THE COMMON LAW, THE RULE OF LAW, AND BREXIT

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Abstract

This article considers how Brexit will affect the rule of law doctrine that is applied by courts in the United Kingdom (UK). Focusing, first, on how UK courts have previously absorbed the demands of EU law, it considers whether the courts will use that experience to safeguard a "thick" conception of the rule of law, or whether they will allow the rule of law to be hollowed out by Brexit. While such analysis can of course only be speculative at this stage, the article suggests that there is much within pre-existing case law to indicate that EU will continue to exert some influence in domestic law. This is a result not just of the fact that there will continue to be statutory links to EU law in the post-Brexit constitution, but also because of the "economy of the common law" and its pursuit of progression rather than regression. Important, too, are the common law's ongoing links to international legal norms that will continue to have various points of intersection with the EU legal order**.

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1. Introduction

Brexit has given rise to a number of searching questions about the nature of the UK constitution, both in its contemporary and in its future forms.[1] Some of the most prominent questions have concerned the balance of institutional relations within the UK during the process of withdrawal, where the leading case law has emphasised the primary function of the "sovereign" Westminster Parliament.[2] However, attention has also been given to the role that EU law may play in UK courts once the transition period agreed under Article 50 TEU has ended, notably as the European Union (Withdrawal) Act 2018 has created a new category of "retained EU law".[3] While the first purpose of that category of law is to ensure that there is legal certainty in the post-Brexit domestic legal order,[4] it is clear that there will be complicated questions about, among other things, the content of the rule of law doctrine that is applied by the courts. At its most obvious, this is because many areas of substantive EU law, as well as the general principles of EU law (but not the Charter of Fundamental Rights), will continue to be directly relevant in proceedings in domestic courts once Brexit has taken form.[5]

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[1] Literature is voluminous: see, e.g., A. Biondi, P. Birkinshaw (eds.), *Britain Alone? The Implications and Consequences of UK Exit from the EU* (2016); M. Dougan (ed.), *The UK After Brexit: Legal and Policy Challenges* (2017); M. Elliott, J. Williams, A. Young (eds.), *The UK Constitution After Miller: Brexit and Beyond* (2018); and A. Antoine, *Le Brexit* (2020).

[2] See, among others, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 WLR 1; and *R (Miller) v Prime Minister* [2019] UKSC 41, [2019] 3 WLR 589.

[3] EU (Withdrawal) Act 2018, ss 6-7. The transition period currently ends on 31 December 2020: Art 126 of the Agreement on the withdrawal of the [United Kingdom] from the European Union and the European Atomic Energy Community of 19 October 2019, available at *www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration*.

[4] See *Legislating for the United Kingdom's Withdrawal from the European Union 2017*, Cmnd. 9446.

[5] On the Charter see EU (Withdrawal) Act 2018, s. 5(4).

Although these norms will no longer be linked to the supremacy doctrine – they are also subject to change by legislation enacted in Westminster and/or in the devolved institutions – UK courts will have to consider how far norms of EU law should continue to have an influence in the domestic legal order. The task will be a not insignificant one: much of the contemporary rule of law doctrine in the UK has been shaped by the experience of EU membership, but Brexit now places the doctrine in a very different constitutional setting.

This article offers some comments on the approach that the courts may take to the relationship between EU law and domestic law in the future – in essence, whether they will use EU to safeguard a "thick" conception of the rule of law, or whether they will allow the rule of law to be hollowed out by the fact of Brexit.[6] Although such comments can (of course) only be speculative at this stage, it will be suggested that there is much within pre-existing case law on the reception of EU law to indicate that it will continue to exert some influence within the domestic system. This is a result not just of the fact that there will continue to be statutory links to EU law, but also because of, what John Allison has called, the "economy of the common law".[7] In a chapter that was published in 2000, Allison used this term to describe the incremental and reactive way in which the UK courts had reconciled UK constitutional law with the demands of the EU legal order. While such assimilation of norms had occurred against the backdrop of the supremacy doctrine, it was characterised by a not infrequent integration of standards even when EU law was not at issue.[8] It will be suggested that such voluntary integration of norms may still occur in post-Brexit case law and that, even if it does not occur, the courts may be reluctant to undo previous instances of integration. This is partly because the development of the common law is best defined by progression rather regression; it is also because the common law

[6] On "thick" and "thin" (and other) conceptions of the rule of law, see P. Rijpkema, *The Rule of Law Beyond Thick and Thin*, 32 L. & Phil. 793 (2013).

[7] J. Allison, *Parliamentary Sovereignty, Europe and the Economy of the Common Law*, in M. Andenas, D. Fairgrieve (eds.), *Liber Amicorum in Honour of Lord Slynn of Hadley: Judicial Review in International Perspective* (2000), 177.

[8] G. Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* (2002).

will continue to be influenced by international (query: global?) legal norms that have various points of intersection with the EU legal order.[9]

The article is divided into two main sections. The first section identifies what the "rule of law" doctrine is taken to mean for the purposes of the common law, and explains how EU law helped to shape the doctrine over the time of EU membership. The second section explains how links to EU law will be maintained post-Brexit and how UK courts may accommodate overlaps between the common law, EU law, and international law. The conclusion offers some more general comments about the common law's future conception of the rule of law.

2. The rule of law and the effects of EU membership

The contours of debate about the rule of law under the UK constitution are well-known and start with Dicey's commentary about the absence of any distinction between private persons and public officials for the purposes of the common law.[10] While this aspect of his commentary was most famously associated with his perceived antipathy towards *droit administratif*, it also belied an approach to legal equality which was "formal" rather than "substantive" in nature.[11] The point here was that, while all persons were equally subject to the law of the land, the sovereignty of Parliament entailed that discriminatory laws could be enacted and that they would be applied "equally" by the courts.[12] Raz, writing much later, also sought to distinguish the

[9] See J. Laws, *The Common Law Constitution* (2014); R. Rawlings, P. Leyland, A. Young (eds.), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, 2013); and P. Birkinshaw, *European Public Law: The Achievement and the Brexit Challenge* (2020). On global law, see N. Walker, *Intimations of Global Law* (2015).

[10] See J. Jowell, *The Rule of Law*, in J. Jowell, C. O'Cinneide (eds.), *The Changing Constitution*, 9th ed. (2019), ch. 1.

[11] P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PL 467 (1997).

[12] For a judicial statement concerning this effect, see, e.g., *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723, Lord Reid: "It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did

content of the rule of law from debates about morality and political philosophy, and linked the doctrine to, *inter alia*: a prospective effect for laws; the need for clear legal rules; access to an independent judiciary; and limits on discretion in the sense that it cannot be used in a way that undermines underlying legal rules.[13] This placed Raz in opposition to commentators who considered that the rule of law has (and must have) a substantive element whereby it incorporates values that serve to constrain governmental choices.[14] For Paul Craig, the endeavour was to find a middle way between these two approaches and to provide a fuller account of precisely how, and when, the various elements take form in law.[15]

The leading contribution on the topic – or certainly now the most widely-cited – is Sir Tom Bingham's book, *The Rule of Law*.[16] Published in 2010, this provides an account not just of historical influences on the rule of law, but also of contemporary features that led another judicial figure – Lord Hope – to describe it as "the ultimate controlling factor on which our constitution is based".[17] The historical account in Bingham's book partly makes the above point about the common law's global positioning, as it refers to comparative experience as well as to the influence that international human rights norms have had on UK law.[18] Bingham's approach is unapologetically in favour of a substantive conception of the rule of law, and he notes his preference for a

these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid".

[13] *The Rule of Law and its Virtue*, 93 LQR 195 (1977).

[14] See, perhaps most famously, R. Dworkin, *Law's Empire* (1986). See, also, the works of TRS Allan, notably *Law, Constitutional Justice: A Liberal Theory of the Rule of Law* (2001) and *The Sovereignty of Law: Freedom, Constitution, and Common Law* (2015).

[15] See n. 11 above. It might be noted that Raz has since written a significantly revised account of the doctrine: see *The Law's Own Virtue* (October 6, 2018), available at: *https://ssrn.com/abstract=3262030*.

[16] Published in 2010.

[17] *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 304, para. 107. On the principle's place under the constitution see further *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219.

[18] See n. 16 above, chs. 1-2.

"thick" understanding of its content.[19] He uses this descriptor when discussing human rights law in particular, where the common law has absorbed a range of European and international influences.[20] Noting a number of rights and examples of their impact in practice, he rejects the populist critique that protecting the individual prioritises rights over community interests.[21] His central thesis is thus that the protection of rights is central to a healthy democratic society rather than antithetical to conceptions of good government.

Bingham's book also mentions the obligations of EU membership and how these were "not problematical from a rule of law viewpoint, since (by Article 6 of the Treaty on European Union) the Union is founded on principles which include the rule of law".[22] When doing so, he briefly discusses the impact that the supremacy doctrine had on Parliamentary sovereignty, and this provides a link to the above point about how EU law was able to influence developments in domestic law more generally. As is well-known, the first case that revealed the supremacy doctrine's full implications for UK law was *Factortame*, where the House of Lords granted an injunction against a Minister of the Crown to prevent him from enforcing an Act of Parliament that interfered with, *inter alia*, the freedom of establishment of Spanish fishing companies.[23] While the case is best known for having resulted in the disapplication of an Act of the (sovereign) Parliament, the grounding imperative for the Court of Justice (which had received a preliminary reference from the House of Lords) was the effective

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[19] *Id.*, 67.

[20] See, also, D. Feldman, *The Internationalisation of Public Law*, in *The Changing Constitution*, cit. at 10, ch. 5.

[21] See n. 16 above, 68.

[22] Id., 46. Though he does note challenges presented by the way in which EU legislation is drafted and the "continental European image" of judgments of the CJEU. *Id.*, 46-47.

[23] *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603. On the basis for supremacy see, subsequently, *Thoburn v Sunderland CC* [2003] QB 151, 187-189. And for related comments about the relationship between domestic law and EU law see *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, 349, para. 79, Lord Reed, and [2014] 1 WLR 324, 382-3, para. 208, Lords Mance and Neuberger; and *Pham v Secretary of State for Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, 1617-1621, paras. 80-91, Lord Mance.

protection of the individual. In *M v Home Office*, that imperative "spilled-over" when the House of Lords ruled that injunctions should also be available against Ministers of the Crown in cases that did not have any EU law dimension.[24]

Injunctions can, of course, also be linked to the imperative of preventing abuses of power or "arbitrariness in executive decision-making". This is one of the cardinal features of the rule of law that are often identified in literature and policy papers, where other features include legality (which can be taken to imply "a transparent, accountable, democratic and pluralistic process for enacting laws"); legal certainty; access to independent and impartial courts; effective judicial review including respect for fundamental rights (as in *Factortame* and *M*); and equality before the law.[25] The common law's development of these principles has inevitably been influenced not just by EU law but also by the law of the European Convention on Human Rights (ECHR), which has effect in domestic law under the Human Rights Act 1998.[26] The rule of law doctrine that exists in common law can, in that sense, be said to be at least part European and to have been developed through a "confluence" of legal systems.[27]

Four cases can be used to illustrate this point. The first is *Wooder v Feggeter*, which concerned legality and transparency in the context of the duty to give reasons.[28] The question here was whether a mental-health patient who was to be administered a form of treatment to which he objected should be given the reasons for the decision that the treatment should proceed. While the case was ultimately determined with first reference to the

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[24] [1994] 1 AC 377, analysed in G. Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration*, cit. at 8, 139-142.

[25] See, e.g., Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158, available at *eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2014:0158:FIN:EN:PDF,* p 4.

[26] See M. Amos, *Human Rights Law*, 2nd ed., (2014).

[27] D.A. Leonardi, *The Strasbourg System of Human Rights Protection: "Europeanisation" of the Law through the Confluence of the Western Legal Traditions* 8 ERPL 1139 (1996).

[28] [2003] QB 219, 229, at para. 37. The judge referred, at para. 39, to, *inter alia*, P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 Cambridge L.J. 282 (1994).

ECHR, it crystallised a debate about whether the common law lagged behind European standards – and notably those in EU law – in so far it does not impose a general duty to reasons.[29] Referencing the leading literature on the point, Sedley LJ held that reasons should be given in the case because "the impact of the decision is so invasive of physical integrity and moral dignity that it calls without more for disclosure of the reasons for it in a form and at a time which allow the individual to understand and respond to them".[30] The judge also noted that "Article 8 [of the ECHR] recognises a standard of protection of personal autonomy" and, on that basis, he concluded that both Article 8 and the common law required the giving of reasons "not as a matter of grace or of practice but as a matter of right". It was a ruling that was widely understood to have taken the common law towards a general duty to give reasons, even if that final stage has not yet been reached.[31]

The second case – which concerned legal certainty – is *Uniplex v NHS Business Services Authority*.[32] This was a preliminary reference to the Court of Justice, which was asked how to interpret a time-limit in public procurement regulations that required challenges to decisions about awards to be made "promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period within which proceedings may be brought".[33] The word "promptly" was one that had been borrowed from the domestic procedure governing applications for judicial review, where it had allowed UK courts to dismiss challenges brought within three-months where the court considered that the applicant had not acted with due expedition.[34]

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[29] On the position at common law, see P. Craig, *Administrative Law*, 8th ed. (2016), 369-376; and on the position in EU law, see P. Craig, *EU Administrative Law*, 3rd ed. (2019), ch. 12.

[30] D.A. Leonardi, *The Strasbourg System of Human Rights Protection: "Europeanisation" of the Law through the Confluence of the Western Legal Traditions*, cit. at 27.

[31] For a recent judicial consideration of the extent of the common law duty, see *R (Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108.

[32] C-406/08, 48 *Common Mkt. L. Rev.* 569 (2011).

[33] Regulation 47(7)(b) of the (now revoked) Public Contracts Regulations 2006.

[34] On time-limits, see P. Craig, *Administrative Law*, cit. at 29, 857-862.

In its ruling, the Court of Justice made it clear that such judicial discretion within the three-month period was contrary to the requirements of legal certainty and that it also had implications for the effective protection of rights under EU law. It was a ruling that was to have effects across two-stages: first, through the courts reading the word "promptly" out of legislation in any case governed by EU law; and, secondly, through amendment of the rules governing judicial review to omit the word "promptly" for purely domestic law cases.[35]

The third case – *R (Unison) v Lord Chancellor*[36] – concerned access to justice and illustrated how the common law and EU law can often arrive at the same end-point in terms of protecting rights. The case centred upon the legality of changes to the fees regime that governs proceedings in employment tribunals, which had been amended to require the advance payment of fees for claims and appeals (the government had sought to justify the changes on the basis of a "user pays" principle).[37] The challenge to the regulations was brought by a public sector union which argued that the new regime was contrary to, among other things, the EU law principle of effective protection of rights and the common law right of access to justice. Finding that the changes were unlawful, the Supreme Court agreed that they breached EU law's precepts of proportionality and effectiveness because they would have the practical effect of meaning that many individuals would be unable to afford to bring proceedings. And on the issue of the common law, the Supreme Court likewise found that there had a been a breach of the right of access to justice. Noting that, "The constitutional right of access to the courts is inherent in the rule of law", the Court emphasised that interference with common law rights is possible only where it is authorised by clear and unequivocal statutory language or language which has that effect by necessary implication.[38] In this case, there was no such authorisation.

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[35] For the first stage, see, e.g., *R (Berky) v Newport County Council* [2012] EWCA Civ 378; and for the second stage, see (in Northern Ireland), *The Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017*, SR 2017/213.

[36] [2017] UKSC 51, [2017] 3 WLR 409.

[37] The new regime was contained in the Courts and Tribunals Fees Remission Order, SI 2013/2302.

[38] [2017] UKSC 51, [2017] 3 WLR 409, at paras. 66-85, esp. 66.

The fourth case is the much older case of *ex parte Equal Opportunities Commission (EOC)*, which concerned equality law and recourse to effective judicial review.[39] The EOC here sought to challenge various provisions of the Employment Protection (Consolidation) Act 1978 as contrary to (what was then) Article 141 EC and related EEC Directives.[40] The EOC argued that the Act discriminated indirectly against women by granting preferential employment protection rights to full-time workers (a majority of whom were men) as opposed to part-time workers (a majority of whom were women). Finding for the EOC, the House of Lords (as it then was) held that *Factortame* had established that judicial review was available even in relation to Acts of the Westminster Parliament and that the 1978 Act breached EU law's equality regime. In doing so, Lord Keith considered the case law of the Court of Justice, and he also had regard to a range of social studies, which was a departure from the normal judicial approach to evidence and argument. The ruling of the House of Lords was thus regarded as novel not just for procedural reasons but also because it had embedded the idea that Parliamentary sovereignty had been abridged by EU membership and the enforceable rights of individuals.[41]

3. The rule of law after Brexit?

How, then, might Brexit affect the rule of law? Certainly, it would seem that the in-road into Parliamentary sovereignty that was made in *Factortame* and *EOC* will not survive EU withdrawal, for the obvious reason that the supremacy doctrine will no longer apply in the domestic courts on its original terms. Moreover,

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[39] *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1.

[40] *Viz.*, Directives 75/117/EEC OJ 1975 L45/19 and 76/207/EEC OJ 1976 L39/40.

[41] Harlow and Szyszczak described that judgment as "a landmark decision and turning point in the public law arena". See Carol Harlow, Erica Szyszczak, *Case Note: R v Secretary of State for Employment Ex Parte Equal Opportunities Commission*, 32 *Common Mkt. L. Rev.* 641 (1995), 650. On subsequent justifications for the supremacy of EU law in UK courts, see n. 23 above. And for a further instance of disapplication of an Act of Parliament, see *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777.

another indicator to that effect is the case law on Brexit that was referenced in the Introduction, where the Supreme Court returned the UK constitution to a traditional (Diceyan) view of Parliamentary sovereignty.[42] Although EU membership had not been the only factor that had suggested a diminution of Westminster's sovereignty – case law on common law fundamental rights and on devolution had had similar effects[43] – the Brexit case law has reaffirmed that Parliamentary sovereignty is UK law's ultimate "rule of recognition". The point was made not just in the first *Miller* case, but also in a case about the powers of the Scottish Parliament during the process of withdrawal.[44]

On the other hand, it has been suggested above that Brexit need not mean that the common law will automatically exist at one remove from EU law, at least in the short-to-medium term.[45] It is a point that can be developed with reference to: (a) The European Union (Withdrawal) Act 2018; and (b) common law fundamental rights.

3.1. The European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act 2018 is the key piece of legislation governing the domestic law effects of Brexit (it is to read alongside related legislation in areas that include customs, trade, and immigration, as well as the EU-UK Withdrawal Agreement that has effect in domestic law under the European Union (Withdrawal Agreement) Act 2020).[46] While the

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[42] See n. 2 above.

[43] See, as regards common law rights, e.g., *Re Moohan* [2014] UKSC 67, [2015] AC 901, 925, para. 35, Lord Hodge. And on the implications of devolution, see, e.g., *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, 1059-1060, paras. 118-119, Lord Thomas.

[44] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; and *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 WLR 1. See further G. Anthony, *Brexit and Devolution*, in S. Kadelbach (ed.), *Brexit – and What it Means* (2019), 68-75.

[45] See further G. Anthony, *Brexit and the Common Law Constitution*, 24 EPL 673 (2018), from which the following paragraphs borrow.

[46] On the legislation that was to be introduced, see the text of the Queen's Speech 2017, available at *https://www.gov.uk/government/speeches/queens-speech-2017*. The Withdrawal Agreement – formally Agreement on the withdrawal of the [United Kingdom] from the European Union and the European Atomic Energy Community of 19 October 2019 – is available at

Act is of considerable complexity – there were many amendments to it as it passed through Parliament – it provides for three main constitutional outcomes. The first is the repeal of the European Communities Act 1972, which had given effect to the obligations of EU membership and had been central to the House of Lord's reasoning in *Factortame* and subsequent case law. The repeal of the 1972 Act happened on 31 January 2020 and, whilst EU law will continue to apply in domestic law until 31 December 2020[47], repeal will bring to an end free movement rights as well as obligations in relation to, *inter alia*, the Charter of Fundamental Rights and the jurisdiction of the Court of Justice.[48] The second outcome is the retention, in force, of a wide range of EU law measures which are known as "retained EU law" and which will be subject to the exclusive jurisdiction of the UK courts.[49] As was also noted in the Introduction, this category of law has been created for reasons of legal certainty, although leading members of the judiciary have expressed concern about how their role may be politicised by having to read retained EU law in the light of the body of EU law that preceded it.[50] This is a criticism of section 5 of the Act, which provides that the supremacy doctrine will not apply to any enactment or rule of law passed or made on or after "exit day", but which gives the doctrine a residual role in relation to the interpretation of legislation that pre-dates – and in some instances post-dates – Brexit.[51] The third outcome is the possibility

https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration.

[47] Article 126 of the Withdrawal Agreement; and European Union (Withdrawal Agreement) Act 2020, s. 1.

[48] Sections 1 and 5.

[49] Sections 2-7.

[50] *Lady Hale outlines concerns with language of Brexit bill*, Irish Legal News (March 22, 2018), available at *http://www.irishlegal.com/11809/lady-hale-outlines-concerns-language-brexit-bill/*.

[51] The relevant parts of section 5 read: "(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day. (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day. (3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day

for the body of "retained EU law" to be changed incrementally in accordance with domestic political preferences, whether at the central and/or at the devolved levels. This is an issue that has since given rise to difficult constitutional questions both about relations between the UK and devolved governments – as per the Scottish case above – and about how far subordinate legislation might be used to amend primary legislation when giving effect to new policy preferences.[52]

Plainly, it would be disingenuous to say that Brexit will not result in a distinction between EU law and UK law, as the bare fact of withdrawal (of course) makes such a distinction, and there have been early political statements about the creation of a very different regulatory regime in the UK.[53] However, it is equally true that the European Union (Withdrawal) Act 2018 has placed UK courts in a circumstance whereby they must now use the "economy of the common law" to reconcile past and emerging constitutional realities. While it is possible that some judges would seek to draw a bright line distinction between EU law and domestic law – there are authorities from the time of membership that would support such an approach[54] – other judges might be expected to adopt a fluid approach to the overlap of norms under the European Union (Withdrawal) Act 2018. For instance, in the field of non-discrimination law – where EU law has historically underpinned domestic measures on, among other things, gender, sexual orientation, race and religion[55] – there may be pragmatic and prudential reasons for regarding post-Brexit Court of Justice rulings as (strong) persuasive authorities. Such reasons start with the fact that courts and tribunals may be faced with questions

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of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification".

[52] Sections 8-12. For the Scottish case, see n. 44 above; and for some of the issues around the use of subordinate legislation, see *The Great Repeal Bill and Delegated Powers*, HL Paper 123 (2017).

[53] *Boris Johnson vows "no alignment" with European in post-Brexit Trade deal*, *PoliticsHome* (February 2, 2020), available at *https://www.politicshome.com/news/uk/political-parties/conservative-party/boris-johnson/news/109558/boris-johnson-vows-no*.

[54] See, e.g., *R v Ministry of Agriculture, Fisheries and Food, ex p First City Trading Ltd* [1997] 1 CMLR 250 (cf. *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400).

[55] For the applicable regimes, see K. Monaghan, *Equality Law*, 2nd ed. (2013).

about the historical and purposive interpretation of the new "retained EU law" measures, where it may be false to attempt to answer such questions without considering the Court of Justice's developing case law on the relevant EU rules. Relevant, too, may be the idea of a "confluence" of legal norms, as questions about anti-discrimination law may overlap with questions about Article 14 ECHR and the case law of the Strasbourg Court.[56]

Another area in which there may be scope for a continued overlap of norms – here, between domestic law, EU law and international law – is the environment.[57] The most prominent example is the Aarhus Convention that has been signed by both the UK and EU, which imposes public interest obligations in relation to access to information, public participation in decision-making, and access to justice.[58] The Aarhus Convention has effect in UK law primarily under legislation that implements a range of corresponding EU Directives and in respect to which the Court of Justice has already delivered a number of significant rulings.[59] One such ruling was in the *Edwards* case on protective costs orders, which followed a Supreme Court reference on the meaning of "prohibitively expensive" for the purposes of the Aarhus Convention's requirements about access to justice.[60] The subsequent ruling of the Court of Justice was relevant not just to the UK's obligations under EU law but also under the Aarhus Convention itself, where a Compliance Committee can assess

[56] For the overlap, albeit in a case in which the court did not need to go on to consider Article 14 ECHR, see *Walker v Innospec Ltd* [2017] UKSC, [2017] 1 ICR 1077, para. 16.

[57] See G. Anthony, *Public Interest and the Three Dimensions of Judicial Review*, 64 NILQ 125 (2013).

[58] The text of the Convention is available at *https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention.html*.

[59] On the legal framework in domestic law, see C. Banner (ed.), *The Aarhus Convention: A Guide for UK Lawyers* (2015), chs. 2-5.

[60] *R (Edwards) v Environment Agency (No 2)* [2010] UKSC 57, [2011] 1 WLR 79; Case C-260/11, *R (Edwards) v Environment Agency* [2013] 1 WLR 2914; and article 10a of Council Directive 85/337/EEC and article 15a of Council Directive 96/61/EC, as read with article 9.4 of the Aarhus Convention. And see, subsequently, *R (Edwards) v Environment Agency* [2013] UKSC 78, [2014] 1 WLR 55.

complaints about breaches by a signatory party.[61] While it would be overly simplistic to expect that the UK courts would or should always follow future Court of Justice rulings on the Aarhus Convention – aspects of the EU legal order itself have been said to breach the Convention[62] – a decision to ignore the Court of Justice's post-Brexit case law may equally be misguided. Environmental protection is, after all, an unavoidably shared endeavour, and courts can always learn from one another in such contexts.[63]

3.2. Common law constitutional rights

The area of common law constitutional rights provides yet another example of where confluence has occurred and where it may continue to occur in the future. Such rights might best be described as unwritten guarantees that have been recognised by the courts (in some instances) for centuries and which have become increasingly prominent in case law since the 1980s.[64] Although it has been doubted whether such rights can truly be described as constitutional in nature,[65] it is axiomatic that the common law offers protection to, amongst others, the right to life, freedom of expression, the right to liberty, and the right of access to justice (as in *Unison*, above).[66] When doing so, the courts have previously said that they may be willing to review even an Act of the Westminster Parliament for compliance with such rights,

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[61] On the Committee, see *http://www.unece.org/env/pp/ccbackground.html*; and M. Macchia, *Legality: The Aarhus Convention and the Compliance Committee*, in S. Cassese, B. Carotti, L. Casini, E. Cavalieri, E. MacDonald (eds.), *Global Administrative Law: The Casebook*, 3rd ed (2012), ch. III.A.1.

[62] See J.A. Campos, *EU violating the Aarhus Convention: Public right to access to justice not yet assured*, at *https://www.clientearth.org/eu-violating-aarhus-convention-public-right-access-justice-yet-assured/*.

[63] For the wider dynamics of such borrowing, see S. Choudry (ed.), *The Migration of Constitutional Ideas* (2009).

[64] For an extra-judicial account, see S. Sedley, *Lions Under the Throne* (2015).

[65] See B. Dickson, *Human Rights and the United Kingdom Supreme Court* (2013), ch. 1; and, e.g., *Watkins v Home Office* [2006] UKHL 17, [2006] 2 AC 395, 411ff, Lord Rodger.

[66] See, respectively, *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696; *R (Lumba) v Home Secretary* [2011] UKSC 12, [2012] 1 AC 245; and *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

albeit no such review has actually happened and the Brexit case law would now cast doubt on the force of such statements. In reality, the protection of common law rights has thus taken form in a "legality principle" that requires the Westminster Parliament to use either express words to override common law rights or words which have that effect by necessary implication (again, as in *Unison*, above).[67] The approach of the courts has also been aligned to a principle of "anxious scrutiny" whereby administrative decisions that interfere with common law rights can be subject to a form of proportionality review.[68]

Such developments in the law have sometimes occurred on the basis of the common law's own internal dynamism, and case law has continued to note the importance of that means of development.[69] Certainly, from an historical perspective, it can be said that the common law has existed on its own continuum so that, for instance, its right to a fair hearing has evolved into a common law right of access to justice.[70] However, in making such adaptations, whether they relate to access to justice or to other rights, the common law has been influenced by external standards that have included EU law (*Uniplex*, *EOC*, etc) and the ECHR.[71] While it is true, in terms of the ECHR, that the courts have not always followed rulings of the Strasbourg Court,[72] they have

[67] *R v Home Secretary, ex p Simms* [2000] 2 AC 115, 131, Lord Hoffmann; and, e.g., *Ahmed v HM Treasury* [2010] UKSC 2 & 5, [2010] 2 AC 534, and *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

[68] *Pham v Secretary of State for Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, 1628-1630, Lord Reed. However, it has to be noted that there continues to be doubt about the precise status of the proportionality principle in domestic law: see *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355.

[69] Notably, in the following decisions: *Re Reilly's Application* [2013] UKSC 61, [2014] AC 1115; *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455; and *A v BBC* [2014] UKSC 25, [2015] AC 588.

[70] P. Leyland, G. Anthony, *Textbook on Administrative Law*, 8th ed. (2016) ch. 17.

[71] See M. Amos, *Human Rights Law*, cit. at 26; and T. Hickman, *Public Law After the Human Rights Act* (2010).

[72] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, 125, Lord Neuberger; and, e.g., *Poshteh v Kensington and Chelsea LBC* [2017] UKSC 36, [2017] AC 624. It has been said that the courts have been involved in a process of "constructive dialogue" with the ECtHR, on which idea, see A. Young, *Democratic Dialogue and the Constitution* (2017), esp. ch. 8.

nevertheless allowed ECHR case law to permeate the common law and even to give rise to new domestic causes of action.[73] When doing so, the courts have sometimes examined the reach of rights with reference to the Charter of Fundamental Rights, which has been referenced both on a free-standing basis and as a correlate of the ECHR.[74] References have also been made to unincorporated international law, where treaties have been used as aids to statutory interpretation and to the development of the common law, and where customary international law has been said to exist as a part of the common law itself.[75]

In broad terms, Brexit should do little to complicate this overlap of standards. While the European Union (Withdrawal) Act 2018 provides that the Charter of Fundamental Rights is no longer enforceable in the UK courts – there have also been political debates about the future position of the Human Rights Act 1998[76] – there is nothing to suggest that further changes to the UK's human rights framework are imminent. Indeed, on the assumption that the Human Rights Act 1998 will remain in force for the foreseeable future, there will continue to be scope for European influences either directly through the ECHR and/or indirectly through the Charter of Fundamental Rights (whether as considered by the Strasbourg Court and/or as "persuasive" authorities within the common law tradition). Looking forward, the real challenge in terms of rights may therefore not crystallise until (if?) further political steps are taken to close-off domestic law

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[73] E.g., the misuse of private information: see *Campbell v Mirror Group Newspapers* [2004] UKHL 22, [2004] 2 AC 457; and *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081.

[74] See, e.g., *Rugby Football Union v Viagogo Ltd* [2012] UKSC 55, [2012] 1 WLR 3333; and *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271.

[75] On treaties, see, e.g., *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, 993, para. 27, Lord Hoffmann; on customary international law, see, e.g., *Keyu v Secretary of State for Foreign Affairs* [2015] UKSC 69, [2016] AC 1355, 1411-1414, Lord Mance. See, also, *Benkharbouche*, cit. at 41.

[76] See, e.g., *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws*, available at *https://www.conservatives.com/~/media/files/.../human_rights.pdf*. For some constitutional questions, see H. Mountfield QC, *Beyond Brexit: What does Miller Mean for the UK's Power to Make and Break International Obligations?* 22 JR 143 (2017).

from European human rights influences. Should that happen, there may well be questions about whether the UK would be in breach of its international obligations, as the EU-UK Withdrawal Agreement contains commitments about the role that the ECHR plays in the particular context of Northern Ireland.[77] However, for the common law, which has done so much to absorb European standards, the more pressing matter may be how to continue to develop rights in a progressive, rather than regressive, manner. While one way of doing so may be to draw more immediately on the comparative experience of other common law systems, international law – both in the form of treaty law and customary international law – may also become increasingly influential.[78] Were that to happen, it might be that the common law would merely have replaced one set of "external" norms for another, and continued to develop Bingham's "substantive" / "thick" conception of the rule of law.

4. Conclusion

Such comments are, however, speculative, and the courts may not need to engage in much re-engineering of, what is sometimes called, "the common law constitution".[79] While Brexit undoubtedly represents a fundamental legal and political change, the avoidance of a "no-deal Brexit", coupled with the stated intention to have close EU-UK relations in the future, means that withdrawal may not be so fractious as it may otherwise have been.[80] For the rule of law doctrine, this is important in so far as

[77] See Ireland-Northern Ireland Protocol, esp. Article 2. For some of the complexities, here developed with reference to the previous draft Withdrawal Agreement, see C. McCrudden, *Brexit, Rights and the Ireland-Northern Ireland Protocol to the Withdrawal Agreement* (British Academy, 2018), available at *https://www.thebritishacademy.ac.uk/publications/europe-futures-brexit-rights-ireland-northern-ireland-protocol-withdrawal-agreement*.

[78] For possibilities in this regard, see C. Harlow, *Export, Import: The Ebb and Flow of English Public Law*, PL 240 (2000) and D. Feldman, *The Internationalisation of Public Law*, cit. at 20.

[79] See J. Laws, *The Common Law Constitution*, cit. at 9.

[80] See *Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom* (October 19, 2019), available at *https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration*.

legal disputes often have a political context that lends legitimacy and significance to the judgments of the courts. Where that context is defined by necessary and desirable linkages between legal orders and political systems, it is much easier for the rule of law doctrine to be grounded in domestic principle and to absorb external norms.[81] If Brexit ultimately recasts rather that rejects that reality, the economy of the common law may need to do little to protect the rule of law.

5. Postscript – the United Kingdom Internal Market Bill

Since this article was submitted for publication, there has been a high-profile dispute between the UK government and the EU-27 about trading relations after the transition period has ended. The dispute has centred on a Bill that was introduced in Parliament which includes clauses that would give UK government Ministers the power to act in contravention of the Withdrawal Agreement, in particular as relates to the Ireland-Northern Ireland Protocol. In an astonishing turn of events, a UK government Minister acknowledged in Parliament that the Bill would contravene international law but that this was necessary to allow Ministers to protect the integrity of the UK's internal market. In corresponding political debates, it was said that this would undermine the rule of law and amount to an act of bad faith on the part of the UK government. Nevertheless, it appears at the time of writing that the Bill will enter into law, albeit that the disputed powers will be exercisable only with prior Parliamentary approval.[82]

The fact of this Bill does not unsettle the argument that has been made above. It does, however, bring into sharp focus the potential legal consequences of the doctrine of Parliamentary sovereignty that has been reinvigorated by the Brexit case law. In short, the UK government has mobilised the doctrine in a way that gives the domestic legal order clear ascendancy over the international order. When doing so, the government has included within the Bill provisions that seek to limit the scope for judicial

[81] For such linkages, see J.B. Auby, *Globalisation, Law and the State* (2016).

[82] For commentary on the Bill and associated issues visit: https://publiclawforeveryone.com/.

review of exercises of the relevant Ministerial powers. While it remains to be seen whether those powers will ever be exercised in practice – an agreement on future trading relations would denude them of relevance – they present a potentially very real challenge to the rule of law doctrine in UK law. In the event that an exercise of the contested powers comes before the courts, it is to be hoped that any subsequent ruling would be able to reinforce the rule of law as "the ultimate controlling factor on which our constitution is based".[83]

[83] *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 304, para. 107, Lord Hope.