**People get ready! The European Union (Withdrawal) Act and the incorporation of EU Law into UK Law**

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**Introduction**

The United Kingdom’s preeminent post-war judge, Lord Denning, famously described the arrival of European Union Law into British law as ‘an incoming tide:’

*It flows into the estuaries and up the rivers. It cannot be held back.*[[2]](#footnote-2)

While commenting on the European Communities Act 1972, the legislative stopcock which attempted to govern this apparent flood, Professor Hood Phillips noted in 1979 that the incoming tide had reached the Palace of Westminster.[[3]](#footnote-3) Finally, in 1980, while discussing the discrimination case of *Macarthys v Smith* (another Denning appearance),[[4]](#footnote-4) he declared: ‘High tide in the Strand.’[[5]](#footnote-5) Given the presumed unidirectional nature of the influx of EU Law, it might have been thought that Denning’s tidal metaphor was inappropriate. However, following the result of 2016’s EU referendum, it now appears that we must add prognostication to the already considerable list of the famous Law Lord’s attributes.

The United Kingdom’s withdrawal from the EU necessitates the repealing of the European Communities Act 1972, but the statute by which this was to be achieved has had a most lengthy gestation. After some one thousand four hundred amendments, a record in recent times, and two hundred and fifty hours of Parliamentary debate,[[6]](#footnote-6) Royal Assent was finally given to the European Union (Withdrawal) Act on 26 June 2018 (henceforth: the Act or the 2018 Act).[[7]](#footnote-7) The reason for the delay was that as well as reversing the past, the statute also needed to articulate the future. Thus it was decided that all existing European Union Law, in its English version, would be incorporated within UK Law following Brexit.

**Outline and strategy of the 2018 Act**

Reactive, and only partially reassuring, the European Union (Withdrawal) Act 2018 – ‘an exceptional piece of legislation, necessitated by the extraordinary circumstances of Brexit’[[8]](#footnote-8) – serves numerous purposes. In terms of overview, the Act’s own Explanatory Notes offer the following:

*The Act ends the supremacy of European Union (EU) law in UK law, converts EU law as it stands at the moment of exit into domestic law, and preserves laws made in the UK to implement EU obligations…*[[9]](#footnote-9)

The Act further gives Ministers powers to lay statutory instruments with a view to making the country’s domestic legal system operational after Exit Day, and, assuming the signing of a Withdrawal Agreement at the end of the Article 50 process[[10]](#footnote-10) and the ratifying of same – via separate statute – by Parliament,[[11]](#footnote-11) the Act also empowers Ministers to ‘implement’ this Agreement by making such further changes as may be needed to domestic law. Special arrangements are set out for the exercising of these powers in matters currently within the competence of the devolved authorities, including the power on the part of Westminster Ministers to pass controversial ‘freezing’ regulations, temporarily limiting the powers of the devolved administrations.

First and foremost, then, that ‘masterpiece of drafting,’[[12]](#footnote-12) the European Communities Act 1972 (henceforth: the 1972 Act), is to be silenced for good; section 1 of the 2018 Act brings the 1972 Act to an end on Exit Day thus

*removing the mechanism for the automatic flow of EU law into UK law (through section 2(1) of the [1972 Act]) and removing the power to implement EU obligations (under section 2(2)…)[[13]](#footnote-13)*

It is true that technically, even if the 1972 Act were not repealed, the withdrawal, on exit, of the UK from the EU Treaties would, as the eight Law Lords making up the majority pointed out in the Supreme Court’s *Miller* ruling, abrogate domestic rights created by the 1972 Act of any effect.[[14]](#footnote-14) They found some assistance in a metaphor of Professor Finnis’ in which (perhaps channeling Lord Denning’s aquatic theme) he described section 2(1) of the 1972 Act as a ‘conduit’ pipe delivering EU law into the UK legal system.[[15]](#footnote-15) Withdrawal from the Treaties would empty the conduit pipe of ‘the contents which flow through it,’[[16]](#footnote-16) and devalue to nil any contents already having made the journey. By section 1 of the 2018 Act, however, Parliament takes the extra, final precaution of itself terminating the ‘existence of the... pipe’,[[17]](#footnote-17) presumably so as to preclude even the possibility of any future flow, this act less about law and more about ‘symbolism.’[[18]](#footnote-18)

By section 2 of the 2018 Act, current UK legislation implementing EU law survives the UK’s withdrawal from the Union. This is what is known as a savings clause, and is needed because ‘[g]enerally’ UK delegated legislation ceases to exist as soon as its parent statute, in this case the 1972 Act, is repealed.[[19]](#footnote-19) Section 3 then intends to incorporate into UK law all of what has been up until this point directly applicable EU Law. Now it it is clear that laws to which a country subscribes as part of its international obligations are *ipso facto* not part of the national legal code (although this may make little difference in practice to those on whom it imposes obligations or those for whom it creates rights). However, section 3 does much more than simply retain the *status quo* by renewing the subscription cancelled by section 1; the moniker ‘continuance clause’ somewhat undersells it.[[20]](#footnote-20) In fact, section 3 *imports* the ‘lost’ directly applicable EU legislation wholesale into UK law, considerably swelling the UK’s statute book as it does so. Some have referred to it as an ‘onshoring process.’[[21]](#footnote-21) It is to be hoped that Cicero was not right when he said *summum ius, summa iniuria*, which in this context might be translated as ‘the more law you have, the worse things get’. The House of Lords Constitution Committee quickly flagged up ‘the degree of uncertainty as to what exactly the process of converting EU law into UK law will involve’ and correctly predicted ‘the granting of relatively wide delegated powers to amend existing EU law.’[[22]](#footnote-22) Indeed, much of the rest of the statute is taken up with the granting, and attempted control, of exactly such powers. The vital opening quartet of sections, which represents the nerve centre of the entire Act, is completed by section 4, a further savings clause entitled, ‘Saving for rights etc. under section 2(1) of the ECA.’

Let us examine this in slightly more detail. Leaving aside the pre-existing domestic implementations of EU Law (specifically EU directives) which are ‘saved’ by section 2, the Act informs us that there are to be three categories of so-called Retained EU Law, two of them deriving from section 3 of the Act and the third from section 4 of the Act. The two from section 3 are collectively known as ‘Retained direct EU legislation,’ and this encompasses most EU legal measures which are directly applicable, with the exception of Treaty provisions. According to section 7(6) of the Act, ‘Retained direct principal EU legislation’ will encompass most EU regulations,[[23]](#footnote-23) while ‘Retained direct minor EU legislation’ is a residual category covering all of the other types of directly applicable measure, EU decisions for example, and also EU tertiary legislation. The third category of Retained EU Law comes from section 4 of the Act and, according to the Explanatory Notes to the Act, this category will encompass *inter alia* ‘directly effective rights contained within EU treaties.’[[24]](#footnote-24) However, other directly effective rights, such as those which can be derived from directives where these have not been properly implemented, are included, as long as they have already been declared directly effective by the European Court of Justice prior to Exit Day. There is no guidance at the moment as to whether any given piece of Retained EU Law will be treated by Parliament and indeed the courts as an Act of Parliament or as a Statutory Instrument, or even as something else entirely.[[25]](#footnote-25)

In the present article, it is intended to consider the prospects for this ambitious incorporation project. The analysis will proceed via the interrogation of two propositions. The first proposition is that the doctrine of implied repeal will quickly render the codex of ex-EU law unworkable, and the second proposition is that, even in the absence of the doctrine of indirect effect, national courts will still have to interpret pre-Brexit national law in line with EU law.

**First proposition: The doctrine of implied repeal will quickly render the codex of ex-EU law unworkable**

A discussion is now underway in the UK about implied repeal of EU law after the entry into force of the Act. The opening contribution to this discussion was arguably in a submission by Dr Lock to the Finance and Constitution Committee of the Scottish Parliament, which launched a call for evidence on the impact of the European Union (Withdrawal) Bill (as it then was) on Scotland’s devolution settlement in mid-July 2017. Dr Lock eloquently articulated a number of important questions raised by the Bill, including the following:

*[M]ust one assume that post-Brexit legislation overrides all contradictory retained EU law by virtue of the doctrine of implied repeal?[[26]](#footnote-26)*

So far as the present author can gather, the next contribution to this discussion was a House of Commons Library Briefing Paper from November 2017,[[27]](#footnote-27) which again broached the topic and even suggested that, since the Act was ‘likely to be’[[28]](#footnote-28) a constitutional statute in the sense in which Laws LJ had used this phrase in *Thoburn v Sunderland City Council*,[[29]](#footnote-29) then retained EU law converted by sections 3 and 4 thereof might also be afforded some ‘degree of constitutional protection.’[[30]](#footnote-30) As will be explored more fully hereafter, given the leading role played by chronology in a legal system based on parliamentary sovereignty, one law needs all the reinforcement it can get if it is to survive the knockout blow delivered – advertently but more often inadvertently – by a later one. Nevertheless it would seem to be counter intuitive to domesticate a certain body of law with a view to amending it, only to render it invulnerable to amendment by cladding it in a suit of armour on arrival. The most recent contribution to the discussion, again as far as this author can gather, was a blog post by Professor Young from May 2018 in which she expertly explored the same hypothesis: that new legislation passed by Parliament on or after Exit Day may impliedly repeal retained direct EU legislation.[[31]](#footnote-31)

This first proposition investigates how serious the threat to EU Law is, principally by means of a case-study based on some real-life legislation which is currently before Parliament. The case-study will, however, deal with a *Treaty* right, which is not retained direct EU legislation under section 3 of the Act, but rather EU Law which is retained by virtue of section 4 of the Act, referred to simply as ‘directly effective rights’ in the Explanatory Notes.[[32]](#footnote-32) In the present author’s opinion, such law could be equally vulnerable to implied repeal, though, and that is so even if, as the Explanatory Notes warn, ‘it is the right which is retained, not the text of the Article itself’.[[33]](#footnote-33) This is not the place for a discussion of whether rights can exist without law, although Parliament’s decision to exclude the text – if the Notes may be trusted on this point[[34]](#footnote-34) – is deeply problematic as some of the rights are complex and it is unthinkable that British judges would not have recourse to the words ‘behind’ the rights when enforcing them from the Bench. These words may then clash with future words to be written by Parliament. If the result of the clash must be described as ‘implied vitiation’ rather than ‘implied repeal,’ then so be it.

**The ban on cold-calling in the pensions sector as a case-study**

At the time of writing, the UK government is committed to passing a ban on so-called ‘cold calling’ in the pensions sector, so as to eliminate the threat of pension scams which often cost victims their life savings.[[35]](#footnote-35) Meanwhile, it may be remembered that when the Dutch government attempted such a ban in 1991, the Court of Justice ruled that, at least in principle, this was a violation of the freedom to provide services.[[36]](#footnote-36) A Statutory Instrument providing for the UK ban, to be entitled the Privacy and Electronic Communications (Amendment) (No 2) Regulations, is anticipated shortly, and one imagines that it could be challenged in the UK, on the basis of an alleged breach of Article 56 TFEU, once passed. However, for the purposes of this section, I would like to imagine that the British regulations are not in fact passed until after Exit Day, the day on which Article 56 TFEU becomes part of domestic law.[[37]](#footnote-37)

So let us suppose now that it is after Exit Day, and that the Privacy and Electronic Communications (Amendment) (No 2) Regulations 2019 have just come into force. A British service provider, working in the pensions sector and wishing to use cold calling as a method of developing their business, challenges these Regulations as violative of ex-Article 56 TFEU.[[38]](#footnote-38) It is submitted that they may fail in this challenge for two reasons, one obvious but remediable, and the other with more far reaching consequences.

Dealing with the obvious but remediable reason first, this concerns the wording of Article 56 TFEU itself:

*Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.*

*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.*

It will be seen that, once domesticated, the (now ex-) Article does not work in the context of the UK, which post Exit Day will no longer be a Member State. Thus the ex-Article cannot protect our challenger, even if – hypothetically – his or her cold calling, and the follow-up services, if any, are targeted at customers in the EU27, as it will then be. If we assume, then, that between Exit Day and the challenge, the deficiencies of Article 56 had been remedied by a Minister pursuant to the enabling power in section 8 of the European Union (Withdrawal) Act 2018,[[39]](#footnote-39) with the European provision reworded so as to operate in the UK context, then we may turn to the second reason for the challenging service provider’s failure to successfully invoke ex-Article 56 as against the Privacy and Electronic Communications (Amendment) (No 2) Regulations 2019. This is that the Regulations may impliedly repeal all or part of the ex-Treaty provision.[[40]](#footnote-40)

**The doctrine of implied repeal (and friends)**

The doctrine of implied repeal in UK constitutional law is often seen as a ‘corollary’ of the doctrine of parliamentary sovereignty.[[41]](#footnote-41) The latter doctrine is that

*no Act of the sovereign legislature (composed of the Queen, Lords and Commons) could be invalid in the eyes of the courts; [...] it was always open to the legislature, so constituted, to repeal any previous legislation whatever; [...] therefore no Parliament could bind its successors.*[[42]](#footnote-42)

In order for no Parliament to bind its successors, clearly the pronouncements of the later Parliament had to override the pronouncements of the earlier Parliament, and thus, in the event of a conflict, a later Act would repeal an earlier one.[[43]](#footnote-43) This was most famously expressed by Dicey:

*Parliament... has, under the English constitution, the right to make or unmake any law whatever; and further, [...] no person or body is recognised.... as having a right to override or set aside the legislation of Parliament.*[[44]](#footnote-44)

The first clause, up to ‘any law whatever,’ is regarded as the ‘positive limb’ of the doctrine.[[45]](#footnote-45) Cooke has dubbed this parliamentary ‘omnicompetence.’[[46]](#footnote-46) The effect of this limb is that no statute can be entrenched. The remainder, strictly forbidding disapplication of the legislation produced by sovereign Parliament, is the ‘negative limb’.[[47]](#footnote-47) From this doctrine, it follows that Parliament must be free to legislate as it pleases, and that in turn means that an earlier Parliament is prevented from tying the hands of a later one by immunising any statute from repeal. The doctrine of implied repeal is the mechanism by which this prevention is brought about.[[48]](#footnote-48)

An example would be the 1783 case of *R v John Davis*,[[49]](#footnote-49) where an individual charged with stealing deer was no doubt pleased to learn that a statute from 1723, classifying the offence as a felony and imposing the death penalty on those found guilty, had been impliedly repealed by a statute from 1776, downgrading the offence to a misdemeanour to be punished by a £20 fine. As Bennion points out, this ‘virtual repeal,’ as the doctrine seemed to be known then,[[50]](#footnote-50) could be reduced to the latin tag: *leges posteriores priores contrarias abrogant.*[[51]](#footnote-51)However, there is an important caveat which militates against this, and that is that judges should be slow to deploy the doctrine, and should first attempt to reconcile the two laws if they possibly can. As Arden J. puts it in *Henry Boot v Malmaison Hotel*,

*the courts presume that Parliament does not intend an implied repeal.*[[52]](#footnote-52)

Bennion adds:

*The effect of the presumption is that courts should, where possible, interpret the provisions of a later Act in a way that is compatible with the earlier one.*[[53]](#footnote-53)

A second important point to note is that implied repeal should not be confused with the maxim *generalia specialibus non derogant*, which as Barber has written is ‘a different principle.’[[54]](#footnote-54) According to this maxim, where a later general provision appears to conflict with an earlier specific provision, the general will give way to the specific. An example is the case of *Seward v The Vera Cruz (owners).*[[55]](#footnote-55) In this case, the Fatal Accidents Act 1846, granting a (then) new claim for loss of life to surviving family members of the deceased, was held not to have been repealed by the Admiralty Court Act 1861 which gave the Court of Admiralty ‘jurisdiction over any claim for damage done by any ship.’ Thus a shipowner could not dodge a loss of life claim brought by family members of a deceased sailor on the grounds that the later statute overthrew the earlier one, bringing the matter within the jurisdiction of the Court of Admiralty, and considerably restricting the remedies available. Lord Selborne L.C. held:

*Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.*[[56]](#footnote-56)

As Goldsworthy explains, the later (general) statute is ‘read down,’ meaning that it is regarded as *inapplicable* to the earlier, specific matter.[[57]](#footnote-57) Such inapplicability of the later statute could be viewed as an ‘exception’ to the common law ‘rule’ of implied repeal, as the earlier statute is held invulnerable to the later one.[[58]](#footnote-58) But in reality one could view the earlier, specific law as the settlement of the discreet matter by Parliament, and the later general law as never having been intended to disturb the earlier one, and, in fact, as being ‘impliedly qualified’ such that no disturbance should be brought about.

What happens when it is the general law which comes first, and the specific law which comes afterwards? At its highest, the argument would be that the maxim *generalia specialibus non derogant* – the general does not derogate from the particular – equates to a maxim, *specialia generalibus derogant* – that the particular derogates from the general. However, although the latter result is the general trend in the case-law,[[59]](#footnote-59) this would seem to be back on chronological grounds (implied repeal *strictu sensu*), rather than due to the purported primacy of the specific, or at the very least a combination of the two. *Halsbury’s Laws of England* gives the position thus:

*To the extent that the continued application of a general enactment to a particular case is inconsistent with special provision subsequently made as respects that case, the general enactment is overridden by the particular, the effect of the special provision being to exempt the case in question from the operation of the general enactment or, in other words, impliedly to repeal the general enactment in relation to that case*.[[60]](#footnote-60)

Thus in the New Zealand case of *R. v Pora*,[[61]](#footnote-61) in which a later and more specific provision restricted parole eligibility in ‘home invasion’ murder cases, with retroactive effect, a clash was discerned with earlier, more general provisions upholding the notion of *nullum pene sine lege*, namely, that there should be no punishment without law. An individual who had committed a murder in the context of a home invasion prior to the adoption of this new law appealed against the sentencing judge’s order that he not be considered for parole for 13 years; the law as it stood at the time of his offence would have allowed for parole after 10 years. Did the later specific law override the earlier, general ones? The majority of the Court of Appeal answered this in the affirmative. However, dissenting judges Elias C.J. and Tipping J. pointed out that, at least in their opinion, the maxim *generalia specialibus non derogant* did *not* equate to a maxim, *specialia generalibus derogant*; they found the latter maxim to be ‘inherently less useful.’[[62]](#footnote-62) But if that is true, then neither level of generality *nor* chronological order definitively determine primacy. And if *that* is true, then it would indicate the hidden presence of a more flexible ‘third way’ for resolving a conflict between two legislative provisions. Such a ‘third way’ was arguably enunciated by Lord Herschell L.C. in *Institute of Patent Agents v Lockwood*:[[63]](#footnote-63)

*You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other.*[[64]](#footnote-64)

This ‘leading provision’ theory is greatly preferred by Elias C.J.and Tipping J. in their dissent in the New Zealand case mentioned immediately above.

**Models of implied repeal**

While much has been written about the doctrine, surprisingly little seems to actually be known – beyond doubt – about its operation. Matters are not helped by the fact that most of the literature concerns one particular putative scenario for the doctrine’s application, namely, the scenario wherein a later non-constitutional enactment is purported to have impliedly repealed an earlier constitutional enactment.[[65]](#footnote-65) That would not be the situation in our case study. As commented above, it would seem odd indeed if British legislators or judges chose to immunize incoming EU Law as ‘constitutional,’ when the goal of withdrawal from the EU would seem to have been all along precisely to facilitate the amendment or repeal of EU Law, not to make it more difficult.[[66]](#footnote-66) So we need to know, not what happens when a constitutional enactment undergoes implied repeal (if it does at all), but when a common or garden one does. And the answer not only depends on the precise nature of the later, supposedly repealing enactment, but also on the model of implied repeal employed.

Proponents of the Conflict of Norms Model hold that, where there are two conflicting enactments, an earlier one (call it Act 1) and a later one (call it Act 2), priority is *always* to be given to the norm produced by the later enactment.[[67]](#footnote-67) However, proponents of the Conflict of Subject-Matter Model hold that the two enactments can ‘operate… side by side,’[[68]](#footnote-68) with Act 2 only taking precedence over Act 1 ‘when they stand on the same subject-matter.’[[69]](#footnote-69)In all other circumstances, each should be interpreted after its own fashion, in its own context.

So, in our example, if the Conflict of Norms Model is followed and the doctrine of implied repeal *does* apply in cases where the two enactments in contention concern different subject matters, then the 2019 Regulations, although as a statutory instrument rather than a statute they would not be powerful enough to effect a knock-out blow on ex-Article 56, whatever legislative form the latter eventually takes,[[70]](#footnote-70) they would need to be judicially interpreted so as to be compatible with the ex-Article. If they could not be so interpreted, then the ex-Article would be impliedly repealed to the extent of the inconsistency. But what does the phrase ’to the extent of the inconsistency’ mean here? Does it mean, as Lyon suggests in the context of Section 2 of the European Communities Act 1972, that by passing the later enactment Parliament showed that it ‘no longer intended’ for there to be such a thing as the free movement of services?[[71]](#footnote-71) If so, then, here, ‘to the extent of the inconsistency’ would mean ‘altogether.’ But if, on the other hand, the repeal is viewed more abstractly – as pertaining to its own context only – then it could be said that no actual change to the wording of ex-Article 56 has come about at all, but a change to its interpretation such that future judges should be aware that free movement of services is disapplied where cold calling was concerned.[[72]](#footnote-72) As Dodge has wisely written in the US context, we need to know ‘the level of abstraction at which implied repeal analysis should occur.’[[73]](#footnote-73)

However, given that Brexit is legal *terra incognita* for both the legislature and the judiciary, one wonders if there might not be another reading of the Conflict of Subject-Matter Model in the particular context of retained EU Law. According to that reading, Act 1 would represent Parliament’s latest thinking on the matter *with regard to the whole EU*, while Act 2 would represent Parliament’s latest thinking on the matter *with regard to the UK only*. On this reading, two acts dealing with the same subject matter could in fact be reconciled; the *locus* of the conflict, if there can still be said to be a conflict following such reconciliation, shifts to the *geographical context*.[[74]](#footnote-74) New Act 2 would in effect only apply in what EU Lawyers call the Purely Internal Situation, leaving old Act 1 to govern situations occurring across borders.[[75]](#footnote-75) The model would in fact seem to be a reification of the old rule that EU Law should not apply in the Purely Internal Situation.[[76]](#footnote-76)

Critics will argue that the new model, the Conflict of Geographical Context Model perhaps, in fact only replicates the *status quo*, where clashes between national law and EU Law are concerned anyway. However, one must be careful here, as the Purely Internal Situation rule (that EU Law should not apply in such situations), has not been honoured consistently, and some would say has been mainly honoured in the breach. Certainly beer drinkers will know that Germany is still perfectly entitled to impose its famous ‘beer purity’ – or *Reinheitsgebot* – laws internally, requiring domestic brewers to follow them and indeed to declare that they have done so on the label. What EU Free Movement Law *forbids* is that German shops or bars should exclude those (foreign) beers that have *not* done so.[[77]](#footnote-77) Thus national and EU Law can happily coexist. Elsewhere in the Free Movement casebook things are not so clear-cut, and the Court of Justice’s fear, even where there were no actual cross-border effects, of hypothetical ones, often led the Court to breach the Purely Internal Situation rule and apply Free Movement law within the host State itself. Thus a prohibition on mixing brown and golden bees had to be set aside even within one Member State (Denmark).[[78]](#footnote-78) Bees, once (hypothetically) mixed up by foreigners, are, one would certainly imagine, hard to unmix. And there are many other instances of the Court violating the Purely Internal Situation principle besides this one. So, if we assume that the effect of *Alpine* (the Dutch cold calling case) is that in EU Law cold calling, as a selling technique, is forbidden both between *and within* Member States,[[79]](#footnote-79) then in fact such a Conflict of Geographical Context Model of implied repeal – ‘repeal within doors, and none abroad’[[80]](#footnote-80) – *would* bring about a result different from the *status quo*, in this and quite possibly many other situations.

**Conclusion on the first proposition**

Of the two, and maybe three, models of implied repeal, then, only one really poses a danger of Act 2 ‘knocking out’ Act 1 (the Conflict of Norms Model), and even here there is a degree of doubt as to whether the whole of the predecessor enactment falls, or just the part with which the successor enactment is in conflict.[[81]](#footnote-81)

A tentative conclusion to this proposition, then, would be that, on only one reading of one model of the doctrine of implied repeal (the Conflict of Norms Model) would the codex of ex-EU Law known as retained EU Law be rendered unworkable, as every subsequent enactment would, perhaps inadvertently, knock out a previous one with which it clashed. Even on the Conflict of Subject-Matter reading, there will be damages to the body of imported European Law, but rather than a series of knock-out blows, it would be more like death by a thousand cuts[[82]](#footnote-82) This is also what would happen on the more liberal reading of the Conflict of Norms Model. One imagines this steady, incremental approach to be the more palatable, even if it brings with it greater threats to legal certainty. Finally, the Conflict of Geographical Context Model, if entertained, could prevent damages occurring to the body of retained EU Law altogether, although the purpose of that law would increasingly come into question – intact, yes, but barely enforceable.

One way to protect the body of retained EU Law from the (potential) ravages of the Conflict of Norms reading would be to reinforce certain pieces of retained EU Law by constitutionalising them. They would then be immune from implied repeal, and this in turn would force Parliament to be more robust in its repealing: explicit, rather than implicit. Arguably the inclusion of prospective Henry VIII powers within the European Union (Withdrawal) Act 2018 has also had a strengthening effect on the ex-European laws, by subjugating any future Acts of Parliament by which the government might seek to dilute the EU rights under the yoke of possible subsequent amendment. While this is hardly ‘constitutional *self*-defence,’ to use Barber and Young’s phrase,[[83]](#footnote-83) it is constitutional defence of some sort. Might Parliament after all be trying to future-proof the incoming EU Law to preserve it from alteration, or even abolition, after Exit Day?

**Second proposition: Even in the absence of the doctrine of indirect effect, national courts will still have to interpret pre-Brexit national law in line with EU law**

*Laws will be… interpreted by our judges, not those in Luxembourg.*

So said the former Brexit minister, David Davies, in the House of Commons on 17 January 2017.[[84]](#footnote-84) He clearly believes that interpretative sovereignty will come flooding back into UK domestic courts following Brexit and the receding of the European tide. However, his use of the future tense implies that it is only in relation to post-Brexit legislation that this new interpretative sovereignty will apply. With regards to legislation already passed, it is the UK judges’ own interpretative method, with its focus on the intention of the legislature,[[85]](#footnote-85) which may mean that their hands remain tied by EU Law, even in the absence of the EU legal doctrine of indirect effect, for some time to come. Thus, the final result may not be all that Mr Davies hoped.

In accordance with the doctrine of indirect effect, sometimes called the obligation of harmonious interpretation, or duty of consistent interpretation, national provisions intended to implement an EU rule must be interpreted ‘in the light of’ EU Law.[[86]](#footnote-86) This means that they must be interpreted in the way in which the Court of Justice, if it is later seized of the matter, rules that they should be interpreted. However, for a common lawyer, this may mean pretending that the Court of Justice’s later interpretation had been known to the national Parliament at the time of passing the national implementing measure. The question for this section then is, assuming that the doctrine of indirect effect is obliterated by Brexit, surely the national provisions may now be interpreted by reference to Parliament’s *actual* state of knowledge at the time of passing said measure?

Suppose, by way of example, that an EU Directive had provided for what the Court of Justice later regarded as an objective test for non-liability for defective products, while the UK, in its implementation, had set a subjective test.[[87]](#footnote-87) As things stand, the doctrine of indirect effect would compel the UK courts to apply the objective test. However, in a post-Brexit rerun, can it seriously be predicted that the opposite conclusion would be reached? If indirect effect no longer applied, presumably the UK court would still need to adopt the EU court’s traditionally broad teleological method in interpreting a domestic implementation of an EU obligation.[[88]](#footnote-88) Even if the national judges did feel empowered to swap the teleological approach for the English and Welsh[[89]](#footnote-89) literal and golden rules,[[90]](#footnote-90) giving the words of the UK law their ‘plain meaning,’[[91]](#footnote-91) and interpreting them in such a way as ‘best declare[s] the intention of the lawgiver,’[[92]](#footnote-92) the question they would have to ask themselves would be, ‘What did Parliament intend when it passed this law?’ And of course what Parliament intended was to implement the Directive! This would arguably lead the national judges right back to the ‘European’ understanding of the test to be performed.

To understand this further, we need to analyse more precisely what ‘legislative intention’ is: what, if anything, does the phrase ‘the intention of the lawgiver’ mean?

**The intention of the lawgiver: Orthodox and liberal positions**

This phrase is often coined when discussing the judiciary’s obligation, in interpreting statutes, to give effect to Parliament’s will. It is worth quoting Lord Tindal’s dictum in the *Sussex Peerage Case*, which might be deemed the orthodox position, in full:

*The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.*[[93]](#footnote-93)

According to the orthodox position, then, judges are expected to give the words emanating from Parliament their literal meaning (the ‘ipsissima verba’),[[94]](#footnote-94) and, as Lord Tindal points out in the quotation above, the words – once given such meaning – are declaratory of Parliament’s will, without more. As a result, judgment will be given based on that meaning irrespective of the consequences.[[95]](#footnote-95) What does *not* form part of the judicial obligation, though, is working out what Parliament’s will *in fact was*, or at least not where that will is, or is suspected to be, any other than that which is arrived at by ‘giv[ing] effect to [the statute’s] plain meaning.’[[96]](#footnote-96) As Lord Reid puts it:

*We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.[[97]](#footnote-97)*

It is important to point out, though, that the orthodox position is not the only position which it is possible to take. Others have been prepared to regard meaning as a much more flexible, fluid tool. In 1832, the Lord Chancellor in the *Earl of Waterford’s Claim* noted how the literal meaning of a statute became distorted through the accretion of successive judicial interpretations, ‘each going a little and a little further,’ but, far from calling for the literal meaning to be restored, he regarded these successive interpretations as ‘all but imported into the words of the Act,’ even where the courts had ended up with a ‘construction widely different’ from the original literal one.[[98]](#footnote-98) This step-by-step approach, which Lord Steyn labeled an ‘evolutive process,’[[99]](#footnote-99) was also alluded to by Hoffmann J in *Stoke-on-Trent v B&Q*, where he commented that ‘every decoding is another encoding.’[[100]](#footnote-100) Bennion is also an adherent of the liberal position. In particular, he criticizes Lord Kerr’s dictum in *R v London Transport Executive*, in which the latter said that, once the court has interpreted the relevant law, ‘any change in the law from its definition… again devolves to Parliament alone’.[[101]](#footnote-101) Bennion writes that this ‘understates the judicial role.’[[102]](#footnote-102)

**The intention of the lawgiver: Effect of EU Law and new orthodoxy after *Factortame* and *Thoburn***

The need to interpret EU Law, and the legislation implementing it within the UK, led to a major revision in the methods of statutory interpretation utilized in the United Kingdom. The complex relationship between the at that time new legal system, the UK Parliament, and the UK courts, is well set out by Professor Hood Phillipps:

*[T]he dualist and pluralist theory adopted by British constitutional law requires the courts of the United Kingdom to look at Community law through the medium of Parliament... The expression “supremacy of Community law,” if used in the context of our domestic law, must refer to construction, not legislative power; to judicial interpretation, not review of validity.* [[103]](#footnote-103)

EU Law having been given its qualified Right to Remain, the judges then had to work out how to deal with this alien legislation, let alone the interpretations given to it by an alien court. It is worth noting that, up until that point, foreign law was dealt with as a question of fact, not law, and as such was to be decided by the judge. However, in doing so, the judge still had to keep in mind the presumption that Parliament does not intend to act in breach of international law,[[104]](#footnote-104) and that therefore judicial notice should be taken of the rules of such law.[[105]](#footnote-105) Questions of EU Law were converted from questions of fact into questions of law by section 3(1) of the European Communities Act 1972.

Following the landmark constitutional cases of *Factortame*,[[106]](#footnote-106) and particularly *Thoburn*,[[107]](#footnote-107) a *nouveau* orthodox approach emerged. According to this view, judges’ consideration of the meaning and effect of the relevant piece of EU Law, as a question of law, during legal proceedings concerning the related piece of UK Law (let us say the purported transposition into domestic law of the EU obligation) is carried out pursuant to section 3(1) of the European Communities Act *only*, and always with the assistance of the ‘rule of interpretation’ from section 2(4) of the same Act.[[108]](#footnote-108) It is, to paraphrase Laws LJ in *Thoburn*, that the UK instrument took effect *subject to* EU rights incorporated into UK law by the 1972 Act.[[109]](#footnote-109) Those rights, including the right to have domestic law read in the light of EU Law, were therefore *part of* the MPs and peers’ intention, constituting a proviso to their new instrument. If that is correct, then the demise of the 1972 Act[[110]](#footnote-110) renders the proviso inoperative, or put the other way round, allows the new instrument to overcome its proviso. On that reading, to interpret a given phrase from the UK instrument the ‘British way’ following the passage of the European Union (Withdrawal) Act 2018 is arguably a fulfilment, not a betrayal, of the intention of the Parliament which passed the UK instrument in question.

***Assange* as a case-study**

Given the controversial nature of certain pieces of EU Law, it is perhaps unsurprising that there are some judgments where one can find judges from both the conservative and the liberal camps sitting on the same Bench. An example is the case of *Assange v Swedish Prosecution Authority*.[[111]](#footnote-111)

Julian Assange is an Australian journalist who was working in the UK when it was announced that he was wanted by the police in Sweden. Finding himself the subject of a European Arrest Warrant issued in Sweden, he sought to challenge this warrant through the English courts.[[112]](#footnote-112) This meant that ultimately it fell to the judges in the UK Supreme Court to interpret the Framework Decision by which the European Arrest Warrant had been created. In Article 6(1) of the Framework Decision, it provided that the ‘judicial authority’ issuing the warrant was to be the judicial authority of the issuing Member State which was competent to issue an arrest warrant by virtue of the law of that State. Meanwhile, in section 2(2) of Part 1 of the Extradition Act 2003, the act by which the UK had transposed the Framework Decision into English law, it also said that a warrant had to have been issued by a ‘judicial authority.’ Counsel for Mr Assange said that this had to be a court or a judge, who in particular had to be impartial. But in Mr Assange’s case, the European Arrest Warrant had been issued by the Swedish *Prosecutor* (a party to the case). Therefore, according to counsel for Assange, the warrant should be declared invalid. Counsel for Sweden, however, successfully counter argued for a broad meaning to be given to the phrase ‘judicial authority,’ in line with what had already been accepted in other EU countries and by the Commission and the Council, namely, that ‘judicial authority’ included a prosecutor.

With the Framework Decision expunged from UK law, or, perhaps better, with *the requirement for the UK to comply with it* expunged,[[113]](#footnote-113) the court, in a post-Brexit replay of this case, would find itself in a different situation, at least on the face of things.[[114]](#footnote-114) The Act of Parliament would now be the supreme piece of legislation before the court. However, it again cannot be comfortably predicted that the opposite conclusion would be reached. If the Supreme Court judges gave the phrase ‘judicial authority’ its ‘plain meaning,’[[115]](#footnote-115) which, certainly in the UK where there is no tradition of the civil law *juge d’instruction*, would presumably not include prosecutors, would this ‘best declare the intention of the lawgiver?’[[116]](#footnote-116) Their Lordships would need to work out the legislative intention behind the Extradition Act 2003 and it is quite possible that they would hold that this intention, or at least part of it, was to implement the Framework Directive.

To unpack this further, we need to understand more precisely how the Supreme Court in *Assange* came to be persuaded by counsel for Sweden. For the majority, Lord Phillips held that the Supreme Court was obliged to interpret the 2003 Act in the light of the Framework Decision. The phrase ‘judicial authority’ did not give rise to direct effect,[[117]](#footnote-117) but, at least in the view of the majority of the court, was still amenable to indirect effect. He therefore gave the phrase the meaning which had been given across Europe and by the EU institutions, namely that it included prosecutors.[[118]](#footnote-118) It was not open to him to give the phrase a different ‘UK’ meaning, even though Lord Mance, dissenting, had found considerable evidence from the Parliamentary record that a different UK meaning (namely, that the phrase did *not* include prosecutors) had been prevalent in the minds of Government ministers at the time of the passing of the Act. The fact was, as Lord Brown puts it, that they were mistaken,[[119]](#footnote-119) not, as in Lord Denning’s ‘wilful failure’ scenario from *Macarthy’s*, that they were rebelling.[[120]](#footnote-120)

Lord Mance’s dissent is centred on the notion that, when the UK legislature departs from the exact wording of an EU obligation which it is transposing, the resultant differences are *not* a mistake, but, as Lord Hope had opined in an earlier extradition case,

*regarded by Parliament as a necessary protection against an unlawful infringement of the right to liberty.[[121]](#footnote-121)*

Lord Mance actually agrees with Lord Phillips on the correct EU meaning to be given to the phrase ‘judicial authority,’[[122]](#footnote-122) but is of the view that

*Parliament in 2003 may well have thought that the concept of a “judicial authority” (...) in the Framework Decision meant the same as its natural English meaning. If so, we should give effect to Parliament's intention.[[123]](#footnote-123)*

He goes on to explain his belief that Parliament, in passing the Extradition Bill, had fashioned ‘an objective domestic conception of judicial authority.’[[124]](#footnote-124) As to whether a public prosecutor could constitute a ‘judicial authority’ for the purposes of the new statute, Lord Mance deduced from his lengthy consideration of the parliamentary debates leading up to the adoption of the Act that the government ministers introducing the Bill had made assurances that such a prosecutor could not be considered to be a ‘judicial authority;’ the only authority which would request extradition would be a ‘judicial authority in the sense of a court, judge or magistrate.’[[125]](#footnote-125) What could not be imputed to Parliament, according to Lord Mance, was an intention that ‘judicial authority’ should mean whatever it subsequently *came to* mean under EU Law:

*Both Parliament and the courts can and should, in my opinion, take ministers at their word as to the meaning of the Act they were promoting, and not question unqualified assurances which they have given.[[126]](#footnote-126)*

**Analysis**

Brexiteers might well argue that the views expressed by ministers during the passing of the Extradition Bill as to whether or not the notion of ‘judicial authority’ included prosecutors were evidence of a British belief system wherein partial prosecutors could never be confused with impartial judges, a belief system on the basis of which they were entitled to brief MPs and peers who in turn were entitled to adopt laws reflecting it. Such views were only ‘mistakes’ as a matter of EU-imposed legal fact – views no reasonable minister diligently carrying out his or her duty could have reached given the state of EU law at that moment.[[127]](#footnote-127)

Brexit removes the ‘mistaken’ character of these views as they are or may be held on or after Exit Day, but can it neutralise the mistakes of the past? A negative answer to this question would hold that, if the intention of Parliament when passing the Extradition Act 2003 was to fulfil the UK’s existing obligations, and if the fact was that *at that time* the meaning of ‘judicial authority’ - in EU law - was such that it included prosecutors, then neither the intention nor the fact would appear to be capable of being changed *ex post*, even if, going forwards, it will not be possible for MPs and peers to be misled as to meaning, as the interpretative buck will stop with them in any event. It is they who will be the sole masters and mistresses of meaning after Brexit.

Of all of the alternative interpretations given in *Assange*, it is only Lord Phillips’ fifth, that of subsequent state practice, that would allow for the possibility of a UK-only meaning of ‘judicial authority’ after Exit Day. That is because, if Parliament did indeed write the UK judges a blank legislative cheque, allowing them to fill it out in accordance with the prevailing legal zeitgeist at the moment of interpretation, and index-linking the interpretative act to subsequent legal developments, then the adoption of the European Union (Withdrawal) Act would appear to be just such a development, and the repeal of the European Communities Act 1972, removing all of the UK’s obligations under EU Law,[[128]](#footnote-128) should leave the way clear for UK judges to reinterpret the Extradition Act solely from the British point of view. To put it in terms employed by the present article, the orthodox approach would give way to the liberal one.

Perhaps the only *other* way a judge could be able to get away with judging a post-Brexit case about a pre-Brexit law ‘the Brexit way’ would be if he or she took a teleological approach, with the successful realisation of Brexit being the *telos* in question, as the successful completion of the Single Market was for the Court of Justice. The present author has already offered this suggestion elsewhere.[[129]](#footnote-129)

**Final thoughts on the second proposition**

Ultimately what is being called into question here is the power of past Parliaments. But can historic *vires* be varied? Open-ended reassessment of the original intention of Parliament puts old-time views about undiluted sovereignty under strain. Cooke is right to call it a ‘pervading fiction.’[[130]](#footnote-130) However, to return to the US context, ‘changed factual circumstances’ are regarded there as one of the so-called ‘special justifications’ for overruling a precedent,[[131]](#footnote-131) and Brexit is nothing if not a changed circumstance. It is just that abandoning the idea of a unitary meaning either compels one to downgrade the relevance of legislative intention, or else to perform increasingly complex mental gymnastics to relate the ‘new’ meaning back to the original lawmaker.

We have seen that it will be tricky for judges following the liberal approach to find a way to alter the meaning of ‘judicial authority,’ arguably for the second time, post-Brexit. Judges following the orthodox approach might then be tempted to leave the definition as it is. Judges following the ‘new orthodoxy’, though, might *also* find a way to define ‘judicial authority’ so as to exclude prosecutors,following the logic of Hood Phillips as explained in the section before last. According to these judges, their Lordships’ consideration, in the original *Assange* case, of the meaning and effect of the Framework Decision, as a question of law, during legal proceedings concerning the Extradition Act, was carried out pursuant to section 3(1) of the European Communities Act *only*. Thus, they would reason, with the latter Act repealed,[[132]](#footnote-132) the meaning and effect of the Framework Decision would return to what would have been their pre-1972 status of questions of fact and as such could be discarded at will. The Extradition Act must then no longer be interpreted in the light of the Framework Decision; that light would in fact have been switched off. Our *nouveaux* orthodox judges would regard the situation as being, once again to paraphrase Laws LJ in *Thoburn*, that the 2003 Act took effect *subject to* EU rights incorporated into UK law by the 1972 Act.[[133]](#footnote-133) Those rights, including the right to harmonious interpretation, were therefore *part of* the lawgiver’s intention at the time of the passage of the Extradition Act 2003, and those rights were thus to be *read into* the 2003 Act courtesy of an unwritten proviso originating in the 1972 Act. And, they would conclude, since the 1972 Act implied them in, its demise – at Parliament’s instruction – should remove them once again, freeing the post-Brexit judges to interpret the Extradition Act’s words and phrases, including ‘judicial authority’, in as disharmonious a fashion, vis-à-vis the rest of the EU, as they pleased.

However, this author remains unsure whether the new orthodoxy sufficiently excuses future British judges fromcontinuing to interpretpre-Brexit national law in line with EU law. The argument presented immediately above presupposes that the judge’s job is to interpret the domestic legislation at issue as though on the day of the trial, not as though on the day it was granted Royal Assent. There is no getting around the fact that, on the latter date, the ‘proviso’ was still in place, and the lawgiver thus intended, albeit impliedly, that their phrase ‘judicial authority’ should *then* be read in the light of EU Law, however it might be read *now*. There is a case from the Court of Criminal Appeal which nicely illustrates the dilemma. In *R v Munks*,[[134]](#footnote-134) a husband was convicted of inflicting grievous bodily harm on his wife by means of tampering with the electric wiring in their house such that anyone opening the French window would receive an electric shock. The legislation at issue (s 31 of the Offences against the Person Act 1861) offered the following definition of the offence:

*Whosoever shall set or place… any spring gun, man trap or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanour…*

In 1861, ‘engine,’ derived from the Latin ‘ingenium,’ meant any instance or product of ingenuity. By 1963, however, ‘engine’ had come to mean specifically ‘a mechanical contrivance.’ Lord Parker CJ chose to read the statute as though on the day of the trial, and thus reasoned that, since electric wires were not mechanical, the husband was not guilty of the offence. Bennion says that this decision is ‘clearly incorrect, since the intention of Parliament was to punish use of anything falling within the old meaning of “engine”, prevailing at the time the Act was drafted. The Court should have applied an updating construction...’[[135]](#footnote-135) If he is right, then it is the intention of Parliament ‘at the time the Act was drafted’ which matters, not how the same words might be read today. That would mean, in the *Assange* example, that ‘judicial authority’ should still be read, even after the UK’s withdrawal from the EU, as including ‘prosecutor.’

**Conclusion**

Nothing of him that doth fade

But doth suffer a sea-change

Into something rich and strange.

W Shakespeare, *The Tempest*, Act 1, Scene 2

It was Shakespeare who first coined the expression ‘sea-change,’ in Ariel’s ballad ‘Full Fathom Five,’ describing a death at sea, in *The Tempest*. The phrase has come to mean a profound or notable transformation, and while the great playwright no doubt intended this, he also had a more literal meaning in mind: a change brought about by the sea. If the lawyers and judges of the United Kingdom put their minds to reversing the tide of EU Law, there is little doubt that they will succeed, sooner or later. But what emerges from the deep will have undergone many changes since it was last seen in the 1970s. This contribution has attempted to probe those changes a little by means of two propositions.

The first proposition considered was that the doctrine of implied repeal might quickly render the codex of ex-EU law unworkable. After some consideration, including the possibility of a new model for implied repeal especially for Brexit, it was seen that this proposition is probably invalidated as even if some provisions of a new piece of legislation passed after Exit Day are found to be inconsistent with some provisions of a piece of retained EU Law incorporated on Exit Day, the result would most probably be that the conflictual provisions of the new law would be read as exceptions to the earlier EU Law with regard to those particular provisions only, in the spirit of the Australian authority of *Goodwin v Phillips*.[[136]](#footnote-136) The ‘death’ of the ex-EU law would therefore play out over a longer period of time. However, one could not rule out a little death-defiance on the part of the ex-EU law – a case of heavy water, perhaps – either courtesy of some version of constitutionalisation, legislative or judicial, for an as yet unascertained motive, or via a more creative ‘leading provision’ approach to conflict resolution on the part of judges, which might, in given circumstances, see the earlier EU rule declared victorious over the later UK one.

The second proposition considered was that, even in the absence of the doctrine of indirect effect, national courts will still have to interpret pre-Brexit national law in line with EU law. The conclusion to this proposition was that it was probably half validated and half invalidated. Were a case similar to *Assange* once again to come before the British judges after Exit Day,[[137]](#footnote-137) it seems equally likely that they would take the orthodox approach to statutory interpretation, wherein a meaning (in this case the ‘European’ one), once isolated, is embedded within the casebook for all time, as take the liberal one, deploying an updating construction in order to cast their predecessors’ decisions in a new, post-Brexit mould. It was also seen how an orthodox approach may achieve liberal ends, with post-Brexit judges freed from the *Factortame*/ *Thoburn* ‘proviso’ and thus at liberty to interpret a phrase like ‘judicial authority’ in a manner inconsistent with EU Law. However, that would require the judges in question to read the statute as though on the day of the trial rather than as though on the day of Royal Assent, and that in turn could well run counter to traditional canons of statutory interpretation. Thus, even after the UK’s withdrawal from the EU, freedom from the obligation of harmonious interpretation may still be a way off, leaving national judges struggling to change their tune.

1. BA(Hons), LL.M, Ph.D. Senior Lecturer in Law at Brighton Business School (Law Subject Group), University of Brighton, UK; member of the EU Committee of the Law Society of England & Wales. [↑](#footnote-ref-1)
2. *Bulmer v Bollinger* [1974] Ch 401, 418 (Denning MR). [↑](#footnote-ref-2)
3. O Hood Phillips, ‘Has the “incoming tide” reached the Palace of Westminster?’ (1979) 95 LQR 167. [↑](#footnote-ref-3)
4. *Macarthys v Smith* [1979] 3 All ER 325. [↑](#footnote-ref-4)
5. O Hood Phillips, ‘High tide in the Strand? Post-1972 acts and Community law’ (1980) 96 LQR 31. In 1991, commenting on Factortame Ltd’s famous EU Law challenge to the Merchant Shipping Act 1988, Dawn Oliver wondered if these Spanish fishermen, who had been prevented by the Act from registering in the UK, were trying to ‘fish [...] on the incoming tide:’ D. Oliver, ‘Fishing on the Incoming Tide’, 54 *MLR* (1991) p. 442. [↑](#footnote-ref-5)
6. Source: David Cook, Second Parliamentary Counsel, Office of Parliamentary Counsel, ‘Two blinks before Brexit: The legislative side’ (Sir William Dale Annual Memorial Lecture, Institute of Advanced Legal Studies, 30 November 2018). [↑](#footnote-ref-6)
7. European Union (Withdrawal) Act 2018 c16. [↑](#footnote-ref-7)
8. Select Committee on the Constitution, *The ‘Great Repeal Bill’ and delegated powers* (HL 2016–17, 123) para 48. [↑](#footnote-ref-8)
9. Department for Exiting the European Union, ‘European Union (Withdrawal) Act 2018 Explanatory Notes’, p. 6. [↑](#footnote-ref-9)
10. The UK Prime Minister, Theresa May, ‘triggered’ Art. 50 TEU on 29 March 2017, by writing to the Council President, Donald Tusk, communicating to him the country’s ‘decision’ (to use the language of Article 50) to leave the bloc. Negotiations then began on a Withdrawal Agreement, with a Treaty-mandated two-year time limit for such negotiations to be concluded: Art. 50(3) TEU. [↑](#footnote-ref-10)
11. MPs, concerned that they may be used simply to rubber stamp any deal Mrs May reached with the EU, successfully pushed for the inclusion of clauses within the (then) Bill to allow them a so-called ‘meaningful’ vote, in effect an opportunity to consent (or otherwise) to the deal brought back and influence next steps. [↑](#footnote-ref-11)
12. S. Weatherill and P. Beaumont, *EU Law* (3rd edn, Penguin 1999) 438. [↑](#footnote-ref-12)
13. Explanatory Notes, *supra* n. 8, p.9-10. [↑](#footnote-ref-13)
14. *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [70] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge). [↑](#footnote-ref-14)
15. J. Finnis, ‘*Brexit* and the balance of our constitution’, *Policy Exchange*, 2 December 2016, <http://judicialpowerproject.org.uk/wp-content/uploads/2016/12/Finnis-2016-Brexit-and-the-Balance-of-Our-Constitution3.pdf>, visited 2 February 2019. [↑](#footnote-ref-15)
16. *Miller*, *supra* n. 13 [84]. [↑](#footnote-ref-16)
17. ibid. [↑](#footnote-ref-17)
18. Clifford Chance, *Brexit: What will the Great Repeal Bill do?* (Clifford Chance, 2017) 4. Had the repeal not been included in the 2018 Act, the situation would have been as described by Lord Neuberger (President) in an exchange with Mr Eadie, for the Secretary of State: ‘if the Government pulls out of the treaty, the conduit pipe stays there, the statute stays there, but nothing comes through’. See – –, ‘Article 50 Brexit Appeal – Draft Transcript’, *The Supreme Court,* 8 December 2016, [www.supremecourt.uk/docs/draft-transcript-thursday-161208.pdf](http://www.supremecourt.uk/docs/draft-transcript-thursday-161208.pdf), visited 2 February 2019. [↑](#footnote-ref-18)
19. Explanatory Notes, *supra* n. 8, p. 24-5. A fuller investigation into this phenomenon by the present author may be found in R. Lang, ‘What will become of EU laws on the UK statute book after Brexit? Victims’ rights as a case-study’, in R. Lang and C.M. Smyth (eds.), *The Future of Human Rights in the UK* (Cambridge Scholars Publishing 2017). [↑](#footnote-ref-19)
20. J.S. Caird, ‘Legislating for Brexit: the Great Repeal Bill’ (Briefing Paper No 7793, House of Commons Library 2016) 9. [↑](#footnote-ref-20)
21. Clifford Chance, *supra* n. 17, p. 5. [↑](#footnote-ref-21)
22. Select Committee on the Constitution (2017), *supra* n 7, para 46. [↑](#footnote-ref-22)
23. Excluding delegated or implementing regulations. [↑](#footnote-ref-23)
24. Explanatory Notes, *supra* n. 8, p. 29. [↑](#footnote-ref-24)
25. It is likely that the bifurcation of retained EU Law into the two categories of ‘principal’ and ‘minor’ was an attempt to ‘lay down... [a] formula capable of satisfactorily distinguishing between retained direct EU law that should be treated... as primary legislation and that which should be treated as secondary legislation:’ Select Committee on the Constitution, *European Union (Withdrawal) Bill* (HL 2017-19, 69) para 65. The Select Committee’s main concern was that retained direct EU law would find itself vulnerable to revocation by secondary law-making powers, subject to lesser forms of parliamentary scrutiny, if the relevant Minister could merely declare a certain piece of said law to be secondary legislation at will. [↑](#footnote-ref-25)
26. T Lock, ‘Evidence to the Finance and Constitution Committee: European Union (Withdrawal) Bill’, *Scottish Parliament*, August-September 2017, <https://www.parliament.scot/S5_Finance/General%20Documents/3._Dr_Tobias_Lock_Edinburgh_Law_School.pdf>, visited 4 February 2019, [13] – [15]. [↑](#footnote-ref-26)
27. J.S. Caird and V. Miller, ‘The European Union (Withdrawal) Bill: Retained EU law’ (Briefing Paper Number 08136, House of Commons Library 2017). See also a later Briefing Paper, published since the 2018 Act received Royal Assent and thus taking in more recent academic commentary: G Cowie, ‘The status of "retained EU law”’ (Briefing Paper Number 08375, House of Commons Library 2018). [↑](#footnote-ref-27)
28. ibid, p. 19. [↑](#footnote-ref-28)
29. *Thoburn v Sunderland City Council and other appeals* [2002] EWHC 195 (Admin). [↑](#footnote-ref-29)
30. Caird and Miller, *supra* n. 25, p. 19. [↑](#footnote-ref-30)
31. A. Young, ‘Status of EU Law Post Brexit: Part One’, *United Kingdom Constitutional Law Association Blog*, 2 May 2018, https://ukconstitutionallaw.org/2018/05/02/alison-young-status-of-eu-law-post-brexit-part-one/, visited 2 December 2018. [↑](#footnote-ref-31)
32. Explanatory Notes, *supra* n. 8, p. 30. [↑](#footnote-ref-32)
33. ibid, p. 29. [↑](#footnote-ref-33)
34. [I]f the text is indeed not part of UK law, how might it be modified as provided for in e.g. Schedule 8, §3(1)? [↑](#footnote-ref-34)
35. See, for example, HM Treasury, ‘Consultation outcome: Ban on cold calling in relation to pensions: consultation on regulations’ (*Gov.UK*, 29 October 2018) < https://www.gov.uk/government/consultations/ban-on-cold-calling-in-relation-to-pensions/ban-on-cold-calling-in-relation-to-pensions-consultation-on-regulations> accessed 4 December 2018. [↑](#footnote-ref-35)
36. ECJ 10 May 1995, Case C-384/93, *Alpine Investments BV v Minister van Financiën*; in the event, the Court accepted as objective justification the need to safeguard the reputation of the Netherlands financial markets and to protect the investing public. [↑](#footnote-ref-36)
37. At the time of writing, Exit Day would be 29 March 2019 by default (‘no deal’), and it is so defined in the European Union (Withdrawal) Act 2018, s20(1). [I]f Mrs May’s deal (approved by the Heads of State and Government of the EU27 on 25 November 2018) survives various parliamentary procedures, then another key date would be 31 December 2020, which would be the end of the transition period. That would also become the new date on which the domestication of EU Law would take place. Exit Day could also, potentially, be any other date, if the Article 50 process is extended, depending on the extension agreed. [↑](#footnote-ref-37)
38. It is hard to know how exactly to refer to a measure of EU Law which the Withdrawal Act incorporates into UK Law, as it is of course now something other than EU Law – a sort of domestic facsimile, or copy. One could refer to such a measure by its given name, followed by a phrase such as ‘in its new domestic form.’ However, for ease of reference, I have chosen simply to refer to the relevant measure by its given name, preceded by ‘ex-.’ The prefix ‘ex-‘ merely connotes that the measure in question once carried the name which follows, when it was a measure of EU Law, and indeed it still does in its subsisting EU legal version, but that the measure herein being referenced is a piece of UK Law not having been given as yet (and in fact probably never to be given) a new name by which to call it in its new UK legal context. Since the goals of the Heads of State and Government, or the EU institutions, in passing the original act, differ from the goals of the UK Parliament in incorporating the facsimile, one is sorely tempted to adapt Nozick’s famous riposte to distributive rules based on internal goals, whereby he divided health-centred and profit-centred medical services into ‘doctoring’ and ‘schmoctoring:’ R Nozick, *Anarchy, State, and Utopia* (Blackwell, Oxford 1975) 235. [↑](#footnote-ref-38)
39. Paragraph 96 of the Explanatory Notes confirms that the rights retained as a result of s. 4 will be able to be amended by statutory instrument: Explanatory Notes, *supra* n. 8, p. 31. Such remedying may even already have been provided for before Exit Day, coming into force on Exit Day itself. This scenario is foreseen in Withdrawal Act, Schedule 7, §24. [↑](#footnote-ref-39)
40. It should be noted at the very outset that the EU doctrine of supremacy will *not* assist our challenger here. By section 5(1) of the European Union (Withdrawal) Act 2018, once the UK leaves the EU, EU law is no longer to be supreme over new laws made by Parliament. [↑](#footnote-ref-40)
41. A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge 2009) p. 297. [↑](#footnote-ref-41)
42. H.W.R. Wade, ‘The basis of Legal Sovereignty’ *C.L.J.* (1955) p. 172 at p. 174. [↑](#footnote-ref-42)
43. ibid. [↑](#footnote-ref-43)
44. AV Dicey, *Introduction to the study of the law of the constitution* (10th edn, Macmillan 1959) at p39-40. [↑](#footnote-ref-44)
45. I Loveland, *Constitutional Law, Administrative Law, and Human Rights: A critical introduction* (OUP 2009) p. 23ff. [↑](#footnote-ref-45)
46. Lord R Cooke, ‘The road ahead for the Common Law’ (2004) 53 *ICLQ* 273, at p. 274. [↑](#footnote-ref-46)
47. Kavanagh, *supra* n. 39, p. 315. [↑](#footnote-ref-47)
48. Bennion calls it a ‘so-called doctrine’ as, in his view, it is not a separate doctrine at all, but merely an application of the ‘general linguistic principle:’ F.A.R. Bennion, *Understanding common law legislation: drafting and interpretation* (OUP, Oxford 2009) 52. [↑](#footnote-ref-48)
49. (1783) 1 Leach 271. [↑](#footnote-ref-49)
50. ibid at p. 272. [↑](#footnote-ref-50)
51. F.A.R. Bennion, *Bennion on statutory interpretation* (7th edn, LexisNexis Butterworths 2017) at section 6.10. [↑](#footnote-ref-51)
52. *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] 1 All ER 257 at 273 (Arden J.) [↑](#footnote-ref-52)
53. Bennion, *Bennion on statutory interpretation*, *supra* n. 50, section 6.10. [↑](#footnote-ref-53)
54. N.W. Barber and A.L. Young, ‘The rise of prospective Henry VIII clauses and their implications for sovereignty’, Spr. *P.L*. (2003) p. 112 at p. 116. [↑](#footnote-ref-54)
55. (1884) 10 App Cas 59. [↑](#footnote-ref-55)
56. ibid at 68 (Lord Selborne LC). One authority given by Bennion is *R v Secretary of State for the Home Department, ex parte Hickey (No 1)* [1995] 1 All ER 479 at 487 (1983 Act governing the release of life prisoners receiving treatment in a mental hospital not repealed by 1991 Act governing release of life prisoners generally): Bennion, *Bennion on statutory interpretation*, *supra* n. 50, section 6.10. [↑](#footnote-ref-56)
57. J. Goldsworthy, *Parliamentary* *Sovereignty: Contemporary Debates* (CUP 2010) p.292. [↑](#footnote-ref-57)
58. *Contra* Bennion comments that ‘[a]lthough it is sometimes treated as an exception to implied repeal it is really just one example of circumstances in which the presumption against implied repeal is particularly strong:’ Bennion, *Bennion on statutory interpretation*, *supra* n. 50, section 6.10. [↑](#footnote-ref-58)
59. E.g. *Re Williams, Jones v Williams* [(1887) 36 ChD 573](https://www-lexisnexis-com.ezproxy.brighton.ac.uk/uk/legal/search/enhRunRemoteLink.do?linkInfo=F%23GB%23CHD%23sel1%251887%25vol%2536%25tpage%25576%25year%251887%25page%25573%25sel2%2536%25&A=0.9948826643475417&backKey=20_T28402398446&service=citation&ersKey=23_T28402398445&langcountry=GB). [↑](#footnote-ref-59)
60. -- --, ‘Implied repeal of general enactment by particular enactment’ in (2018) 96 *Halsbury’s Laws of England* . [↑](#footnote-ref-60)
61. *R. v Pora* [2001] 2 NZLR 37 (CA). [↑](#footnote-ref-61)
62. ibid [43] (Elias C.J. and Tipping J.) It is true that in the case of *Kidston v Empire Marine Insurance Co. Ltd.* (1866) L.R. 1 C.P. 535, Willes J does appear to entertain the second maxim alongside the first (at 546), but it must be noted that this is in the context of the interpretation of an insurance policy, not legislation. [↑](#footnote-ref-62)
63. [1894] AC 347. [↑](#footnote-ref-63)
64. ibid at 360 (Lord Herschell L.C.) [↑](#footnote-ref-64)
65. That the European Communities Act 1972 is a constitutional statute providing an ‘exception (...) to the doctrine of implied repeal’ derives from the case of *Thoburn, supra* n. 28, [58] – [70] (Laws LJ). [↑](#footnote-ref-65)
66. Young does however entertain the idea of the constistitionalization of (some of) the incoming European Law: A Young: ‘Status of EU Law Post Brexit: Part One’ (United Kingdom Constitutional Law Association Blog, 2 May 2018) <https://ukconstitutionallaw.org/2018/05/02/alison-young-status-of-eu-law-post-brexit-part-one/> accessed 2 December 2018. I also come back to the idea at the end of this section. [↑](#footnote-ref-66)
67. Goldsworthy, *supra* n. 52, p. 291; Barber and Young, *supra* n. 49, p. 115, and references therein. [↑](#footnote-ref-67)
68. Goldsworthy, *supra* n. 52, p. 292. [↑](#footnote-ref-68)
69. Barber and Young, *supra* n.49, p. 115. [↑](#footnote-ref-69)
70. As mentioned above, there is a conspicuous silence around this issue. For its part, the House of Lords Select Committee on the Constitution opined that, if the mechanism for incorporating directly applicable EU Law into UK Law were to be a general provision in the Act, as has subsequently proved to be the case, then ‘it will presumably have the same hierarchical constitutional status as the [Act] itself: i.e. it will have the status of UK primary legislation:’ Select Committee on the Constitution (2017), *supra* n. 7, para 60. However, the Committee goes on to comment: ‘such domesticated EU law will not actually be primary legislation’ (ibid para 61). Presumably, like all legislative matters once the legislation in question has received Royal Assent, this will now be a matter for the courts. [↑](#footnote-ref-70)
71. A Lyon, *Constitutional History of the UK* (Routledge 2016) p. 449. [↑](#footnote-ref-71)
72. A potential US example of this kind of contextual disapplication is given by Dodge, namely that the Federal Arbitration Act of 1947 might be read as being impliedly repealed by some subsequent amendments to the Bankruptcy Code (Bankruptcy Reform Act of 1978 as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984) such that the latter knock out the possibility of a bankruptcy case going to arbitration; the 1947 Act would thus continue to operate normally for all other contexts except bankruptcy: J.L. Dodge, ‘Jurisdiction in bankruptcy proceedings: A test case for implied repeal of the Federal Arbitration Act’ 117 *Harv. L. Rev.* (2004) p. 2296. [↑](#footnote-ref-72)
73. ibid at p. 2312. [↑](#footnote-ref-73)
74. An alternative way of looking at this reading would be to see it as the removal of an apparent conflict *by interpretation*. Some take the same view of the *Factortame* litigation in order to defend the argument that that case was not an attack on Diceyen parliamentary sovereignty: Goldsworthy, *supra* n.52, p. 289 et seq. Others hail the Human Rights Act 1998 for its promotion of interpretative techniques to get around incompatibilities, thus preserving parliamentary sovereignty and, for that matter, ‘supplant[ing]’ implied repeal: Kavanagh, *supra* n. 39, p. 299. [↑](#footnote-ref-74)
75. It is to be expected that the Purely Internal Situation will once again become a topic of controversy following Brexit, precisely because there are some Directives the effect, or scope, of which is intended to be inter-State only, with the Member State free to operate its own laws, on the same issue, as it may arise domestically. An example is Directive 2009/133/EC [2009] OJ L310. When the UK saves its implementation of such directives (s2 of the 2018 Act), the question will be begged, what for? Those who wish to make use of the ‘export’ regime internally will surely a have a good argument that they were entitled to believe that the saved implementation was now intended for domestic usage. Otherwise, for what purpose was it saved? [↑](#footnote-ref-75)
76. See e.g. ECJ 15 January 2002, Case C-43/00 *Andersen v Skatteministeriet*, where the Court at least admits, and justifies, its incursion into the Purely Internal Situation. [↑](#footnote-ref-76)
77. ECJ 12 March 1987, Case 178/84 *Commission v Germany* (Reinheitsgebot). [↑](#footnote-ref-77)
78. ECJ 3 December 1998, Case C-67/97 *Criminal proceedings against Ditlev Bluhme*. [↑](#footnote-ref-78)
79. For citation, see n. 34 *supra*. [↑](#footnote-ref-79)
80. With apologies to Shakespeare: W Shakespeare, *Henry IV Part 2*, Act IV, Scene 5. [↑](#footnote-ref-80)
81. In the Australian case of *Goodwin v Phillips* [1908] 7 CLR 1, Griffith CJ was clearly of the opinion that, where a later enactment was only partially at odds with an earlier one, then repeal by implication would only occur vis-à-vis the part at odds: ‘[I]f the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then *to that extent* the provisions of the former Act are excepted or their operation is excluded’ (ibid 7, emphasis added). [↑](#footnote-ref-81)
82. Butler calls this phenomenon a ‘progressive erosion:’ A. Butler, ‘Implied repeal, parliamentary sovereignty and human rights in New Zealand’ Aut. *Public Law* (2001) p. 586 at p. 590. [↑](#footnote-ref-82)
83. Barber and Young, *supra* n.49, p. 127, emphasis added. [↑](#footnote-ref-83)
84. HC Deb 17 January 2017, vol 619, col 792. The Prime Minister had said something similar when first introducing the ‘Great Repeal Bill,’ as it was then known, in October 2016: ‘The judges interpreting [our] laws will sit not in Luxembourg but in courts in this country.’ See T May, ‘Brexit speech’ (delivered in Birmingham, 2 October 2016) in --, ‘Read Thersea May's full Brexit speech to Conservative conference in Birmingham’ *International Business Times* (New York, 2 October 2016) <http://www.ibtimes.co.uk/read-thersea-mays-full-brexit-speech-conservative-conference-birmingham-1584423> accessed 28 January 2019. [↑](#footnote-ref-84)
85. Described as a ‘very slippery phrase’ by Lord Watson in *Salomon v Salomon & Co* [1897] A.C. 22 at p. 38. ‘[It] may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant’: ibid. [↑](#footnote-ref-85)
86. ECJ 10 April 1984, Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*. [↑](#footnote-ref-86)
87. Facts drawn from ECJ 29 May 1997, Case C-300/95 *Commission v UK*. [↑](#footnote-ref-87)
88. Craies states that it is not possible to interpret the domestic implementation of an EU obligation purely from the UK perspective and with UK interpretive methods. It is not only ‘necessary... to have regard to the terms and purpose of that obligation’ (purposive approach), but the ‘purposive construction’ may well end up being the ‘principal thrust of [the court’s] decision:’ *Craies on Legislation* (9th edn, 2008, Sweet and Maxwell) para 32.5.3. [↑](#footnote-ref-88)
89. With regard to the other two constituent nations of the United Kingdom, Scotland also has a ‘liberal rule’ which she interpolates between the literal and mischief rules. This semi-purposive interpretative method is focussed on the policy behind the legislation: B Clark, *Scottish legal system* (2nd edn, Dundee University Press, Dundee, 2009) 31. In Northern Ireland, there is a stronger tendency to follow the behaviour of the English and Welsh courts, although the Northern Irish judges do seem to leap from the literal approach to the purposive one, potentially missing out the others: B Dickson, *The legal system of Northern Ireland* (5th edn, SLS Legal Publications, Belfast, 2005) 94-5. [↑](#footnote-ref-89)
90. A third rule, the mischief rule, involves the presumption that Parliament intended to remedy a certain mischief and it is true that this introduces a purposive element into the British rules of statutory interpretation. However, as with the golden rule, the purposive construction is only considered where it is judged to ‘outweigh (...)’ the literal meaning, not as a first port of call: F.A.R. Bennion, *Statutory interpretation: A code* (4th ed, Butterworths 2002) at p. 468. [↑](#footnote-ref-90)
91. *Duport Steels Ltd v Sirs* [1980] 1 W.L.R. 142 at p. 157 (Lord Diplock). [↑](#footnote-ref-91)
92. *Sussex Peerage Case* [1843-60] All ER Rep 55 at p. 63 (Tindal CJ). [↑](#footnote-ref-92)
93. ibid. [↑](#footnote-ref-93)
94. Although commonly known as the literal rule, Bennion points out that this is really a presumption ‘that the text is the primary indication of intention and that the enactment is to be given a literal meaning where this is not outweighed by other factors:’ Bennion, *Statutory interpretation: A code*, *supra* n. 91 at p. 468. *Barrelll v Fordree* provides authority for the first part of this statement. In declining to consider case-law while construing the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, Lord Warrington stated that ‘the safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning’: *Barrell (Pauper) Appellant v Fordree Respondent* [1932] A.C. 676 at p. 682 (Lord Warrington). [↑](#footnote-ref-94)
95. *R v Tonbridge Overseers* (1884) 13 Q.B.D. 339 at p.342, where Brett MR states that opting for alternative meanings to avoid inconvenience would be a ‘dangerous doctrine,’ although he accepts that departure from the plain meaning may be justified either by the need to bring various enactments into alignment, or by the need to avoid ‘absurd’ inconvenience or ‘palpable injustice:’ ibid. This last caveat seems to be an articulation of the so-called ‘golden’ rule of statutory interpretation, which had only a few years earlier been ‘invented’ by Lord Blackburn: *River Wear Commissioners v Adamson* (1877) 2 App Cas 743. [↑](#footnote-ref-95)
96. *Duport Steels Ltd v Sirs* [1980] 1 W.L.R. 142 at p. 157 (Lord Diplock). [↑](#footnote-ref-96)
97. *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg A.G.* [1975] 2 WLR 513 (Lord Reid) at p. 517. [↑](#footnote-ref-97)
98. *The Earl of Waterford's Claim* (1832) 6 Cl. & Fin. 133 at p. 172 (Lord Chancellor). [↑](#footnote-ref-98)
99. J Steyn, ‘Dynamic Interpretation Amidst an Orgy of Statutes’ (The Brian Dickson Memorial Lecture, Ottawa, 2 October 2003) < https://commonlaw.uottawa.ca/ottawa-law-review/sites/commonlaw.uottawa.ca.ottawa-law-review/files/11\_35ottawalrev1632003-2004.pdf> accessed 4 December 2018, 170. [↑](#footnote-ref-99)
100. *Stoke-on-Trent City Council v B & Q plc; Norwich City Council v B & Q plc* [1991] 4 All ER 221 at p. 230 (Hoffmann J). [↑](#footnote-ref-100)
101. *R v London Transport Executive, ex parte Greater London Council* [1983] Q.B. 484 at p. 490-1 (Kerr LJ). [↑](#footnote-ref-101)
102. Bennion, *Statutory interpretation: A* code, *supra* n. 91 at p. 130. [↑](#footnote-ref-102)
103. Hood Phillips, *supra* n 2, p.168-9. [↑](#footnote-ref-103)
104. *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116, at p. 143 (Lord Diplock). [↑](#footnote-ref-104)
105. *Pan American World Airways Inc v Department of Trade* [1976] 1 Lloyd's Rep. 257; [1975] 7 WLUK 143; (1975) 119 S.J. 657; Times, July 30, 1975. [↑](#footnote-ref-105)
106. *Factortame Ltd and others v Secretary of State for Transport* [1989] 2 All ER 692. [↑](#footnote-ref-106)
107. For citation, see n. 28, *supra*. [↑](#footnote-ref-107)
108. TC Hartley, *The foundations of European Community law* (4th edn, OUP 1998) 255. [↑](#footnote-ref-108)
109. *Thoburn*, n. 61, *supra*, [61] (Laws LJ). See also the speech of Lord Bridge in *Factortame Ltd and others v Secretary of State for Transport* [1989] 2 All ER 692 at p. 701. [↑](#footnote-ref-109)
110. Or, again, withdrawal from the Treaties under which the right was created. [↑](#footnote-ref-110)
111. *Assange v Swedish Prosecution Authority* [2012] UKSC 22, on appeal (via leapfrog) from *Julian Assange v Swedish Prosecution Authority* [20111 EWHC 2849 (Admin). [↑](#footnote-ref-111)
112. To say the least. He actually went into hiding in the Ecuadorian embassy in London, and at the time of writing is still there. [↑](#footnote-ref-112)
113. This requirement – to give legal effect to the Framework Decision directly after the end of the implementation period where there may have been a failure in transposition (ie indirect effect) – having originally been contained within Art 2(1) of the European Communities Act 1972, which after Exit Day will no longer have the force of law. [↑](#footnote-ref-113)
114. The dissenters, Lady Hale and Lord Mance, reasoned that the Framework Decision, an EU rather than an EC measure, was not part of UK law to begin with, and that is how they were able to reach the opposite view from Lord Phillips, Lord Dyson and Lord Brown with regard to whether ‘judicial authority’ should be interpreted the UK way or the EU way: *Assange* (n 116) [173] – [176] (Lady Hale). [↑](#footnote-ref-114)
115. *Duport Steels Ltd v Sirs* [1980] 1 W.L.R. 142 at p. 157 (Lord Diplock). [↑](#footnote-ref-115)
116. *Sussex Peerage Case* [1843-60] All ER Rep 55 at p. 63 (Tindal CJ). [↑](#footnote-ref-116)
117. This was because it came, not from a Directive, but from a Framework Decision. In the pre-Lisbon ‘three pillar’ system, a Framework Decision, though the same as a Directive in other respects, was a creature of the third, intergovernmental pillar (Police and Judicial Cooperation in Criminal Matters) rather than the first, supranational pillar (the European Union, as it then was). Its transposition into UK Law was thus governed by old Art 34(2)(b) TEU, which expressly excluded the possibility of Direct Effect: *Assange* (n 116) [173] (Lady Hale) and [198] (Lord Mance). [↑](#footnote-ref-117)
118. His five reasons for doing so included that any restriction of the meaning to just ‘judge’ would have been made explicit (*Assange* (n 116) [61] (Lord Phillips)) , and that the requirement to notify the Council of the identity of the competent judicial authorities under the law of the member state (Art 6 of the Framework Decision) makes no sense unless the phrase bore the wider, rather than the narrower, meaning (*Assange* (n 116) [66] (Lord Phillips)). Gage LJ had been equally as enthusiastic about giving the phrase its ‘European’ meaning – barely considering the alternative meanings at all – in *Enander v Governor of Her Majesty's Prison Brixton and another* [2005] EWHC 3036 (Admin). [↑](#footnote-ref-118)
119. *Assange v Swedish Prosecution Authority* [2012] UKSC 22 [98] (Lord Brown). [↑](#footnote-ref-119)
120. Referring to *Macarthy’s v Smith*, supra n 3, at p. 329 (Lord Denning). [↑](#footnote-ref-120)
121. *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1 [24] (Lord Hope). This quotation is also referred to by Lord Kerr at *Assange* (n 116) [111] (Lord Kerr) and by Lady Hale at ibid [176] (Lady Hale). [↑](#footnote-ref-121)
122. *Assange* (n 116) [244] (Lord Mance). [↑](#footnote-ref-122)
123. ibid [246] (Lord Mance). The natural English meaning, unsurprisingly, was that favoured by counsel for Mr Assange, namely, that a ‘judicial authority’ could only refer to a judge, not a prosecutor: ibid [245] (Lord Mance). [↑](#footnote-ref-123)
124. ibid [260] (Lord Mance). [↑](#footnote-ref-124)
125. ibid [262] (Lord Mance). [↑](#footnote-ref-125)
126. ibid [264] (Lord Mance). [↑](#footnote-ref-126)
127. As Goldsworthy opines in relation to *Factortame* and the passage of the Merchant Shipping Act 1988, Parliament in these circumstances manifests two contradictory intentions – the intention to pass the Act, and the intention not to legislate in violation of EU Law – but allowing the courts to correct the mistake by disapplying the violative Act is hard to reconcile ‘with the orthodox legal understanding of parliamentary sovereignty:’ Goldsworthy, *supra* n.52, p. 288. [↑](#footnote-ref-127)
128. As explained above, it is more the withdrawal of the UK from the EU Treaties which will bring about this removal than the repealing of the 1972 Act. See text between n. 13 and n. 17 *supra*. [↑](#footnote-ref-128)
129. R Lang, ‘Must Mutual Recognition Transform into Mutually Assured Obstruction? Three Creative Suggestions for the UK's Brexit Negotiators’ (Twenty fourth International Conference of Europeanists, Glasgow, July 2017) <[https://ssrn.com/abstract=3029656](https://ssrn.com/abstract%3D3029656)> accessed 11 October 2018. [↑](#footnote-ref-129)
130. Cooke, n. 60 *supra*, p. 274. [↑](#footnote-ref-130)
131. For the origin of ‘special justification,’ see Justice O’Connor’s judgment in *Arizona v. Rumsey,* 467 U.S. 203 (1984) at p. 212. [↑](#footnote-ref-131)
132. Or the pertinent rights/ obligations arising under the Treaties annihilated by means of the latter’s termination. [↑](#footnote-ref-132)
133. See text accompanying n. 115 *supra*. [↑](#footnote-ref-133)
134. [1963] 3 All ER 757. [↑](#footnote-ref-134)
135. Bennion, *Understanding*, n. 46 *supra*, p. 56. [↑](#footnote-ref-135)
136. For citation, see n. 77 *supra*. [↑](#footnote-ref-136)
137. Bearing in mind that the UK’s continued involvement in the European Arrest Warrant is still somewhat in doubt. [↑](#footnote-ref-137)