

## **Special Issue MJIEL**

# **UK-INDIA post-Brexit *Trade and Power Democracy***

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## **Introduction**

On Tuesday 24<sup>th</sup> September 2019, in an unprecedented decision with major legal repercussions for British and comparative constitutional law, the UK Supreme Court ruled that the prorogation of the parliament, by Prime Minister Boris Johnson ahead of the Brexit, was unlawful<sup>1</sup>. Reading the judgement live, the Supreme Court President, Lady Hale, said: *"the decision to advise Her Majesty to prorogue Parliament was unlawful because it had the effect of frustrating or preventing the ability of Parliament to carry out its constitutional functions without reasonable justification."* This extraordinary exercise of judicial review might well provide the most dramatic example yet of independent judges' powers to oppose the arbitrariness of the State while, as the ruling explains, the Prime Minister's decision's *"effect on the fundamentals of democracy was extreme."*

It is indeed democracy, with its defenders and opponents, which plays the central part in the Brexit debate. It is also democracy, which is at stake when the UK envisages to redesign the entire architecture of its trade regime and engages in long term negotiations with its main strategic partners and indeed India.

Brexit is a significant development not just for the UK, but for much of the rest of the world. The significance arises from the new perspectives with which UK and the rest of the world would view each other, almost five decades after UK integrated with Europe. Economic integration was among the major drivers behind UK's association with Europe. Following Brexit, irrespective of the form it eventually assumes, economic relations between UK and Europe would need to be re-formalized. Substantive part of the re-formalization would involve recasting trade relations. The UK would need to develop its own trade policy for engaging with Europe and the rest of the world. Modern trade policies are as much about trade in goods, as they are about cross-border movements of capital, technology, people, knowledge and data flows. Bilateral or regional trade agreements entail far deeper alignment between domestic regulations that influence these issues than what was comprehensible before. UK needs to

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<sup>1</sup> The decision is available at:

<https://www.supremecourt.uk/cases/uksc-2019-0192.html> and <https://www.supremecourt.uk/cases/uksc-2019-0193.html>. The decision was taken after a three-day hearing at the Supreme Court, which dealt with two appeals, one businesswoman, Gina Miller, appealing against the English High Court's decision that the prorogation was "purely political" and not a matter for the courts; the second from the UK government appealing against the ruling by Scotland's Court according to which the prorogation of Parliament was "unlawful".

It is the second time in the three years history of Brexit that the UK Supreme Court exercises its power of judicial review. In 2016 indeed, Mrs Gina Miller and others already challenged the Primer Minister's power to activate the Article 50 of the Treaty on European Union ("Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements") without the authority of an Act of Parliament. That challenge succeeded with the decision *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, available at: <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>. The Parliament responded by passing the European Union (Notification of Withdrawal) Act 2017, which received royal assent on 16th March 2017 and authorised the Prime Minister to give the notification. Mrs May did so on 29th March 2017.

examine these issues from both national and global regulatory perspectives post-Brexit, as do countries, which envisage new institutionalised trade relations with UK through trade agreements.

In a parliamentary report published in June 2019, the UK revisits its existing trade relation with India to conclude on the need to reawaken the relationship<sup>2</sup>. Missed opportunities have characterised this special relationship embedded in the complex history of decolonisation. The report acknowledges that: *“The UK is falling behind in the global race to engage with a rising India. Despite strong ties across investment, education and culture—and a shared commitment to democracy and to the rules-based international order—the relationship is not fulfilling its potential. India’s place in the world is changing fast, and UK strategy has not yet adjusted to this new reality. As the UK prepares to leave the EU, it is time to reset this relationship. We cannot afford to be complacent or rely on historical connections to deliver a modern partnership.”*

Both the UK and India are prominent global middle powers looking to elevate their respective strategic influences in global affairs and the world order. Apart from more than three centuries of colonial history, both countries are also common in their democratic principles, reliance on rule of law, robust legal systems and multi-cultural, multi-ethnic societies. As economies though, notwithstanding roughly similar sizes, they vary significantly in structures and nature of socio-economic development, as high-income OECD advanced economies do vis-à-vis large populous developing emerging market economies. Disruptive developments like trade hostilities between the US and China, threats to the multilateral rules-based trade order, upsurge in Asia’s strategic significance, and Brexit, present new opportunities for engagement between both countries. Enthusiastic calls for repositioning the engagement are mutual with trade relations expected to be at the forefront of such repositioning.

Against this backdrop, and as a follow up to an international conference organised by the *Democratic Citizenship Theme of the University of Portsmouth (UoP)* in partnership with the *National University of Singapore (NUS)*, in June 2018<sup>3</sup>, this Special issue on *UK-India post-Brexit: Trade and Power Democracy*, addresses the challenges and opportunities of a renewed relationship between the two countries. While international economic dynamics, and trade, are at the centre of our discussions, our contributors also tackle important political questions in relation to the role of law and regulation, the settlement of dispute, the rule of law and indeed democracy.

*Lisa Mardikian and Clair Gammage* provide the reader with an insightful and dynamic perspective on the Brexit process and the possibility of differentiated integrations within a regional project. They argue that the *“Brexit does not constitute a process of regional disintegration but rather represents a reconstruction of the United Kingdom (UK)–European Union (EU) relationship within the existing normative orders of the EU through which an*

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<sup>2</sup> See House of Commons Foreign Affairs Committee, “Building Bridges: Reawakening UK-India Ties”, Eighteenth Report of Session 2017–19, 11 June 2019, available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmfa/2633/263302.htm>

<sup>3</sup> Prof. Leïla Choukroune, Director of the University of Portsmouth (UoP) Democratic Citizenship Thematic Initiative and Dr Amitendu Palit, Senior Research Fellow and Research Lead (Trade and Economic Policy) at the Institute of South Asian Studies of the National University of Singapore (NUS) indeed co-organised this international scientific event, please see: <https://uopnews.port.ac.uk/2018/06/11/2-day-joint-conference-india-uk-economic-regulatory-perspectives/>

*intense level of heterogeneity is recognised alongside diverging ‘scripts’ in preference formation.”* In examining issues likely to dominate trade talks between India and the UK in the event of post-Brexit trade treaty negotiation, including tariffs and movements of people, *Amitendu Palit* then strategically highlights the contrasts in approaches and stresses the different possibilities for positive outcomes. *James J. Nedumpara and Sandeep Thomas Chandu* accurately remind us that the Brexit is not only a UK-EU exercise, but also very much triggered technical discussions in Geneva on the changes within the World Trade Organization (WTO) as, for the first time since the signing of the General Agreement on Tariffs and Trade (GATT)/WTO, a Member’s exit of a customs union is setting in motion a series of novel and unprecedented legal issues. As a consequence of these major changes, a series of legal dispute might well arise in trade as well as in international investment law. These disputes shall also be settled in accordance with the State’s right – and responsibility- to regulate according to its sovereign choices. Hence *AFM Maniruzzaman and Ijaz Ali Chishti* address the concept of public policy, as it is conceived and applied in English common law as well as in international arbitration law and practice, in the Indian subcontinent in the context of international arbitration. *Sai Ramani Garimella* sheds lights on the now popular yet highlight contested practice of third party funding (TPF) in Investor State Dispute Settlement (ISDS) and suggests, on the basis of a thorough UK-India comparison, areas for law reform to prevent the adverse effects of TPF on developing states and on the investment law regime itself. Lastly, *Leila Choukroune* examines the UK-India trade relationship “beyond trade”, that is on the basis of a Human Rights-Based Approach (HRBA) taking into consideration issues often described as “non-trade” concerns and yet at the centre of business relations. From Corporate Social Responsibility (CSR) to trade and gender, the environment and Human Rights, this contribution explores recent treaty practices to create a modern framework for trade, that is one putting the human being at its centre.

As alluded to above, the Brexit produces consequences for all UK trade partners and the world. It poses pressing questions in relation to the State’s functioning and its ability to engage in but also withdraw from regional and international trade deals with major implications for its population and indeed democracy. We hope that this Special Issue of the *Manchester Journal of International Economic Law* will contribute to the debate on the role of the State and its interactions with the economic forces of globalisation to the benefit of the people as well as the more conceptual discussions on a 21<sup>st</sup> century truly international law.

