ISSN 2723-9195

CERIDAP

Rivista Interdisciplinare sul Diritto delle Amministrazioni Pubbliche

Estratto

Fascicolo
3 / 2022

LUGLIO - SETTEMBRE

The UK's Future Contribution to European Public Law

Patrick Birkinshaw

DOI: 10.13130/2723-9195/2022-3-3

L'UE ha aggiunto alla nostra costituzione una dimensione di legalità superiore, determinata dal giudice e realizzata da un edificio costruito dalla legge. Quando furono apprese le lezioni di Van Gend en Loos e Costa c. ENEL, gli effetti furono profondi: non solo la legislazione che violava il diritto dell'UE direttamente applicabile non veniva applicata, ma potevano essere emesse ingiunzioni contro un ministro che sostituiva la Regina come funzionario della Corona in violazione del diritto dell'UE. L'uscita dall'UE ha comportato un'importante modifica della nostra Costituzione. L'EU (Withdrawal) Act 2018 (EUWA) (e ora si veda l'EU Withdrawal Agreement Act 2020) è stato approvato per garantire una transizione agevole per il sistema giuridico del Regno Unito dopo la Brexit. Ciò significa che tutto il diritto dell'UE (ad eccezione della Carta dei diritti fondamentali), insieme ai principi di interpretazione del diritto dell'UE antecedenti alla Brexit (noti come "principi generali del diritto") e alla giurisprudenza della Corte di giustizia antecedente alla Brexit, sono stati convertiti nel diritto del Regno Unito il 31 dicembre 2020 come " retained EU Law" (REUL). Il Governo intende sia dare priorità alla riforma del diritto dell'UE conservato nelle aree che porteranno "il maggior guadagno economico", sia dare al Parlamento il potere di definire con maggiore precisione il rapporto tra il diritto dell'UE conservato e il diritto del Regno Unito. Il margine di deviazione dagli standard dell'UE sarà limitato dalle realtà economiche e commerciali. Una priorità costituzionale urgente sarà la sfida al Parlamento di tenere sotto controllo l'ampia delega di poteri legislativi all'esecutivo che la Brexit ha comportato.

The EU added a dimension of overriding legality to our constitution that was judicially determined and made by an edifice constructed by law. When the lessons of Van Gend en Loos and Costa v ENEL were learned there were profound effects: not only was legislation disapplied which contravened directly enforceable EU law but

injunctions could issue against a minister standing in the shoes of the Queen as an officer of the Crown when contravening EU law. Leaving the EU involved a major change in our constitution. The EU (Withdrawal) Act 2018 (EUWA) (and now see 2020 EU Withdrawal Agreement Act) was passed to ensure a smooth transition for the UK's legal system after Brexit. This meant that all EU law (except the Charter of Fundamental Rights), together with pre-Brexit principles of interpretation of EU law (known as "general principles of law") and the pre-Brexit case law of the Court of Justice, was converted into UK law on 31 December 2020 as "retained EU Law" (REUL). The Government intends both to prioritise reform of retained EU law in areas that will deliver "the greatest economic gain" and to give Parliament the power to define in a more precise way the relationship between retained EU law and UK law. The scope to wander from EU norms will be confined by economic and commercial realities. A pressing constitutional priority will be the challenge to Parliament to keep under scrutiny the vast delegation of legislative powers to the executive that Brexit has brought about.

1. The Legacy – a constitutional coming of age

Our 48-year membership of the European Union ended on 31 December 2020 at 11pm.

A new, uncertain and fractious relationship lay ahead based on the withdrawal agreement and trade and cooperation agreement between the EU and UK. My efforts today are to pick up the reins of what had been my preoccupation for a quarter of a century: to chart the development of European Public Law and the English contribution to that development. There are no UK judges on the CJEU, no UK politicians in the Council or Parliament, no UK functionaries in the Commission, agencies or institutions of the EU and EU law is no longer binding over – or takes primacy over – national law. Any English or UK contribution cannot be direct.

Let me commence with the change in mind-set in the domestic judicial psyche brought about by almost a half century of membership.

Before EEC membership, the UK constitution was a political constitution and its pre-eminent legitimating foundation was parliamentary sovereignty. All constitutions owe their origins to politics but the UK was almost unique in the

absence of judicially determined parameters in the constitution's functioning. Parliament's will set in legislation was unquestionable, whether the legislation enshrined the substance and spirit of the rule of law or not. The doctrine of the supremacy of legislation, and the sovereignty of the Queen in Parliament as a legislator, was the rule of law. Who controlled Parliament controlled legislation and the content of the rule of law. A large Commons majority after a general election, such as we have now, can be used to express populist, demagogic, xenophobic policies. Some will say this is the whole point of elections, especially in a first past the post system of victory.

Legislation has to be interpreted by the courts. Our judges are not hand-picked for their political preferences and I am confident they approach their task in a spirit of independence. The methods of interpretation are common law inspired and have been fashioned to give a special protection to human and constitutional rights[1]. But they are left with little alternative when the legislation is clear and determines one outcome. Short of invoking the Human Rights Act (below) there appears little they can do to resist an autocratic, arrogant and abusive executive in such a context.

The EU added a dimension of overriding legality to our constitution that was judicially determined and made by an edifice constructed by law. There is no need for me to detail the judgments of the ECJ on sovereignty and direct effect. The full implications of *Van Gend en Loos* and *Costa v ENEL*[2] were not grasped by our judges for almost twenty years. When the lesson was learned it had profound effects[3]. Not only was legislation disapplied which contravened directly enforceable EU law but injunctions could issue against a minister standing in the shoes of the Queen as an officer of the Crown when contravening EU law. These remedies were then applied against a minister in a case involving no element of EU law[4]. The cases were in an English setting revolutionary and challenged both Parliamentary sovereignty and Crown immunity. The latter doctrine had been used as a cover by the executive for its actions since personal rule by a monarch disappeared with "divine right".

It seemed we stripped the King of power to let his secretary of state run free[5]. The efficacy of EU law helped ensure that was not the case.

My colleague Mike Varney and I have set out a thesis for the revolutionary impact of these and subsequent judgments of the House of Lords and Supreme

Court in British judicial attitudes. In short, if legislation can be set aside because it contravenes EU law, so much was implied by the European Communities Act 1972 s 2(1) and 2(4) ensuring the supremacy of EU law and protecting the 1972 legislation against implied repeal, then what of the next step: striking down legislation because of unconstitutionality? Constitutionality based on the principles of our constitution as shaped by the common law through judicial decisions?

We explain[6] how not only was the sovereign will of Parliament disapplied when it contravened EU law, but the sovereignty of EU law was itself brought into question when it clashed with constitutional fundamentals contained in the UK separation of powers, or identity of citizenship, or one might add inquisitively, the rule of law protecting fundamental rights such as democracy and the right to vote, access to justice or legal protection[7]. Constitutionality itself was now in the legal crucible[8].

On various occasions, the courts have expressed the view that they will not accept legislation that acted in defiance of the rule of law, obiter[9]. Simultaneously, the judges have perennially proclaimed the sovereignty of Parliament[10]. Might the outcome be Parliament is sovereign as long as it does not abuse its sovereignty? Its sovereignty means it must be given the opportunity to repair its own damage. The judge is not questioning overall sovereignty; the judge is not usurping the role of legislator.

Not even Coke CJ in Bonham's case in 1610 (77 Eng Rep 638) advocated that. The judge is refusing to enforce a particular rule because of its repugnance to human rights and constitutionalism. As the judges have put the point, were our public life to come to this pass things have gone badly wrong. It is to be hoped, as they have hoped, they never do.

The spectre of judicial resignation, or dismissal from office and chastisement will arise.

Post Brexit, of course, UK judges do not have the protection of Art 19 TEU and Art 47 CFR[11]. Matters have not reached that stage. A clash of the Titans is not anticipated. But the *Miller* litigation came close to it. *Miller No 1* was the occasion when the Supreme Court by an 8-3 majority ruled that the government did not have a prerogative power to notify the EU under Article 50 TEU of the UK's wish to leave the EU[12]. Such an action could only be effected by legislation

and not prerogative. Prerogative is the totality of the ancient powers of the Crown in governance, now largely but not exclusively exercised by the government advising the Monarch. A conventional reading of the law might suggest that the prerogative could be so used[13]. But the large Supreme Court majority in favour of legislation was making a constitutional point. Leaving the EU involved a major change in our constitution.

Such a change required the ultimate legal imprimatur in our constitution: legislation. If Parliament needed to be reminded by the court on this, so be it.

My attention turns to *Miller No 2.* This litigation I believe is more constitutionally momentous than *Miller No 1.* It concerned the prorogation (suspension) under prerogative power of the UK Parliament by the Prime Minister for almost five weeks in the autumn of 2019. It is redolent of clashes between the Stuart kings and Parliament in the seventeenth century. The prorogation was to avoid Parliamentary scrutiny and opposition to Boris Johnson's plans for the UK departure from the EU including the distinct possibility of a no-deal departure and its disruption. Unlike the Commons to emerge after the 2019 elections, Johnson was in a weak position in that House which had begun to act almost as a governor.

As far back as 1610, the courts in England had ruled that the King has no prerogative but that which the law allows him, and one adds, recognises[14]. Since the 1960s, the courts had chipped away at the ancient prerogative powers. But this was where the exercise of a prerogative interfered with an individual's rights or undermined legislation, the latter point illustrated by earlier case law. There was judicial acceptance that on some matters it was inappropriate for the courts to challenge a prerogative power by judicial review. The Monarch's dissolution of Parliament had been given as an example of this in the mid 1980s[15]. A dissolution leads to a general election and a new Parliament – or it should do. The problem in *Miller No 2* was that, as the Supreme Court saw it, Parliament was thwarted for a period of up to five weeks in a crucial stage of EU negotiations both from its constitutional role of exercising sovereignty through legislation and rendering the government accountable for its actions/non actions to the people's representative chamber.

A unanimous court of eleven[16] ruled that for the PM to do this without offering any reasons for his advice to the Queen to prorogue was not only

unconstitutional but, and crucially, it was unlawful. As a consequence, Parliament had not been prorogued. Parliament resumed sitting on the next day. The Divisional Court in England and Wales had ruled that such an exercise of the prerogative was not justiciable. It was confined to the realm of high politics[17] – a different decision was taken by the Scottish Inner House[18].

I see *Miller No 2* as a natural progression of case law since the 1960s, which itself had been nurtured in far earlier English case law. Developments in judicial review after 1973 had been heavily influenced by principles of review from EU law[19]. The case law is rich with examples of legitimate expectation, giving reasons for decisions, proportionality, legality, legal protection and access to justice, legal certainty and equality to name a few. These principles came from EU influence.

I do not think the point was lost on Boris Johnson who, along with Dominic Cummings, was the architect of Brexit. In his 2019 election manifesto published shortly after *Miller No 2*, Johnson promised a review of the constitution and specifically of judicial review and the Human Rights Act. JR had been used as a device he argued to conduct politics by another means leading to abuse. Two reviews were set in motion in 2020 and 2021 of judicial review and the Human Rights Act.

Despite a basically clean bill of health on judicial review conducted by a government appointed expert panel (containing some notable sceptics of judicial review and judges) the government proceeded to a further consultation on judicial review reforms with the general public because of apparent difficulty with the experts' assessment[20]. In the event the reforms suggested and put into legislation are comparatively modest[21]. There is a clear threat if the judges overstep the mark, the government will return to more significant reforms.

The reform of the human rights act followed a similar pattern to JR with the appointment of an "independent" expert panel and publication of a consultation document by the government when the panel's report was published[22]. This did not entail a review or removal of substantive ECHR rights the government emphasised. The HR Panel was like the JR panel balanced and temperate in its proposals. It observed that a «*markedly stronger and more positive public perception of the HRA was noted in Northern Ireland, Scotland and Wales than was apparent in England*»[23] . The government wanted more significant reform.

The government initially envisaged a review that would examine the relationship

between domestic courts and the ECtHR (CHR). Secondly, it would examine the impact of the HRA on the relationship between the Judiciary, the Executive (Government) and the Legislature. «*It particularly focuses on what might be termed the impact that the HRA has had on the "constitutional balance" that exists between them*»[24]. The reforms envisaged by the government are more belligerent in tone than those of the panel (CP 586 (December 2021)[25]. They would end the "mission creep" of the use of the Act by lawyers while maintaining the UK's commitment to the ECHR. This comes after well over ten years of attacks on the ECHR and "lefty lawyers" by the Conservatives in opposition and in government. A modern Bill of Rights (BoR) would «*provide a clearer demarcation of the separation of powers between the courts and Parliament*»[26]. The reforms will provide a check on the expansion of human rights without democratic oversight and accountability – in other words judges will be restricted in the criticism they make through human rights litigation of the executive and legislation so that the BoR will preserve Parliament's democratic prerogatives in the exercise of the legislative function[27]. The BoR will strengthen the Supreme Court's powers in the interpretation of the ECHR rights so as not to be bound by the Strasbourg CHR (UK judges are not so bound!) and provide a "democratic shield" to protect Parliamentary sovereignty[28]. Again and again the senior courts have shown they are not slavishly aping the Strasbourg court. They have also shown reluctance to go beyond that court[29]. The Bill attempts to make the Court of Human Rights an optional consideration and in some cases, eg interim orders, an irrelevance. According to the government the new BoR will provide a better balance between individual rights and the rights of society as a whole and introduce a leave stage for applications, as in judicial review.

The Bill of Rights was introduced into the Commons on 22 June 2022. The opportunity was taken to introduce a clause seeking to circumvent the future issue of interim orders by the Court of Human Rights affecting the exercise of powers of the UK government. This occurred in a case involving a deportation of asylum seekers to Rwanda when the flight was grounded in England by order of the Court of Human Rights, even though the English courts had allowed the flight without testing the legality of the policy.[30] The Bill provides that for the purposes of determining the rights and obligations *under domestic law* (emphasis added) of a public authority or any other person, no account is to be taken of any

interim measure issued by the European Court of Human Rights. The domestic court may not have regard to any interim measure issued by the European Court of Human Rights. The legality of this under international law has to be tested.
It was notable that both the *Miller No 2* judgment and the judicial developments in JR and HRA have attracted some impassioned academic legal opposition[31]. In *Miller No 2,* it was claimed the court did not give sufficient weight to the arguments based on Article 9 of the 1689 BoR which seeks to prevent proceedings in Parliament being questioned in any other place i.e. the courts. The attacks on judicial review are at best an attempt by critics to turn back the clock not only to pre-1972 ECA but on movements pre-dating that Act. The action to prorogue Parliament involves Lords Commissioners on behalf of the Crown reading out the prorogation to both Houses. That action is predicated on advice from the PM to Her Majesty in the Privy Council. This advice is not a proceeding in Parliament and as we have seen was based upon an illegality – not the only time the PM has been found guilty of breaching the law in his official capacity. Whatever the limits on attacking a prerogative power, illegality is not among them. It is not without interest that when BJ sought to re-introduce the prerogative of dissolution by repealing David Cameron's Fixed Term Parliaments Act, he did not seek to protect prorogation from judicial review. Only dissolution was given that protection. This is in line with previous case law.

2. The European Convention on Human Rights before the HRA

It is worth recalling how frail the protection of human rights was in the UK leading up to the 1998 HRA. Numerous cases allowed the executive in the form of the police, the prison service, immigration authorities or other wielders of official power the right to interfere with communications, organise forms of imprisonment in breach of Article 3 ECHR, administer corporal punishment because there was no law against it and authorities were, like everyone else, free to do what the law did not prohibit. If an individual had no rights in law, they invariably didn't where what we term human rights were involved, there was nothing to hold the authorities in check. There was no right protected by law with a guaranteed legal remedy subject to exceptions that were in accordance

with the law, necessary and proportionate. There were simply residual liberties which could easily be removed by legislation or official fiat.
The ECHR was not a part of domestic law and could not override a power set out in statute although it could be used as a guide to interpretation of statute or common law. Human rights law has been transmuted in the UK but the reason for this was the influence of the judgments of the CHR after the convention's incorporation into domestic law. Prior to that incorporation it was but a pale shadow, although from the 1980s it was showing increasing traction. This provided a stimulus to the common law of human rights. After incorporation it was enforceable domestically under the terms of the HRA. The government position as expressed in the HRA review assumes a resolute common law but does not acknowledge the European provenance that changed the common law from that shadow. I am reminded of Neuberger LJ in a case concerning admissibility of evidence obtained by torture from third parties which was ruled admissible by the Court of Appeal:«*If my conclusions on the issue so far are correct, they may be said to be somewhat ironic: the common law of England, which has a particularly good record as to the vice of torture since 1640, does not exclude evidence obtained by torture, whereas the law of Europe, where the abolition of torture is rather more recent, would exclude such evidence*»[32].
The common law moves more by pragmatism than principle he said but «*the very fact that countries in mainland Europe have had a more chequered history over the past 300 years may render their courts more sensitive on issues such as torture*»[33]. It was left to the House of Lords to rule a bar on evidence obtained by torture deciding the case on "constitutional principle" not "technical rules of the law of evidence" as had the Court of Appeal. The case post-dated the incorporation of the ECHR, which had no relevance to the point of law in issue, but it displays a compromised approach to vital questions of human rights under the common law by the Court of Appeal, an approach which characterised English courts and human rights pre-incorporation.

3. The Supreme Court and EU Law

On 6 April 2022, Lords Reed and Hodge, President and Vice President of the Supreme Court, gave evidence to the Lords Constitution Committee, an annual

session involving the Supreme Court[34]. Amongst other topics, Reed spoke of the Supreme Court and the ECJ. He explained how the Privy Council has heard a case involving EU law (in Gibraltar) *Gibfibre v Gibraltar Regulatory Authority*, 2021, UKPC, 31 arising after Brexit[35].

The case concerned the Gibraltar Regulatory Authority ("the GRA"), the regulator of the telecommunications industry in Gibraltar and an authorised operator of a public telecommunications in Gibraltar. GRA is the appointed national regulatory authority in accordance with the Communications Act 2006 ("the Act") which transposes into Gibraltar law the provisions of Framework Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("the Framework Directive").

Lord Sales noted in his judgment, at para 68, that in the legal context as it stood prior to Brexit he did not think that it could have been said that the proper interpretation of the Access Directive regarding its scope was "acte clair". The result would have been a reference to the Court of Justice of the European Union. In the proceedings before that court, the European Commission would have appeared to make submissions. The Court of Justice would thus have had the benefit of submissions regarding the policy aims of the common regulatory framework from the body which understands in detail the nature of the markets sought to be regulated, which had formulated the policy to be given effect in the relevant interlocking Directives which comprise that framework, which had drafted them as proposals to be put to the European Parliament and the Council and which continues to have an important role in the implementation of the framework regime (see, articles 7, 15, 17 and 19 of the Framework Directive and article 8(3) of the Access Directive). The domestic court would then have applied the law as interpreted by the Court of Justice to the case at hand.

But the obligation to make a reference to the Court of Justice has gone and the Supreme Court lacks the power to do so. The Board must make its own decision regarding the meaning and effect of the Access Directive without further input from the Commission. We have to determine the case, said Lord Sales, on the basis of the materials available to us. «*Whilst I think it is possible that the Court of Justice might reach a different view from us regarding the meaning and effect of the Directive, I have no confidence that it would be likely to do so*». The PC then reasoned to its conclusion.

The case arose prior to Brexit but was determined by the Privy Council after Brexit and involved no member state. Lord Reed expressed the view that there was no confidence the court would arrive at the same conclusion on the Directive as the ECJ. Post Brexit and the Transition Period, references may no longer be made to the ECJ, but this is not the case under the NI Protocol (below). The same piece of legislation (directive) could have been given two different interpretations in different parts of the UK i.e. between NI (ECJ) and England, Wales and Scotland (Supreme Court). In England the directive was retained EU law; in NI it was EU applicable law.

Choice of law clauses frequently cite the use of English law and courts in commercial disputes and this is going to raise increasing illustrations of choice of law conflicts between English law and EU law where a point of EU law arises. Neither the Supreme Court, nor domestic courts apart from those in Northern Ireland, have power to refer to the ECJ. As Reed spoke (6/04/22) a case had arisen in which an English court had awarded an injunction against a party taking the case to Luxembourg on a preliminary reference. Appeal to the Supreme Court was possible.

4. Retaining and removing EU law[36]

The EU (Withdrawal) Act 2018 (EUWA) (and now see 2020 EU Withdrawal Agreement Act) was passed to ensure a smooth transition for the UK's legal system after Brexit. This meant that all EU law (except the Charter of Fundamental Rights), together with pre-Brexit principles of interpretation of EU law (known as "general principles of law") and the pre-Brexit case law of the Court of Justice, was converted into UK law on 31 December 2020 as "retained EU Law" (REUL). The general principles may be used in a "purposive way" by UK courts but not to disapply UK laws post Brexit or to "create rights of action". While the Charter of Fundamental Rights is not maintained by deliberate exclusion this does not remove any underlying fundamental rights or principles which exist, and EU law which is retained will continue to be interpreted in light of those underlying rights and principles. This seems to suggest out by the front door but in via the back door. The rule in *Francovich* and liability does not apply after 31 December 2020.

Furthermore, REUL takes precedence over conflicting provisions of pre-Brexit UK law. After Brexit, Parliament can pass a law to reverse any judicial decisions giving primacy to EU law. It can also pass laws to repeal any REUL it no longer wishes to have on the statute book. So, to that extent control has been taken back. The Supreme Court and Court of Appeal and Scottish equivalents may also diverge from erstwhile CJEU binding judgments (SI 2020 No 1525 EUWA etc Regs). It was recommended that this power should be widely extended to lower courts and this was avidly advocated by Lord Frost but this to date has not happened. Common sense seemed to prevail over dogma and a recipe for total chaos. In short since 31 December 2020, the UK is no longer bound by past EU law if it chooses not to be and, apart from Northern Ireland, is not bound by future EU law[37].

The Trade and Cooperation Agreement (TCA) stipulates that each side sets its own policies in areas such as social, commercial, environmental matters and criminal justice. However, the safety net for the parties referred to as level playing field provisions means that if this creates a material impact on trade or investment, the EU (or UK) may take retaliatory action. The TCA is replete with dispute mechanisms involving consultation, negotiation, and arbitration as well as "rebalancing" measures[38].

The ECJ retains an important role under the Withdrawal Agreement: under the provisions on citizens' rights UK courts may make a preliminary reference to the ECJ about the interpretation of the WA until 2028. The general dispute resolution mechanism (DRM) provides for political consultation and then arbitration; however, if a point of EU law is at issue, a reference must be made to the ECJ. Under the Northern Ireland Protocol, the ECJ continues to have the same role as it did before Brexit in matters covered by the Protocol. So, for example, the Commission can bring enforcement proceedings against the UK (Article 258 TFEU and it has commenced such action) and national courts can make references to the ECJ (Article 267 TFEU) on points covered by the NIP. Provision is made for litigation commenced before 31 December 2020. Johnson is planning changes under the NIP (below).

The Commission commenced proceedings under the Protocol before the ECJ when the UK unilaterally extended smoothing provisions for the Protocol's introduction. The DRM was resorted to as well by the Commission. The UK

complained in its White Paper in July 2021[39] that the ECJ should have no role under the Protocol – having agreed to the Protocol. The UK wants the DRM that applies under the TCA to apply to the Protocol. Yet because the TCA contains no elements, with minor exceptions, of EU law, the TCA's DRM can be based on the model found in more standard trade agreements (political consultation and then arbitration, with no role for the ECJ). One possible compromise might be that the Withdrawal Agreement's general DRM be applied to the Protocol as well suggests Barnard. The 2021 paper mooted the possibility of invoking Article 16 of the Protocol to exert leverage although the Article was not intended to allow either party to suspend provisions of the protocol permanently or in their entirety.

The NIP, agreed by Johnson and effectively forced on the Democratic Unionist Party (the leading protestant party in Northern Ireland) by Johnson has been an albatross dangling around Johnson's neck. While on a trade mission to India in April 2022, the PM asserted that he was prepared unilaterally to tear up the NIP if the EU failed to make changes. He was prepared to legislate for change without EU agreement. This has been threatened previously and had the Attorney General's support that such action would not breach international law because of Parliamentary sovereignty. The US urged the UK to reach a compromised settlement. Both the EU Commission and Labour opposition said that such unilateral action would breach international law. The Commission emphasised that the NIP created bi-lateral legal obligations. Such breaches would reverberate badly at a time when Russia was acting in breach of international law. Sinn Fein (the Irish nationalist (catholic) party in NI) supported the NIP and its observance; the DUP (above) wanted resolution of the Protocol's "problems" before governmental power sharing, set out in legislation, could recommence in NI[40]. Back on the mainland BJ is planning to extend relaxation of border controls for EU goods to the UK because of the threat of shortages. The relaxation was only operated by the UK.

In respect of post-Brexit ECJ cases, we have seen UK courts and tribunals are not bound by them, and preliminary references to the ECJ are no longer permissible. But a UK court or tribunal may have regard to anything done on or after the end of the transition period (31/12/2020) by the ECJ «*so far as it is relevant to any matter before the court or tribunal*». In other words, UK courts can take post-

Brexit ECJ case law into account when interpreting REUL. This provision will be watched with keen interest. Even the Northern Ireland Protocol Bill (June 2022), which authorises wholesale breach of the EU/UK Withdrawal Agreement and removes the jurisdiction of the ECJ under the protocol, allows regulations authorising a UK court or tribunal to refer a question of interpretation of EU law to the European Court where— (a) the question arises in proceedings before the court or tribunal, and (b) the court or tribunal considers that it is necessary for the European Court to deal with that question before the court or tribunal can conclude the proceedings 'which would then be fed back into the UK court processes.'[41] Consistency is not a virtue of Johnson's government.

5. Further Action on REUL

The UK government prioritised UK regulatory autonomy in the TCA. Lord Frost as Brexit minister thought the presence on the UK statute book of volumes of REUL was unacceptable. In his final resignation speech to Parliament in December 2021, he said he wanted to give REUL a «*more appropriate status within the UK legal system for the purposes of amendment and repeal*». This prompted concerns that if this resulted in downgrading all REUL to secondary legislation (some of it is currently considered primary legislation), thus making it much easier to repeal, Parliamentary scrutiny would be inadequate, especially if, as proposed, an "accelerated process" is involved. In its *Benefits of Brexit* policy paper[42], the government reiterated Lord Frost's ambition to allow «*changes to be made to retained EU law more easily*». «*Our intention is to ensure that this foreign-derived body of law has the appropriate status given that we are no longer a member of the EU*». A "targeted power" would provide a mechanism to allow REUL to be amended in a «*more sustainable way to deliver the UK's regulatory, economic and environmental priorities*»[43]. The Government intends to prioritise reform of retained EU law in areas that will deliver "the greatest economic gain". The government also wanted to give Parliament the power to define in a more precise way the relationship between retained EU law and UK law. This involved removing the supremacy of pre-Brexit law over pre Brexit UK law[44]. This will raise complex issues of legitimate expectation and entitlement.
The government is also reviewing the substance of REUL and categorising it.

«*Once all retained EU law has been categorised, we will make this catalogue public and any subsequent changes to retained EU law accessible*»[45]. No doubt this review will suggest areas for amendment, replacement or repeal but the space for reform is constrained in practice by the level playing field provisions in the TCA – just think of competition, state aids, data protection, environmental protection, employment rights and human rights; concerns about regulatory divergence within the UK, particularly given the inhibitions imposed by the Northern Ireland Protocol; and manufacturers, financiers, professionals, entertainers and so on who in many cases are fretful of divergence and who do not see benefits in divergence from a business or occupational point of view. These changes are unavoidable given the UK's departure from the EU but the published proposals are sometimes accompanied by irresponsible claims by Johnson not only to disobey our treaty obligations with the EU but to introduce sunset repeal laws in an indiscriminate and unconsidered manner. Bravado is a part of Johnson's make-up.

6. Conclusion

So, what do we have? A judiciary that has matured constitutionally under European influence and which is fully conversant with EU and human rights jurisprudence. There is no stepping back from the fact that questions of legality and justiciability now inhabit our constitutional sphere in a way unknown before 1973. While there will remain reluctance among UK judges to become involved in matters of high foreign policy (though recall *Miller No* 1) or in matters of high politics which are best resolved through the political process and in which no legal issue emerges, is it really beyond possibility that dishonest conferral of honours under the prerogative, or an outright illegal war, will remain immune from judicial scrutiny? The impact of judicial review and human rights reforms await careful assessment.

A statute book containing, according to the government, 1,400 pieces of REUL (which seems a very low estimate by the government) which it will take years to alter, adapt or remove in their entirety despite the expedited procedures in the Brexit Reform Bill. There are 2,376 UK acts subject to EU supremacy, a supremacy which the bill hopes to remove[46]. A judiciary that is statutorily

encouraged to refer to future EU case law in interpretation of relevant matters. A reform of the HRA which, far from past experience, will maintain all the rights in the ECHR and accord proper respect to the CHR in which judicial dialogue will be encouraged with UK judges even if the government would like to make the CHR's role optional in domestic law. And despite all the rhetoric of taking back control, Global Britannia, a sovereign legislature free from restraint and world beating regulation, the reality is a world in which opportunities for regulatory divergence[47] from the EU are legally and practically limited by the inhibitions of commercial and economic reaction if the UK strays too far from the norms laid down in EU law.

Conversely, the most significant event to affect the UK and the world since Brexit has been Coronavirus[48], though events in Ukraine may produce comparable shock waves. During the first phase of the pandemic — this was before the end of the transition period — the UK was still subject to EU rules. This included EU State aid rules. They had no constraining effect on the UK's response. As Barnard points out, because some of the UK's schemes, such as furlough, were universal they did not need to be notified to the Commission. Where notification was required, such as the Coronavirus Business Interruption Loan Scheme, then notification and clearance were given under expedited clearance. This occurred under the Commission's Temporary Framework. The UK's first vaccine was approved by the UK Medicines and Healthcare Regulatory Agency (MHRA) during the transition period. This action was allowed under the relevant EU legislation whereby member states were permitted to grant temporary authorisation. The action was consistent with EU policy and was not the result of a new-found post Brexit freedom.

The first UK procurement of vaccines also occurred during the transition period: under EU rules the UK was not obliged to participate in the EU's joint vaccine procurement scheme and proceeded alone. While vaccination was an early success story, the pandemic brought about action by the UK government that was widely criticised in the media and Parliament, and which led to a large body of litigation attacking alleged favouritism in procurement, corrupt appointments and serious wastage of public funds. While the government was unsuccessful in some litigation, it was successful in some of the procurement litigation involving the transposed EU procurement directives[49]. The government has just lost a case

involving its policy of returning senior hospital patients to care homes without any Covid testing, under common law irrationality not the HRA[50]. Both Brexit and the pandemic saw the government resort to vast amounts of delegated legislation, the bulk of which meant there was inadequate Parliamentary scrutiny; I have already adverted to the use of such delegated measures to remove REUL.
The scope to wander from EU norms, whether in data protection, public procurement, financial services or removing EU influence will be practically limited. More pressing will be the challenge to Parliament to keep under scrutiny the vast delegation of Brexit legislative powers to the executive. Devolved legislatures will also face challenges as Brexit unleashes a power-grab by the UK government to legislate in areas which devolved legislatures claim to be within their devolved competence. We shall have to see whether Johnson's resignation as Prime Minister introduces any significant changes in policy.

1. *Simms v SoSHD*, [1999] UKHL, 33, see Lord Hoffmann, second paragraph, *Laws LJ*, in *Thoburn v Sunderland City Council*, [2002] EWHC 195 (Admin), paras. 62-64.
2. Case 26/62 and Case 6/64.
3. *R v Secretary of State for Transport ex p Factortame Ltd (Interim Relief Order)*, [1990] UKHL, 7.
4. *M v Home Office*, [1993] UKHL, 5.
5. *Entick v Carrington*, [1765] EWHC KB J98, per Lord Camden CJ who in his judgment ensured the secretary of state did not "run free" although we had to wait almost 200 years for the Crown Proceedings Act 1947.
6. P. Birkinshaw and M. Varney, in *Britain Alone!*, (2016) Eds A. Biondi and P. Birkinshaw, ch 1.
7. *R (HS2 etc) v SoS for Transport*, [2014] UKSC 3, paras. 206-208; *Pham v SoS HD* [2015] UKSC 19, para. 80 and para. 82.
8. A significant contribution was made by Laws LJ, *Thoburn* above.
9. *Moohan v Lord Advocate*, 2014, UKSC 67; *Schindler*, 2016, EWCA Civ 469; *R (Public Law Project) v Lord Chancellor*, 2016, UKSC 39, para 20; Lords Wolf and Hope writing extra judicially have raised the possibility of judicial refusal to enforce an act of Parliament. See Lord Hope, *AXA Insurance Ltd*, 2011, UKSC 46, para. 50; *Jackson v Att Gen*, UKHL 56.
10. See Lord Sumption, *Privacy International*, 2019, UKSC 22; T. Bingham, *The Rule of Law*, 2010, ch 12 and note the Human Rights Act Independent Panel Report below (HRA Panel Executive Report para 51) note 22 below.
11. *Poland v Parliament and Council*, 16 February 2022, C-157/21.
12. *R (Miller) v SoS for Exiting the EU*, 2017, UKSC 5.

13. See P. Birkinshaw, 2017, *European Public Law,* 23(1), 2017, p.1.
14. *Case of Proclamations* (1611), 12, Co. Rep., 74.
15. *CCSU v Minister for the Civil Service*, 1984, UKHL 9.
16. *R (Miller) v The Prime Minister*, 2019, UKSC, 41.
17. *R (Miller etc) v Prime Minister*, 2019, EWHC, 2381 (QB).
18. *Petition of J. Cherry et al*, 2019, CSOH, 70.
19. P. Birkinshaw, *European Public Law: The Achievement and the Brexit Challenge* 3rd, ed 2020, ch 8.
20. https://www.gov.uk/government/consultations/judicial-review-reform
21. These are in the Judicial Review and Courts Act 2022.
22. (https://www.gov.uk/guidance/independent-human-rights-act-review#about-the-independent-human-rights-act-review) See from the Law Society: https://www.lawsociety.org.uk/campaigns/consultation-responses/human-rights-act-reform-a-modern-bill-of-rights-consultation-law-society-response.
23. See The Independent Human Rights Act Review – Executive Summary (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040526/ihrar-executive-summary.pdf), p.8
24. *Ibidem,* p.3
25. (https://consult.justice.gov.uk/human-rights/human-rights-act-reform/)
26. See Ministry of Justice, "*Human Rights Act Reform: A Modern Bill Of Rights. A consultation to reform the Human Rights Act 1998"* (https://consult.justice.gov.uk/human-rights/human-rights-act-reform/supporting_documents/humanrightsreformconsultation.pdf), p.3
27. *Ibidem,* p. 5
28. *Ibidem,* p. 7
29. The HRA is enforced under the terms of domestic law: see *McQuillan*, paras 149 – 157, below; *AB*, 2021, UKSC 28. See *Gardner* note 49 below. In relation to operative timescales for the ECHR to apply under the HRA see *In the Matter of an Application for Judicial Review by Margaret McQuillan (NI) et al*, 2021, UKSC 55.
30. European Court of Human Rights Press Release ECHR 197 (2022) 14.06.22 *NSK v United Kingdom* App No 28774/22.
31. E.g., T. Endicott (2020) L.Q.R. 175.
32. England and Wales Court of Appeal, Civil Division, "*A & Ors v. Secretary of State for the Home Department,* [2004] EWCA Civ 1123, para. 474. See *A v SoSHD* [2005] UKHL 71.
33. *Ibidem*
34. https://committees.parliament.uk/event/13193/formal-meeting-oral-evidence-session/.
35. https://www.bailii.org/uk/cases/UKPC/2021/31.html.
36. For a short introduction see C. Barnard: https://ukandeu.ac.uk/wp-content/uploads/2022/03/UKIN-Constitution-Governance-Report_FINAL-PROOF.pdf, p. 72.
37. See

https://eurelationslaw.com/blog/accrued-eu-law-rights-a-guide-for-the-perplexed#more-983.

38. See P. Birkinshaw,*European Public Law,* 27(2), 2021, p. 229.
39. Northern Ireland Protocol: the way forward (publishing.service.gov.uk).
40. *Financial Times*, 23-24 April 2022, p. 2.
41. NI Protocol Bill Explanatory Notes para. 101.
42. The Benefits of Brexit: How the UK is taking advantage of leaving the EU (publishing.service.gov.uk): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054643/benefits-of-brexit.pdf.
43. *Ibidem,* p. 34
44. *Ibidem*
45. *Ibidem*
46. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074113/Lobby_Pack_10_May_2022.pdf, p. 52.
47. See Changing UK in Europe *Regulatory Divergence Tracker* https://ukandeu.ac.uk/research-papers/uk-eu-regulatory-divergence-tracker/.
48. See Barnard above n. 36.
49. *R (The Good Law Project) v Minister for the Cabinet Office*, 2022, EWCA, Civ 21 on appeal from O'Farrell J in *R. (The Good Law Project) v Minister for the Cabinet Office & Anor*, 2021, EWHC, 1569, (TCC). See also *R (GLP et al) v Secretary of State for Health and Social Care*, 2022, EWHC, 46 (TCC) and *R (GLP et al) v Secretary of State for Health and Social Care*, 2021, EWHC, 346 (Admin).
50. *R (Gardner etc) v SoS H&SC*, 2022, EWHC, 967 (Admin).