Justice will still have a role play in UK domestic life. It may still be called upon to rule on whether the TCA is compatible with EU law. And, even the future case law of the Court of Justice will have an effect on UK courts: UK courts and tribunals ‘may have regard to anything done on or after [31 December 2020] by the European Court ... so far as it is relevant to any matter before the court or tribunal’.

Moreover, in the dispute resolution mechanism of the Withdrawal Agreement (but not in the TCA), disputes between the UK and EU which go to arbitration must ultimately be referred to the Court of Justice if a question of interpretation of EU law is at stake. References to the CJEU can also be made by English courts in matters concerning citizens’ rights for eight years after Brexit. The UK is not, after all, leaving the jurisdiction of the Court of Justice.

Finally, despite possible Government attempts to limit the more constitutional role of the UK courts, by clipping the wings of judicial review, the courts will ultimately have to hold the ring between the four nations of the United Kingdom, as the implications of the Internal Market Act 2020 are felt. English traders prosecuted in Scotland for not complying with new provisions of Scottish law, may — like the greengrocer Mr Thoburn trying to sell his fruit in imperial measurements, and not in metric as EU law required — find themselves caught up in a significant constitutional battle over the powers of the devolved administrations.

HUMAN RIGHTS

Conor Gearty

WHERE HAVE WE COME FROM?

The Human Rights Act has been caught in the Brexit crossfire, but has survived nonetheless. It may even outlive the passions that have done so much to undermine it. Enacted in 1998, the measure brought the rights to be found in the European Convention on Human Rights (by which the UK had long been bound) into force in domestic law. It also gave an advisory-type role within the local legal arena to the European Court of Human Rights in Strasbourg, whose job is to interpret the Convention for the 47 members of the Council of Europe.

In its early years, the Act was able to operate in relatively-benign circumstances. In the mid-2000s, the Eurosceptics who were to become advocates of Brexit turned on this other, human rights Europe as a proxy target for their real enemy, the EU. Their chance came in 2005 when a quintessentially awful applicant, a man (John Hirst) who had killed his landlady with an axe, managed to persuade the Strasbourg Court that prisoners (or at least some of them) were entitled under human rights law to the right to vote. Hirst used the Convention in a plausible way and the Strasbourg decision imposed merely an international law duty on the UK Government to implement it: the case did not directly impact on British law, nor did the Human Rights Act demand that it should. But the successful litigant was a prisoner and the jurisdiction European, and so the case was vulnerable on two scores to attack from those critical in principle of this Continental engagement with British law. There followed ten years of sniping that became so mainstream in Conservative Party circles that, when the then Home Secretary, Theresa May, came out against Brexit, she felt compelled to make hostile noises about human rights in general and the Strasbourg court in particular; indeed, she even promised that she would walk away from that court if given the chance.

WHERE ARE WE NOW?

She did get that opportunity, as Prime Minister, but didn't take it. The referendum vote in favour of Brexit may have (paradoxically) saved human rights: had the vote gone the other way, David Cameron might well have thrown the losers some red meat in the form of speedy repeal of the 1998 Act. After Brexit, the political bandwidth for negative energy about Strasbourg has quickly dissipated: even the prisoner voting case was quietly implemented by the Government, which when challenged about not acting on its human rights promises explained that, with so much Brexit-related activity going on, now was not the time to move on human rights. The Government has now accepted that human rights protection of some sort is required as part of the deal it has concluded with the EU.

WHERE ARE WE HEADING?

Quite apart from the inevitable European complications, there will be domestic obstacles to negotiate if any serious effort is made to repeal the Human Rights Act. Opposition can be expected from many parts of civil society that supported the original legislation. Labour may oppose the repeal of its legislation, not least because it is now led by a former human rights lawyer who may balk

at a tactical concession on this issue. Moreover, the UK Government will surely not want to pick unnecessary fights with Scotland, whose own Government has put human rights at the centre of many of its political initiatives. And then there is Northern Ireland, where both the incoming US administration of President Biden and the government of Ireland appear implacably opposed to any weakening of the Good Friday Agreement and have taken the view that this would be the effect of the removal of human rights protection in the Province.

The referendum result was in part fuelled by a desire 'to take back control' of the UK's domestic laws, and the spirit behind that sentiment has now embraced the idea of greater control over an 'unaccountable' domestic judiciary (see the section on courts by Catherine Barnard). There is a review into judicial power in progress with another recently set up on human rights. Might these lead to a greater restriction on domestic human rights adjudication, and if so what will this entail for the legitimacy of the Strasbourg court's continued oversight of UK laws?

There is also a fascinating domestic dimension. Recent UK jurisprudence suggests that the courts might be able to refuse to recognise as Acts of Parliament any statutes that the judges consider to be overly disruptive of the constitutional order. This started with a case on the hunting ban in the early 2000s and has been fortified more recently by the Supreme Court's deliberate turn to common law rights (rather than the European Convention) as a basis for judicial review. Here might be a possible common law jurisdiction over even Parliament itself, in the shape of a protection of fundamental rights from destruction at the hands of the executive or legislature or both which would apply even if the purported change was delivered under the protective cover of an Act of Parliament. After all, who can ultimately define what an Act of Parliament is if it is not the judges? It is the one thing Parliament cannot do, and we have no written constitution to tell us. What the judges have recognised as Acts of Parliament has changed in the past (Cromwell; the Restoration; the removal of the Lords veto in 1911), so why not again?

Rights are so deeply entrenched in modern European and UK constitutional law that they will be hard to wiggle away from without a frontal assault on separation of powers and the rule of law. My bet is that the Human Rights Act (possibly amended in face-saving but non-essential ways) will still be there by the time of the next UK General Election.



EXTERNAL RELATIONS

GLOBAL BRITAIN

Anand Menon & Matt Bevington

WHERE HAVE WE COME FROM?

Brexit was a boon for the slogan writers and foreign policy was no different. The post-referendum phrase du jour was ‘Global Britain,’ intended to [reassure](#) those — at home and abroad — who feared that Brexit would lead the UK to turn in on itself.

However ubiquitous — the slogan was [prominent](#) in Theresa May’s first speech as leader to the 2016 Conservative Party conference in October 2016 and repeated ad nauseam thereafter — it remained stubbornly ambiguous. By the time Mrs May stood down, observers and politicians alike were little clearer as to what the concept meant in practice. And with all eyes focused on the tortuous Brexit process, little sustained attention was given to foreign policy anyway.

WHERE ARE WE NOW?

‘Global Britain’ has now fallen out of use. The term did not figure in the 2019 Conservative [manifesto](#), and the Prime Minister failed to use it in his one set-piece foreign affairs [speech](#).

Nevertheless, under Boris Johnson there has been more focus on UK foreign policy than at any time since the referendum. He has initiated a root-and-branch [‘Integrated Review’](#) of Britain’s role in the world, covering foreign policy, defence, security and international aid. This is part of a wider attempt to make the UK’s global efforts more coherent and mutually reinforcing. The recent merger of the Foreign Office with the Department for International Development is a notable example.

The Foreign Secretary has stressed that the UK remains a staunch defender of human rights and the rule of law. After the Chinese crackdown in Hong Kong, the Government created a [route](#) for British overseas nationals in Hong Kong to gain British citizenship. Under increasing backbench pressure, a harder line has been adopted towards China, not least with the [banning](#) of Huawei from building the UK 5G network. Then, in July 2020, the UK [imposed](#) its first Magnitsky sanctions for human rights abuses.

In addition, as part of its ‘Force for Good’ agenda, the Government has [inaugurated](#) a media freedom award to promote press freedom across the globe. The UK’s hyperactivity in the trade arena is partly an attempt to bolster liberal principles after years of creeping protectionism. On climate change, too, the UK sees itself as a global leader, a reputation it hopes to cement when it hosts the delayed COP26 summit in 2021. With the US returning to the table, this could help the UK score a major diplomatic victory.

In Europe, however, the message is strikingly different. Under Mrs May, the need for close foreign policy cooperation with the EU was frequently stressed, alongside an unconditional [commitment](#) to European security. Such a public commitment has been conspicuously absent since Boris Johnson became Prime Minister. The UK also [refused](#) to negotiate a formal foreign policy agreement as part of the Trade and Co-operation Agreement (TCA).

That said, the UK has continued to be pragmatic where interests dictate. On Iran, it has continued to [engage](#) in the E3 alongside Germany and France. It has maintained Russian sanctions and sought to coordinate Belarusian sanctions with the EU. On climate, too, there is close alignment, with COP26 being co-hosted with Italy.

WHERE ARE WE HEADING?

2021 will be an important year for British foreign policy. As well as co-hosting COP26, the UK will take over the presidency of the G7 and the chair of the United Nations Security Council. We will also get the results of the Integrated Review early in the year.

In fact, the broad outlines are already clear. ‘Global Britain’ is to be superseded by an ‘Indo-Pacific tilt’. No major policy, it seems, can survive without a slogan. More effort and resources will be [committed](#) to the region ‘east from India’. The Foreign Secretary, Dominic Raab, has made two trips to the region in a little over six months and in September the UK began early [talks](#) to join the 11-country trans-Pacific trade bloc (CPTPP). The UK has also opened new missions in the Pacific.

Whether the UK’s broader geopolitical ambitions and the ‘Indo-Pacific tilt’ will bear fruit, however, is debateable. It is part of a concerted attempt to maintain and improve trade links around the world. Given the proximity of potential partners to China, it also has a geopolitical subtext. Much will depend on China policy formulated in Washington as well as London and on the resources available under major fiscal constraints.

The broad direction of travel implies that, in substantive terms, the UK and the Biden administration will be closely aligned, not least when it comes to climate change, Russia and Iran. The G7 summit in the UK might also see the launch of a ‘D10’ grouping of democratic states — a key ambition of the Johnson Government. On this, too, the US administration should prove supportive.

Yet making a success of the G7 summit and COP26 will require effective cooperation with the EU and its member states. Equally, any effective approach to China will depend on a broader alignment amongst western countries. The Government has made clear that it favours bilateral links with member states rather than collaboration with the EU per se. We can expect continued attempts to mobilise the E3 on issues such as the Iranian nuclear deal. However, on climate in particular, a piecemeal approach with select national capitals may not prove sustainable.

Yet the new US administration will not only be anxious to foster greater burden sharing by European allies, but also to ensure that the UK works closely with European partners as part of a reassertion of ‘the west’. To the extent that the TCA mattered for foreign policy, it at least avoided a blow-up in relations between western allies. As a result, notwithstanding talk of an Indo-Pacific tilt, the UK’s reluctance to see European states as key partners may not survive as shared interests, resource constraints, and potential pressure from Washington militate in favour of a continued close relationship.

DEFENCE

Lawrence Freedman

WHERE HAVE WE COME FROM?

During the 2016 referendum campaign, defence played a surprisingly prominent role — largely in the form of allegations that the EU would require the UK to commit to a European army. This was always far-fetched, although occasional bursts of enthusiasm emanating from Berlin or Brussels were seized upon as evidence that this was a real and even imminent possibility. A defence dimension to European integration has long been an objective of integrationists but they have struggled to show how it could be made to work. The two European countries with the most capable military establishments, Britain and France, joined together in 1998 to encourage more cooperation in security and defence. The results of this initiative were meagre compared with the efforts expended.

A European defence policy involves far more than countries combining to establish new force structures or sharing procurement costs. To make a real difference it must involve a centrally-controlled military instrument that could serve collective foreign policy goals. For this to work beyond modest, albeit valuable endeavours such as peacekeeping or anti-piracy operations, member states would need to agree to put their personnel in harm's way for goals they did not support and be able to show how they could access wholly integrated forces when facing a purely national emergency or one affecting only a few member states. For most countries, NATO appeared a much better bet: it did not imply the same loss of sovereignty, had an established command structure, and, most importantly, could draw upon American military strength and leadership.

Yet between 2016 and the UK's final departure from the EU at the start of 2021, those urging a stronger European defence entity could call in aid a formidable supporting argument. Donald Trump made clear he saw NATO as yet another mechanism to get the US to subsidise countries — in particular Germany — that ought to be paying their own way. Given his 'America first' doctrine, distaste for alliance, lack of consultation on issues such as Iran, and reluctance to challenge Russia, it was by no means clear that the Atlantic Alliance could have survived intact had Trump won a second term.

This argument was lost with Trump's defeat to Joe Biden in the November 2020 election. NATO appeared to have survived its near-death experience. As Germany celebrated the potential revival of warm transatlantic relations, President Macron of France warned that nothing could be taken for granted and Europe needed greater strategic autonomy. Yet the management of the various international crises in and around the European area during 2020 gave little encouragement to hopes that the EU had a shared strategic view. Nonetheless, although the prospect is now of a return to American leadership, the question of distinctive strategic interests will not go away, especially if conflict with China continues to preoccupy Washington.

In terms of UK defence policy, the EU's limited progress on defence meant that Brexit made little difference either way, especially as, on the big security issues, London remained close to the European consensus. There have been no suggestions that the strong bilateral defence relationships previously forged with France and Germany will not continue. There was no tenth anniversary gathering to mark the UK-French Lancaster House agreements, which included significant areas

of cooperation, including on nuclear matters, but that could be put down to Covid-19 as much as Brexit.

By contrast, UK foreign policy did diverge from that of the US, which is why a second Trump term would have caused real difficulties. Recall the breadth and depth of the UK-US defence relationship. The UK's Trident missiles are maintained at Kings Bay, in Georgia, and future warhead development is closely tied to that in the US. In October 2020 US Marine Corps F-35s deployed with the Royal Navy's aircraft on the UK's new Queen Elizabeth class aircraft carrier. When the planned Integrated Security Review is published at the start of 2021, the incoming Biden administration will be a key audience.

WHERE ARE WE NOW?

To impress Biden, the Prime Minister is eager to show that the UK can be a close and reliable partner across a range of areas, and not just in the intelligence and nuclear fields. So eager in fact that on 19 November he announced the defence component of the review, promising over £16 billion of extra money over the next four years and setting out clear priorities. The UK is reasserting its position as a maritime power, with an emphasis on cyber, space and new high technology systems, such as drones, while army numbers will be kept down.

At one point all this was in doubt when the Chancellor decided to abandon his plans for a multi-year Comprehensive Spending Review (CSR), which risked further delay in sorting out defence priorities, including the Future Combat Air System. In this respect Biden's victory has already done the UK's military establishment a good turn.

A stronger defence establishment is being presented as compelling evidence of 'global Britain', contradicting any impressions of withdrawal from an international role. The UK is going out of its way to demonstrate that it remains an ally of good standing. What this will mean in practice remains to be seen.

WHERE ARE WE HEADING?

The Biden administration may well be much more active than its predecessors, and it will inherit unstable situations in the Middle East. Indeed, Trump has gone out of his way to aggravate tensions in Afghanistan and Iraq as a parting gift. Alliance is tested most keenly at times of crisis and when operations are under consideration rather than when drawing up budgets and affirming solemn agreements. This is as true for the UK's European allies as it is for the Americans.

The history of defence reviews — the Falklands after 1981, the Gulf after 1990, 9/11 after 1998, Libya after 2010 — is that you can never be truly sure of whether the priorities are right until the next conflict comes along, which may be in a place and in a form that is quite unexpected.

EUROPEAN UNION

Simon Usherwood

WHERE HAVE WE COME FROM?

The EU has been working through one of the most difficult periods of its existence. If the financial crisis of 2008-9 and subsequent Eurozone crisis exposed the weaknesses and compromises inherent in the economic governance of the EU, then the challenges since 2015 surrounding the management of large numbers of migrants from the Middle East and Africa pointed up the thinness of solidarity between member states and the extent to which rhetoric about a humane foreign policy was not always backed up by actions.

Brexit has run alongside these issues for many years, amplifying greatly the awkward relationship between the UK and EU. A persistent part of the EU's collective understanding of why the UK left in January 2020 was that Brexit was not so much about the UK as special case, but a function of longer-run problems about the nature of representation, legitimacy and democracy in the Union's organisation. Problems, in other words, that could be found in other member states, albeit not to the same extent.

WHERE ARE WE NOW?

2021 finds the EU still dealing with all of these problems, trying to find a settlement that accommodates the wide variety of interests to be found across and within its 27 member states, while maintaining its value as an organisation.

Central to this is a recognition that it cannot be enough that member states work together simply because the costs of not working together. The quest for a more positive vision of European integration sits at the heart of the various debates about economics, politics and society. The Covid-19 pandemic has merely reinforced this, both by demonstrating the benefits of being able to share healthcare and research capacity and the costs of making collective decisions that might be slower than national ones. Similarly, the protracted wrestling over the enforcement of rule of law in Hungary and Poland this year has shown the even seemingly basic elements of political life are open to very different — and possibly incompatible — interpretations.

While Brexit is obviously of substantive consequence, it is by no means the most important matter on the EU's agenda, as will become ever more apparent in the coming years.

WHERE ARE WE HEADING?

The coincidence of these various crises points to two, interlinked agendas for the EU in the next period of time. The internal agenda is the more fundamental, since it aims to deal with the persistent problems outlined above. The continuing rule of law argument has shown the limit of both the EU's own institutions and most of its member states to brush aside a respect for basic principles. Even if the deal to allow the Commission to investigate and prosecute for breaches did come with a

gentlemen's agreement not do so straight away, it does not change the impression that there will be a more robust effort to defend and promote an effective legal order across the board.

Coupled to this, the much-delayed Conference on the Future of Europe is due to start this year, with a remit to generate proposals for the EU's medium-term development. While previous such efforts have been less than inspiring, the Conference will nevertheless represent an opportunity to reopen the question possible treaty reform, something that has been off the agenda for more than a decade. Changes to the basic texts of the Union could potential embed many of the improvised changes made recently, and reawaken public debate about how best to square the circle of supranational governance and strong national political identities.

The successful of closure of a new funding cycle through to 2027, including the first instances of mutualised bond issues through the Next Generation EU package for post-Covid-19 recovery point to a new level of macroeconomic integration. Economic recovery still remains a key focus, both for easing the impact of the pandemic and for generating the kinds of material improvements to people's lives that might help stem the influence of populism.

All of which feeds into the second, external agenda. Recent years have seen a flurry of activity in a number of areas where the EU sees itself as a global leader. This has produced several major new trade deals as well as moves to enhance the EU's capacity, to operate beyond Europe on security matters. The latter was, in part, a function of the strained relations with the Trump White House, but the long-run reduction of US interest in Europe and the continued threat from Russia mean that the EU is liable to see itself drawn into the global security architecture.

Work in support of fighting both climate change and underdevelopment will continue to be key avenues for representing EU values externally, while also offering a version of international cooperation in contradistinction to growing Chinese influence in the global South, and which might also help to limit the flow of migrants to Europe. However, the continuing failure of the EU to find a more systematic and effective response to this latter issue does point to the perennial danger that of endlessly deferred decisions.

Of course, one open question in all of this is the extent to which EU member states will be able to agree on any points of common action. The UK might now be gone, but this doesn't mean that everyone is on the same page: quite aside from the rule of law question, the split between net contributors (the 'frugals') and net beneficiaries of EU spending has already settled into a persistent cleavage that risks making it harder to translate high ideas into practice and policy.

Overall, the EU will be dealing with a long list of challenges in the coming years. These will function as a prism through which member states view the open question of relations with the UK. As strategically and economically significant as the latter is, the priorities of EU members are always going to come first when building a new relationship, something that the UK is going to learn very clearly now it has decided to leave.

TRADE POLICY

L. Alan Winters

HOW DID WE GET HERE?

An independent trade policy has always been one of the key objectives of Brexit. Trade agreements ease the cost and uncertainty of doing business internationally and hence boost trade and incomes, but at the price of imposing constraints on domestic policy. The deeper an agreement — the wider its coverage and the stronger its constraints — the stronger its effect on trade costs and hence on trade and income.

The EU is the deepest trade agreement in existence. Leaving will inevitably adversely affect the UK's trade with the EU. Moreover, because the EU is close, large, rich and similar to the UK, it will always be the UK's principal trading partner (it currently accounts for nearly half of UK trade).

Membership of the EU constrained policy freedom in return for giving the economic security of having similar constraints on other members' policies. Brexiters characterised these constraints as a loss of sovereignty. But they rarely acknowledged the trade-off between policy space and trade volumes that Brexit implied. Since 2016 they have prevented one Prime Minister from trading the former for the latter and installed another who, until the end of negotiations, could barely bring himself to believe that trade-offs existed.

Consequently, four and half years have elapsed without much serious official analysis or informed public debate about the trade-offs that signing a trade agreement entails. During 2020, the politics were clear: any infringement of UK sovereignty was anathema. But there was little discussion of what that sovereignty was to be used for or of what would be sacrificed in one area in order to exercise sovereignty in another.

WHERE ARE WE NOW?

By late 2020, the choice was between no deal, which by common consent would have involved a permanent cost of around five to eight per cent of UK GDP, and a shallow trade agreement which will cost, perhaps, four to six per cent of GDP. The outcome was the latter. The final tussles were over fishing rights, the level playing field (LPF) and enforcement. Fishing is a tiny sector and the UK Government scored a minor 'win' in it. On the latter two, the Johnson Government prioritised obtaining weak EU disciplines on level playing field and enforcement over preserving market access for, say, professional services (11% of UK GDP) or financial services (7%). In the end it obtained weaker disciplines than the EU had aimed for but still ended up with arbitration and rebalancing procedures that will significantly constrain its discretion.

WHERE ARE WE HEADING?

As noted above, the EU will always be the natural focus of UK international trade. This suggests that efforts to improve trading conditions are likely to have their greatest pay-offs here. I expect the UK to start *soto voce* discussions with the EU to restore some of the lost privileges — such as on trade facilitation and the whole range of financial services. It was never going to be easy to do so but the UK-EU Trade and Cooperation Agreement (TCA) has made it more difficult. The latter's arbitration procedures and four yearly reviews will, unless handled extremely carefully, keep chafing at the 'sovereignty scab', making it politically very costly for anyone to advocate accepting constraints in return for economic benefits.

Turning to the UK's independent trade policy, matters will move more slowly than the Government would wish, simply because trade agreements are difficult to conclude. There are 67 countries with which the UK sought so-called [Continuity Trade Agreements](#) to roll-over the trading conditions that applied when the UK was a member of the EU. By 1 January 2021, agreements with 58 countries had been signed, but complete replication was [not possible](#) and at the time the UK resisted attempts by partners to broaden the discussion beyond roll-over. Hence there is unfinished business here, and in some cases the UK had to agree to reopen negotiations in the near future.

I include in the previous paragraph the UK-Japan Comprehensive Economic Partnership Agreement (CEPA), signed on 23 October 2020. It was billed as a new agreement and yet it too became effectively a replication with [minor innovations](#). Areas in which the UK had hoped to advance over the EU-Japan agreement, such as audio-visual, did not materialise, maybe because the UK had not yet articulated what it wanted in them. That is certainly true in the one area in which significant advance was made — digital trade. The UK has agreed to material changes, which, while attractive to much of business, have seen no internal debate or articulated internal policy. Given the sensitivity of data privacy, this could stimulate opposition which may delay progress on other agreements.

CEPA might be a precursor to a UK application to join CPTPP — the Comprehensive and Progressive Trans-Pacific Partnership, a group of 11 countries accounting for 13% of global GDP. Given the Continuity Trade Agreements and the plans to sign FTAs with Australia and New Zealand, this would add little by way of market access and would require adhering to certain CPTPP rules, a few of which are [not compatible](#) with UK commitments in the EU Withdrawal Agreement. As a late-comer the UK would find it difficult to negotiate any changes to the CPTPP *per se*.

The big prize in new trade agreements is said to be an agreement with the USA, but this was already problematic before the change of US administration. The Government was forced to back-track on food and agriculture [provisions](#) and [gave up believing](#) that agreement could be settled before 2021. Now it looks more, rather than less, difficult. President Biden seems unlikely to focus on international trade or to renew the USA's fast-track negotiating authority, which will make it much more complex to get a deal through Congress. Moreover, he seems likely to prioritise the EU over the UK.

There is not much sign that trade agreements with third countries will forge ahead to make up the lost trade with the EU.

RELATIONS WITH THE EU

Hussein Kassim

WHERE HAVE WE COME FROM?

Although the UK formally left the EU on 31 January 2020, its participation in the Single Market and the Customs Union until 31 December 2020 postponed the full effects of its withdrawal. Since the transition period overlapped with the Covid-19 pandemic, it also concealed the scale and detail of the change.

The transition period had been requested by Theresa May to allow time for the EU and the UK to reach agreement on the terms of trade following the UK's withdrawal from the EU. It was also intended to permit public authorities, businesses and others on both sides to prepare for the new arrangements. However, the distance between the UK and the EU on key issues in the negotiations on the future relationship, and the refusal of the Johnson Government to use the UK's power under the [Withdrawal Agreement](#) to request an extension, took the talks themselves beyond the eleventh hour and the sign off on Christmas Eve left no more than a week for business and others to make their adjustments to new rules and new processes.

WHERE ARE WE NOW?

Although the aims set out in the [Political Declaration](#) were wide-ranging, the accord reached by the two sides is not only thin, but provisional, reading in part like a 'launch and learn' agreement. The EU-UK trade and cooperation agreement falls far short of the comprehensive vision for a future partnership envisaged by the [EU](#) and indeed the objectives fleshed out by the [UK](#). Defence and foreign policy is perhaps the main area that has fallen by the wayside, as talks were not timetabled once the UK announced that it had no interest in institutionalised cooperation.

The agreement is essentially limited to free trade in goods, which can cross between the UK and the EU without tariffs or quotas. However, because the UK is no longer bound by EU regulations, there are new technical barriers that require paperwork and impose costs on business. Import and export procedures now apply, and regulatory checks take place at the border between the UK and EU member countries. Access to the EU Single Market for services, which account for 80% of the UK economy, is now much more difficult than when the UK was a member state.

WHERE ARE WE HEADING?

How the relationship between the UK and the EU will develop over the short- and medium- term is highly uncertain. Although neither side walked away from the talks, relations were strained throughout. The differences extended beyond the respective negotiating positions of the two sides, expressed a more fundamental clash of principles and understandings. Negotiations which essentially concerned the terms of separation and the introduction of barriers were perhaps never going to bring the UK and the EU closer together. The sharpening of rhetoric did not help.

The two sides now embody two very different visions of international action: the EU, a bloc of states committed to concerted action and permanent collaboration in the belief that challenges are best confronted collectively; the UK, a mid-sized country, wedded to the pursuit of sovereignty both as an ideal and because of the greater agility it believes independence will allow.

How each side responds to the challenges they face in the post-Brexit world will affect their relationship. The UK's insistence on bringing back control and the right to diverge will be severely tested. Beyond the fact that the EU remains the UK's main trading partner, EU rules have become global standards. In practice, this is likely reduce the scope for regulatory divergence on the part of the UK.

The UK also faces domestic pressures. Now that its departure from the EU has been achieved, the pro-Brexit coalition within the Conservative Party could prove difficult to maintain as the impact of Brexit on the UK economy comes to be felt, especially in vulnerable sectors and regions including the 'Red Wall'. Fissures within the pro-Brexit camp that were largely concealed over the last two years will now be exposed. Brexiters wanting to downsize the state are likely to be pitted against advocates of state interventionism.

Post-Brexit relations will also be testing for the EU, which must now deal with a destabilising neighbour on its frontier, especially since the political leadership of that state views its former membership of the EU as an aberration, rejects (at least for itself) the EU model of international cooperation, and has chosen a different path. Although the EU has relationships with its neighbours that vary in depth and scope, most are predicated on the assumption that these states will eventually join the Union. EU agreements with Norway, Switzerland, and the Ukraine provide a limited guide for how the EU might manage relations with the UK. The uncertainty is further compounded by the low levels of trust the EU has with a government that showed itself willing to break international law by overriding an agreement it had signed only a year previously.

Even if the EU and the UK have shared interests and viewpoints on cooperation on matters such as climate change, policing and security, or Russia, China, and Iran, it is unclear how, on what basis interaction will take place, or in the case of foreign policy, whether NATO and E3 will prove suitable or satisfactory. That the conception of sovereignty that the UK champions has been defined in contradistinction to EU membership is not a promising base on which to develop a relationship.

In conclusion, UK and EU relations are freighted with uncertainty. On the UK side, much depends on how the government chooses to define its place in the world, as well as its management of the disruption that follows the close of the transition period and the post-pandemic recovery. On the EU side, the relationship will depend on how quickly and how well adjustment can be made to the presence of an unpredictable and potentially awkward neighbour on its periphery.

BRITISH-IRISH RELATIONS

Etain Tannam

WHERE HAVE WE COME FROM?

The two decades before the Brexit referendum were a halcyon phase in British-Irish relations, that witnessed the signing of the [Belfast/Good Friday Agreement](#). This established the British-Irish Intergovernmental Conference as a forum for intergovernmental cooperation and the British-Irish Council to discuss sectoral policy issues.

In 2011, Queen Elizabeth made a highly successful visit to Ireland, the first by a British monarch in a century. This was followed in 2012 by Irish President Michael D. Higgins' successful visit to England. Both Governments agreed to hold a formal annual bilateral summit and a joint committee of senior civil servants was also to meet annually.

However, the Brexit referendum highlighted the limits of this cooperation. The UK barely consulted its counterparts in the Republic before the vote and Northern Ireland was hardly mentioned in the campaign. Following the referendum, the prioritisation by Ireland and the EU of maintaining a soft Irish border led to [increased tensions](#) and, at times, hardened rhetoric.

WHERE ARE WE NOW?

The Protocol on Ireland/Northern Ireland in the Withdrawal Agreement, with its agreement to establish a customs and regulatory border between Great Britain and Northern Ireland, led unionists to argue that the constitutional status of Northern Ireland was damaged. The UK Government's statement that it would take powers enabling it to renege on the Withdrawal Agreement in its Internal Market Bill led to further tension.

Ultimately the UK and EU agreed the [EU-UK Trade and Cooperation Agreement](#) ensuring no tariffs on some goods even if they are at risk of entering the EU market. However non-tariff barriers (NTBs) will still apply, and the deal does little on services. There is still '[a plethora of red tape](#)' including paperwork, Export Health Certificates and checks.

For the Irish Government, the revised Protocol in the Withdrawal Agreement was always the second best option to the UK remaining in the Single Market and Customs Union and also to the backstop that was included in the original Protocol. However, the Taoiseach, Micheal Martin, greeted the December deal with relief and [stated](#) that he and his UK counterpart had agreed after the announcement of the deal, 'to recommit themselves to creating a framework for the future to nurture and strengthen the relationship between Britain and Ireland'.

WHERE ARE WE HEADING?

The main task now is to rebuild trust. The British-Irish relationship had thrived in the context of EU membership. In future, the web of overlapping interests and connections will diminish, and this will affect bilateral cooperation. Irish trade, which has been diversifying away from the UK since the

1980s, will further branch out, and Irish hauliers will increasingly bypass Welsh and English ports.

However, the two Governments will be on opposite sides of the table in all future EU-UK negotiations. Attracting foreign investment will also be an area of conflict between the EU and the UK, which may particularly affect Northern Ireland. Future Irish Governments will have to resist becoming a conduit between UK interests and the EU. Northern Ireland could become a pawn used to incentivise Irish advocacy of UK interests. Irish governments will want to advocate for Northern Irish interests in areas of all-island policy, which may cause strains with the British government if it exacerbates divergence from the rest of GB and antagonises unionists.

It is unlikely that the joined-up thinking of the past will return to the same degree. A UK Government facing myriad challenges is unlikely to have the resources or capacity to prioritise the British-Irish relationship. Its policy burden will be vast in adapting to the post-Brexit era. Brexit also changes the strategic framework for Irish Governments and they too will have to decide how much to prioritise the British-Irish relationship as Ireland seeks to diversify trade away from the UK and increase its global footprint.

Another challenge is that Brexit has increased the salience of Irish unification. Sinn Féin has argued for a referendum on unification in five years. There [is no evidence](#) currently that a majority would support unification, but Brexit has led to a substantial [increase](#) in support among the Northern Ireland electorate. A Sinn Féin Government in Ireland within the next five years would very likely increase pressure for a referendum. Although not imminent, the increased possibility has heightened polarisation and unionist insecurity in Northern Ireland. The consent mechanism, which ensures that in four years the Northern Ireland Assembly will vote on whether the Protocol should continue, is another potential flashpoint.

The significance of the EU for cross-border cooperation under the Belfast/Good Friday Agreement contributed to the Taoiseach's 2020 [Shared Island document](#), providing €500 million to support cooperation and dialogue. It aims to strengthen cross-border cooperation, focusing on reconciliation and cooperation on the island. In the face of calls for unification and unionist insecurity, the Shared Island initiative is an attempt to adopt a more gradualist approach to any constitutional changes and minimise instability. The document also calls for an enhanced role for the British-Irish Intergovernmental Conference and the creation of a new bilateral institution — re-committed to by both Governments on 24 December.

Relations are likely to develop between Ireland and the UK's regions and nations. An Irish-Scottish strategic review of the relationship will be published in 2021 and an Irish-Welsh review is also in progress. The devolved and Irish Governments have expressed their commitment to increase economic and cultural cooperation. The Irish Government re-opened its consular office in Cardiff in 2019 and will open one in Manchester in 2021 to serve the north of England. These developments could alter the nature of British-Irish cooperation over the coming decades.

Brexit drives a wedge between both states and removes a powerful framework of cooperation. It has created mutual mistrust. Although future Irish Governments will focus on building reconciliation on the island, they will also want to secure UK engagement. Efforts will be made to create new institutions and forums to meet the challenges ahead and, most of all, rebuild trust. However, these will not compensate for the UK's departure from the EU.

UK-US RELATIONS

Janet Laible

WHERE HAVE WE COME FROM?

The Special Relationship has never been unproblematic. Political leaders have often overlooked it in the name of national self-interest, as disputes over Guantánamo detainees, Libyan terrorists and Iranian nuclear capabilities have demonstrated. In addition, it is arguably not particularly ‘special’ if one considers the relations of the stronger partner, the US, with other states. In 1993, a leaked State Department [study](#) ranking other countries by their importance to the US placed the UK third behind Germany and France. Yet the UK has long played an outsized role in connecting the US politically, economically, and symbolically to European partners. The two states have worked to shape and maintain a distinct vision of post-war global order, broadly committed to democracy, pluralism, a liberal orientation toward trade, and human rights.

WHERE ARE WE NOW?

The Brexit vote and the election of Donald Trump in 2016 shattered any illusion of a stable equilibrium in US-UK [relations](#). Trump’s approach to NATO embodied a zero-sum view of the world, alarming observers on both sides of the Atlantic, concerned lest the weakening of the US commitment to NATO undermine security cooperation. While Boris Johnson emphasized the value of the alliance at the 70th anniversary of NATO in 2019, his words had little impact on the US President.

Brexit also forced the US to reconsider the nature of its partnership with the UK. Many noted that Brexit rendered the UK less relevant to the US and reduced incentives for the US to move quickly on a new trade deal. Without the UK in the EU, the US lost what former NATO Ambassador Nicholas Burns [described](#) as a vital ‘interpreter of sorts between Washington and Brussels.’ Equally damaging has been the harm to perceptions of the willingness of the UK to honour its agreements. The Conservative Government’s draft Internal Market Bill, which would have allowed the UK to override the Northern Ireland protocol included in the Withdrawal Agreement provoked a sharp bipartisan response, with President-elect Biden making clear that a failure to honour the terms of the Good Friday Agreement would be a barrier to concluding a trade agreement with the UK.

WHERE ARE WE HEADING?

President-elect Biden’s foreign and trade policy goals point to a return to multilateralism, to restoring American leadership in NATO and to building new priorities around the climate emergency and human rights into future trade relations with the UK. Biden spoke of the importance of repairing alliances to address global challenges that require collective responses. Setting out his vision for American leadership, he [noted](#) that ‘NATO is at the very heart of the United States’ national security, and it is the bulwark of the liberal democratic ideal—an alliance of values.’

Boris Johnson has indicated that he will work to strengthen the partnership with the US. Biden and Johnson have discussed their interests in working on sustainable economic recovery, climate issues including emissions targets, negotiating together on NATO's New Strategic Concept, and other shared priorities. A broader reorientation of the role of the UK in regional and global security is inevitable, given that Britain is now excluded from EU decision-making about security. Yet its preeminence within NATO means that it remains central to regional security policy. More generally, the UK confronts the [question](#) of how to 'define a credible and distinctive role for a freestanding medium power with strong traditions of diplomacy, defence, intelligence, trade and aid,' and how to reimagine its role as a bridge between the EU and the US.

Engaging with China may enable British Governments to project global leadership in a post-Brexit world. The importance of Chinese economic and political ties with the UK [suggest](#) that the UK will not follow the Trump Administration in declaring China a threat to Western democracy and capitalism. British economic and diplomatic strengths in China may also make the UK a [valuable partner](#) for the US in achieving its goals in the region, in particular with the incoming Biden Administration reasserting human and labour rights, regional security, and environmental issues at the heart of American relations with China.

Trade policy will more starkly illuminate the tensions between the partners in the Special Relationship. There is little sense that a trade deal with the UK is a high priority for the Biden Administration: the incoming US president confronts a polarized domestic political environment, the disastrous impact of Covid-19, and other concerns that make a deal with the US's seventh-largest trading partner less pressing. Based on talks that began during the Trump presidency, the Conservative Government would have liked to conclude a trade agreement by spring 2021, but this is unlikely. Furthermore, President-elect Biden's proposed trade agenda demonstrates some continuity with that of President Trump, including agricultural demands and digital taxes, which will be domestically sensitive in the UK. While Johnson has signaled interest in cooperating on climate issues, other outstanding issues will require significant concessions on the part of the UK Government. Ultimately, the impact of a trade deal with the US will be [minimal](#) in terms of its contribution to the UK economy, but important in terms of symbolizing the political relationship between London and Washington.

When the disruptions of Brexit and Trump have faded, the relationship between the US and the UK will still be subject to stress. Across democratic states, citizens are demonstrating less willingness to accept the externalities of free trade agreements. Calls for protectionism have also accompanied rising populist sentiment across European countries and in the United States, indicating that the once-assumed shared commitment by the US and the UK to a liberal economic order will be under pressure, even with a change in US leadership. A renewed partnership between the UK and the US may be 'back' on the global stage, but the stage itself has fundamentally changed.

THE UK AND CHINA

Rana Mitter

WHERE HAVE WE COME FROM?

Early in the premiership of David Cameron, the UK moved toward a policy of positive, largely economic, engagement with China, termed the ‘Golden Era’ by the Chinese side. It was based on the idea that China would be a new market for British business, and was marked by important milestones such as the establishment of London as a major centre for renminbi (RMB) trading. There was little public discussion of security issues relating to China, and discussion of human rights was kept to a minimum.

Under the May Government, there was more concern about security, for instance with a long-term proposal to build a new nuclear power station at Bradwell in Essex, but the overall position did not shift significantly. Under Boris Johnson, Chinese investment was initially welcomed, and in January 2020, it was announced that Huawei, a major Chinese telecoms firm, would be given permission to make limited contributions to the UK 5G network.

WHERE WE ARE NOW?

In 2020, most of the UK’s positions on China changed profoundly. The Covid-19 epidemic, first detected in China, spread quickly to the rest of the world including the UK, severely damaging China’s reputation both for health control and for openness and willingness to share information promptly. The pandemic allowed a space for those concerned about a Chinese firm’s presence in the UK 5G network to make their voices heard more loudly, notably in the highly Beijing-sceptic China Research Group of Conservative politicians established in April 2020.

In July, China passed a National Security Law for Hong Kong, which prompted fears that civil liberties would be heavily restricted, and led the UK Government to offer residence to holders of British National (Overseas) passports, to Beijing’s fury. In addition, there was wide coverage of the oppressive conditions in camps in Xinjiang holding Chinese citizens of Uighur ethnicity for ‘re-education,’ further damaging China’s international reputation. One major [survey](#) put China’s unfavourability rating in the UK, after the pandemic, at 83%. Yet there are still major points of connection between the UK and China. Over 100,000 Chinese students are in UK higher education institutions, both countries have affirmed a need to work with each other on climate change, and they are both permanent members of the UN Security Council.

WHERE WE ARE HEADING?

The UK currently lacks a clear policy toward China. In the context of heightening tensions, many in the UK have simultaneously argued that it is essential to impose severe sanctions on the country for human rights violations, but also to maintain a healthy and positive trading relationship. The UK found it hard to speak firmly to China while staying separate from the Trump administration’s policy of all-out confrontation, although a more traditional foreign policy under Biden will provide more opportunities for US-UK cooperation on trade negotiations and human rights issues.

The Government's desire to create a 'D10' grouping of 'likeminded democracies' to present a united front to China has promise, but runs up against several problems. First, the majority of likeminded liberal democracies are members of the EU, yet current British foreign policy has found it hard to articulate a means of positive engagement with the bloc on China. Second, Asia-Pacific democracies mostly have very strong trade relationships with China, and have less freedom of manoeuvre against China. Third, many regional democracies aren't all that liberal (think the Philippines, or India); and one of the most 'like-minded' countries on containing China, Vietnam, isn't democratic at all. The language about 'democracies vs China' is a rhetorical holding position, not a strategy in itself.

Are there options for the UK to engage China? Certainly. Higher and secondary education in the UK is highly attractive to the Chinese middle class, although providers will need to resist attempts to influence academic content (like via the extraterritorial clauses of the new Hong Kong National Security Law) sent into China or Hong Kong. UK financial services are also attractive to China, as are its pharmaceuticals and some high-end manufacturing. Legal services might be a particular growth area, as international contractors are far keener to arbitrate disputes in venues which use common law derived from the English system rather than domestic Chinese law. Chinese investment in the UK is likely to come under much more legal scrutiny than in the past after the passing of a new National Security and Investment Bill; but there is a difference between ownership of security-sensitive assets, and plain vanilla investment in 'dumb' infrastructure, property or assets. Chinese offers to buy otherwise unviable Welsh steel plants are not invariably malign.

Right now, the UK public and private spheres are deeply uninformed about China, at a time when its middle classes know plenty about Britain (at least in terms of its value as a centre of education and tourism). Greater 'China literacy' is necessary; not just Mandarin language, which will always be a minority pursuit, but greater awareness of politics, society and culture in the world's second biggest economy and most powerful authoritarian state.

The one area that will continue to see friction between the two sides is the difference in values between an authoritarian society and a liberal one. China will continue to complain about 'interference' in the face of British (and western) criticism of policies in Xinjiang, Hong Kong, and the increasing restriction of space for debate within China itself. However, China itself has become more open about criticizing the internal affairs of other countries (for instance, its foreign ministry tweeted to condemn the killing of George Floyd), and must therefore expect that, as a global power, it will continue to attract criticism.

None of this is likely to affect the fundamental issue. The UK is important to China, but it does not sit in the same category of engagement for Beijing as the US, Japan, Germany, or Russia. This means that the UK is less likely to be able to influence China, acting alone. But neither is the UK particularly dependent on China. The challenge is therefore to develop opportunities, and minimize risks, for a confident, friendly and frank relationship.

UK-JAPAN RELATIONS

Julie Gilson

WHERE HAVE WE COME FROM?

Following Japan's defeat in 1945, despite leaving a legacy of British distrust resulting from Japan's wartime brutality, their respective close bonds to the US enabled Japan and the UK to sign the Treaty of Commerce, Establishment and Navigation in 1962, and to showcase their economic complementarity at major events like the Osaka Expo of 1970.

The following year, YKK opened the first Japanese factory in the UK. This period marked the start of growing Japanese investment, stimulated in 1984 by Margaret Thatcher's intervention to ensure that corporation tax would not damage Nissan's interests in the UK. In 2020, more than 1,000 Japanese firms jointly employed around 160,000 people in the UK, in sectors from financial services to manufacturing and pharmaceuticals.

The presence of firms like Nissan, Toyota, Hitachi and Toshiba was driven by the economic advantages the UK afforded. Tax incentives, the English language, shared liberal economic values and an available pool of labour combined with the role played by the UK as a 'gateway' to the rest of the EU's Single Market. Even in the face of Japan's economic downturn and so-called 'lost decade' from 1991, subsequent financial crises and the economic rise of China, Japanese inward investment into the UK continued to keep Japan among the top six inward investors into 2018. At the same time, various initiatives promoted UK investment into Japan, so that the UK was Japan's fourth largest investor in 2018. According to [ONS data](#), in 2019, trade between Japan and the UK was valued at around £31.6 billion, constituting 2.2% of UK trade.

WHERE ARE WE NOW?

Two events since 2016 have shaken those foundations: The EU-Japan Economic Partnership Agreement (EPA) of 2018 and Brexit. Accompanied by a Strategic Partnership Agreement (SPA) to address non-economic mutual interests, the [EPA](#) removed a swathe of tariffs and non-tariff impediments to trade, and reaffirmed a mutual commitment to the values of an open liberal trading order.

The UK's decision to leave the EU, and uncertainty about its future trade relationship, led Japanese investors to express [concerns](#) about the UK's continued position as a gateway to the rest of Europe. The September 2020 UK-Japan Comprehensive Economic Partnership Agreement (CEPA) essentially rolled over the EU-Japan EPA, leading the UK's Department for International Trade to claim it would increase bilateral trade by £15.2 billion. In practice, despite the publicised gains for stilton cheese, it is difficult to see economic gains above those the UK enjoyed within the EU-Japan EPA.

Importantly for the UK, it also takes it a step nearer to joining the Comprehensive and Progressive Agreement for Trans Pacific Partnership, supported strongly by Japan and which would strengthen trade links with this dynamic region.

WHERE ARE WE HEADING?

Despite those gains, Japan accounts for less than two per cent of British imports and exports and the bilateral UK-Japan deal, even with some added value on ecommerce, rules of origin and financial services, has not allayed Japanese government concerns about Brexit. After the referendum, the Japanese prime minister made an uncharacteristic appeal to the UK, citing concerns about the possible re-imposition of barriers to trade and border controls, the loss of European labour within the UK, and a reduction in the UK's gateway value. Japanese automobile manufacturers continued in late 2020 to express concerns about rules governing content for cars and parts produced in the UK after 31 December 2020.

Even so, there are opportunities for the UK and Japan to focus on specific sectors to exploit shared and complementary expertise. Notable areas for cooperation include innovation and technology in life sciences, nuclear power, and high-speed trains, as well as software development. AI technology is an area for development, particularly around markets like assisted living, for which the UK and Japan plan to launch a Smart Assisted Living project.

There is also the potential for deeper cooperation in other areas. The UK and Japan already cover many of the topics encompassed within the EU-Japan Strategic Partnership Agreement, which seeks to tackle issues from international crime to disaster management and cybercrime. In their 2017 Joint Declaration on Security Cooperation, they agreed to put flesh on the bone of their own strategic partnership and to support Japan's promotion of an Indo-Pacific region — largely designed to check Chinese ambitions in the region — as well as to enhance their military to military cooperation in the Pacific.

Furthermore, in the run up the UK's hosting of COP26 in 2021, cooperation with Japan over climate action could prove fruitful. Japan continues only slowly to regain its sustainability credentials — particularly given post-Fukushima dependence on fossil fuel imports. A recent shift in policy by Prime Minister Yoshihide Suga, who pledged to cut national carbon emissions to net zero by 2050, brought Japan in line with UK and EU pledges. Both countries are rapidly advancing their reliance on renewable power and installed increased solar capacity, making this an area ripe for cooperation.

In summary, Japan has seen Europe through a British lens for many generations and retains a sense of shared cultural values and history with the UK, and these continue to bolster important areas of mutual interest. But the key role of the UK as an economic gateway to the rest of Europe has now been lost. The last-minute UK agreement with the EU may save Japanese producers based in the UK from prohibitive tariffs, but car makers like Nissan are [yet to evaluate](#) the cost and benefits on their UK presence of additional customs bureaucracy, the impact of rules of origin and local content requirements, and of the many negotiations that lie ahead between the UK and EU. And with areas like financial services missing from the agreement, Japanese relief that a deal has been struck is tempered by concerns that the road ahead for UK-Japan relations is far from clear.

THE UK AND AUSTRALIA

Philomena Murray

WHERE HAVE WE COME FROM?

When Australia became a British colony over 200 years ago, this far-flung country was to be imprinted with the influence of the UK on its society and its political system — and British colonisation had a devastating impact on Australia's indigenous population.

The UK was Australia's most important market from the time of colonisation. There was a close affinity with British traditions and its people. For a century and a half, Australia was even [regarded](#) as 'good and solid members of a British family of nations'.

When the UK joined the European Community in 1973, Australia lost the privileged access which it had enjoyed under the 1932 Ottawa Agreement to the British market for its goods, particularly primary products, leading Australia to accelerate its trade orientation to Asia.

Australia launched trenchant critiques of the EU as protectionist, especially its [Common Agricultural Policy](#) (CAP). This critique, influenced in part by a British media prism, undermined the scope for a closer relationship between the EU and Australia for some decades, although without any significant impact on UK or EU opinion. The condemnation of the EU was not accorded much attention, with [Sir Leon Brittan](#) stating, during a visit as EU trade commissioner in 1998: 'Being completely frank, we haven't suffered terribly from Australia's attitude'.

WHERE ARE WE NOW?

Since the 1990s, this perspective changed, as Australia and the EU increasingly found [common ground](#) in multilateral forums and agreements including on nuclear energy, wine, mutual recognition, police cooperation and security cooperation. By the time the Brexit referendum took place, most Australian politicians perceived British membership of the EU as positive, though there were some notable [exceptions](#).

By that time, too, Australia and the EU had advanced towards a [Framework Agreement](#), a major comprehensive accord across a range of policies that may provide [useful pointers](#) for the UK as it recalibrates its relationship with Europe. This Agreement is complemented by free trade agreement [negotiations](#), launched on 18 June 2018.

UK-Australia bilateral relations, meanwhile, remain characterised by regular defence and foreign policy ministerial [dialogue](#) and, in recent years, the partners have sought to develop closer ties to complement the Five Eyes Agreement and other security arrangements, especially after the Brexit referendum.

WHERE ARE WE HEADING?

The UK faces a number of tasks as it engages in trade talks with Australia, now that it has secured an agreement with the EU and efforts to forge trade and other ties with the rest of the world gather speed. One task is to prove that it is trustworthy at a time of some concern about UK adherence to

international law. A second is to excel on trade negotiations with Australia, a state that punches above its weight in bilateral trade deals, and which has signed two recent major plurilateral agreements, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP).

Although Australia is keen on close ties with Britain, it will remain [close](#) to the EU and the US and Asia-Pacific and the UK will need to recognise this.

Free trade [negotiations](#) were launched by the UK and Australia on 17 June 2020. The [Australian objectives](#) include an expansion of trade access; services access; an increase two-way investment flows; balanced rules on intellectual property rights; opportunities for SMEs and on government procurement; the promotion of shared values on trade and sustainable development; and the establishment of strong legal and institutional frameworks to ensure the effective implementation of the FTA.

After [two rounds](#) in 2020, the Australian side reported on ‘substantive progress through text-based discussions for most issues, in a positive atmosphere’ and referred to sessions on ‘trade in goods, services and investment, digital trade, legal and institutional, and other issues typically covered in a modern and comprehensive FTA, such as intellectual property, government procurement and SMEs.’

That progress suggests that there is scope to deliver on the UK government’s [policy paper](#), which suggests that this FTA ‘offers a golden opportunity to further cement our existing relationship’. Significantly, the UK paper commented: ‘There are few countries with which we could negotiate as advanced an FTA as we can with Australia in the areas that matter to the UK.’

As the UK needs trade agreements throughout the world, it will work closely with Australia, which has a significant trade and security foothold in the Asia-Pacific (referred to by the Australian Government, and recently the British Government, as the Indo-Pacific). The UK can develop its commitment to a major trade presence in this region, which its [policy paper](#) sees as capable of delivering ‘greater prosperity for the whole of the UK’, as ‘the Asia-Pacific remains a region with significant long-term potential’.

Although the UK has left the EU, it is embarking on a different form of regional belonging, as it explores the potential for membership of the CCTPP and a closer relationship with the RCEP.

Beyond trade, the Australia-UK Ministerial [AUKMIN Joint Action Plan](#) of 2018 sets the agenda for enhanced global and regional partnership, to further develop their strategic defence partnership; to strengthen collaboration on global issues; to counter global threats; to boost their Pacific partnership and to build closer diplomatic ties.

Although Boris Johnson and some ministers had suggested that Australia provided a model for the UK’s future trade relationship with the EU, now that the UK-EU agreement has been negotiated, it is [clear](#) that it does not. Australia may, however, provide some inspiration for Britain, as it deepens and consolidates its engagement with the Asia-Pacific and considers options for agreements with the EU that have some similarities with those that Australia has forged with Europe. Either way, strong historical links will endure but will not dominate the UK-Australia relationship after Brexit.

UK SANCTIONS POLICY

Matthew Moran

WHERE HAVE WE COME FROM?

A [recent report](#) by the House of Commons Foreign Affairs Committee declared that, ‘[The] centrality of sanctions to UK foreign policy, national security and the functioning of the rules-based international system cannot be overstated’. Before Brexit, the UK pursued its sanctions policy through multilateral fora, primarily the UN and the EU. The EU, in particular, offered a means of pursuing sanctions when the UN Security Council was deadlocked, or if UN sanctions were deemed insufficiently robust.

The UK had little scope to impose restrictive measures independently but did much to shape multilateral policy decisions relating to sanctions. A 2017 House of Lords [report](#) noted that the UK was ‘widely recognised as playing a leading role in developing the EU’s sanctions policy’. In this context, the UK is perhaps best categorised as a sanctions entrepreneur, drawing on decades of expertise and experience to drive many of the bloc’s sanctions policies and regimes. In recent years, for example, the UK played an important role in the development of EU sanctions on Russia over the crisis in Ukraine. It also helped shape the bloc’s chemical weapons and cyber sanctions regimes.

The decision to leave the EU upended existing policy and practice and required a complete overhaul of the UK’s long-established sanctions architecture. The cornerstone of this effort was a new legislative framework — the Sanctions and Anti-Money-Laundering Act (SAML) — giving the UK power to impose, amend and enforce sanctions, including those agreed at the multilateral level. The legislation gives the government wide-ranging powers to impose sanctions, including, crucially, in areas that go beyond the current scope of EU sanctions, such as human rights and national security.

During transition, the UK was still bound by EU sanctions, but it did have the power to impose some new sanctions autonomously under SAML 2018. In July 2020, Foreign Secretary Dominic Raab did just that when he launched a new UK [sanctions regime](#) targeting human rights abusers, although it’s worth noting that the EU had begun [preparatory work](#) on its own global human rights regime by that point. Then, in September, the UK [joined forces](#) with Canada to impose further human rights-related sanctions against Alexander Lukashenko, the President of Belarus, and members of his regime in the wake of rigged elections.

WHERE ARE WE NOW?

With the end of transition, however, EU sanctions cease to apply in the UK. The UK will continue to implement multilateral sanctions imposed by the UN, but beyond this the British Government is largely free to deploy sanctions as it sees fit. The UK is no longer bound by EU measures, but there will continue to be considerable alignment on sanctions. Indeed, the Government has [committed](#) to co-operating as closely as possible with the EU on sanctions policy after Brexit.

This makes sense. The UK and the EU share many foreign policy interests and objectives, and it is widely accepted that sanctions work best when applied by a coalition of states. In any case, the

UK cannot hope to emulate the approach of the United States and go it alone. The dominance of the dollar in the international financial system, even if this [is being challenged](#), gives Washington's aggressive and far-reaching sanctions policies a weight that the UK simply cannot replicate.

WHERE ARE WE HEADING?

From the [rise](#) of economic nationalism to the [return](#) of great power politics, the international rules-based order that has held sway since the end of second world war is under considerable pressure. This has implications for how states work together to use sanctions, and, more importantly, how effective restrictive measures are in supporting foreign policy.

Moreover, those targeted by sanctions, such as [North Korea](#) for example, have developed increasingly sophisticated means of evading them. Part of the issue here is the challenge of ensuring meaningful implementation and enforcement. But this also reflects an evolving sanctions environment where those seeking to uphold international order must innovate and devise new ways of approaching sanctions.

As an EU member state, the UK wielded considerable influence over the sanctions policy of a bloc of 28 states with a combined GNP that is only slightly smaller than that of the United States. This particular form of influence has now ended.

The Foreign Secretary, Dominic Raab, has invested heavily in the idea of 'Global Britain' as a [leading force for good](#) and has indicated that sanctions will play a role in this effort. The real challenge, then, is how the UK can reposition itself as one of the principal centres of sanctions influence and decision-making alongside the US, the EU and the United Nations.

Part of the answer relates to leadership. The UK should seek to reinvent itself as a global sanctions leader that will shape international thinking and action on sanctions in a UK mould. The UK has a base of expertise and knowledge — including universities, think tanks and industry groups — that leaves it well-positioned to provide thought leadership on sanctions. Yet these pockets of expertise could benefit from greater coherence and a more connected approach that transcends disciplinary and sectoral boundaries.

The goal here should be a broad community of practice that engages with some of the big questions surrounding the use and value of sanctions. What combinations of restrictive measures will be most useful going forward? How can governments and multilateral organisations be innovative in their use of sanctions? How can the sanctions be shaped so as to achieve maximum impact while avoiding harm to civilian populations and legitimate commerce, and be proportional in their application to targets?

The UK's withdrawal from the EU has the potential to significantly undermine the role and reputation of the UK as an international sanctions actor. This approach offers a means of mitigating the risks on this front while at the same time enhancing the environment within which UK policy making occurs at home.

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

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