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Fundamental Rights and the Legacy of EU Membership in the UK Constitutional System

Umberto Lattanzi
Dottore di ricerca in Diritto Pubblico Comparato, Università L. Bocconi

Giuseppe Martinico
Professore di Diritto Pubblico Comparato, Scuola Superiore Sant'Anna

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Fundamental Rights and the Legacy of EU Membership in the UK Constitutional System***

di Umberto Lattanzi*, Giuseppe Martinico**

Abstract (Ita): Questo articolo analizza l'eredità costituzionale dell'appartenenza all'Unione europea nel Regno Unito, sostenendo che il progetto dei sostenitori della Brexit di un pieno recupero della sovranità parlamentare è stato ostacolato dalla complessità del rapporto tra il diritto dell'UE e l'ordinamento giuridico britannico. Facendo ricorso alla teoria dei sistemi complessi, l'articolo interpreta l'UE come un sistema caratterizzato da irreversibilità e irriducibilità, in cui l'interazione tra le diverse componenti genera trasformazioni giuridiche difficili da separare e destinate, nel caso britannico, a persistere anche dopo il recesso. Dopo aver illustrato le modalità attraverso cui il diritto dell'UE continua a operare, in particolare tramite retained e assimilated law, l'analisi si concentra sul caso Dillon, sorto nell'ambito del Windsor Framework. Il contributo mostra come, in Irlanda del Nord, sia ancora possibile invocare la Carta dei diritti fondamentali dell'UE per ottenere la disapplicazione della legislazione interna. Inoltre, l'articolo inquadra la decisione recentemente resa dalla Supreme Court, nel quadro più ampio dell'evoluzione della posizione della Corte con riferimento al rapporto tra costituzionalismo giuridico e politico e al ruolo delle fonti internazionali nel campo della tutela dei diritti fondamentali.

Abstract (Eng): This article examines the constitutional legacy of EU membership in the UK, arguing that the Brexiters' project of fully restoring parliamentary sovereignty has been hindered by the complexity of the relationship between EU law and the UK legal order. Drawing on the theory of complex systems, the article conceptualises the EU as a system whose effects are irreversible and irreducible, where the interaction between its components produces legal transformations that cannot be easily disentangled and persist even after withdrawal. After outlining the persistence of EU law through retained and assimilated law, the article focuses on the Dillon litigation under the Windsor Framework. It shows how individuals in Northern Ireland may still invoke the EU Charter to seek disapplication of domestic legislation. The article also frames that litigation, and the decision the Supreme Court recently rendered, within the broader context of the Court's evolving stance on the balance between legal and political constitutionalism, and on the role of international sources in the protection of fundamental rights.

Parole chiave: Brexit; diritto UE; Irlanda del Nord; Windsor Framework; tutela dei diritti fondamentali

Keywords: Brexit; EU law; Northern Ireland; Windsor Framework; protection of fundamental rights

Sommario: The complexity of the EU-UK relationship; Complexity in the post-Brexit scenario: the persistence of EU law; The legal construction of Article 2(1) Windsor Framework; The interpretation of Article 2(1) Windsor Framework in the Dillon litigation by the Northern Ireland Court of Appeal; The Secretary of State's appeal before the Supreme Court; The decision of the Supreme Court; The significance of the dispute for the wider constitutional framework; 4. Final Remarks

1. On the Persistence of EU Law

In his address to the Nation on 31 January 2020, the day in which the UK left the EU, then PM Johnson stated: «This is the moment when the dawn breaks and the curtain goes

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* Dottore di ricerca in Diritto Pubblico Comparato, Università L. Bocconi
** Professore di Diritto Pubblico Comparato, Scuola Superiore Sant'Anna

up on a new act in our great national drama. And yes, it is partly about using these new powers – this recaptured sovereignty – to deliver the changes people voted for»[1].

Six years after the purported recapture of sovereignty through Brexit, the UK Supreme Court was called upon to decide whether certain provisions of the Northern Ireland Troubles and Legacy Act 2023 should be disapplied because of their incompatibility with the EU Charter of Fundamental Rights and the Victims Directive[2]. How is this possible after Brexit?

To answer this question, in this article we shall analyse the constitutional legacy of the EU membership in the United Kingdom and explore the tension between, on the one hand, the constitutional aspiration to a return to the pre-accession, full and unfettered sovereignty of Parliament and, on the other, the lingering applicability of EU law, especially in the field of the protection of fundamental rights[3].

Indeed, even after the withdrawal from the Union, the inextricable knot created by EU membership has not vanished and the UK remains significantly anchored in many changes introduced by EU law into its legal system, partially negating the ideal of absolute autonomy pursued by Brexiters.

Our intention is to focus on the continuing impact of EU membership on the UK legal system, primarily through the lens of rights. While the paper also refers to broader legal issues such as jurisdiction, remedies, and trade-related obligations, these are discussed only insofar as they intersect with, or influence, the UK's evolving rights framework post-Brexit. This, of course, does not exclude the possibility that there are several interesting perspectives from which the constitutional implications of EU membership might be considered, for example, its impact on devolution[4] or other issues of a more political nature[5].

Particularly, in Section 2, we will first observe that the Brexiters' project to simply turn back the clock and revert to the *status quo ante* was hindered by the complexity – in technical terms – of the relationship between the UK and the EU[6]. Understanding the EU as a complex system means that it is characterised by non-reducibility and non-reversibility. Accordingly, the features of such a system are the product of interactions between its components (mainly at the national and supranational level), and not their mere sum: thus, it is not possible to ascribe them entirely to either of those levels. At the same time,

[1] UK Government, *PM address to the nation: 31 January 2020*, 31 January 2020, available at: https://www.gov-.uk/government/speeches/pm-address-to-the-nation-31-january-2020. This link, as well as all other links in the Article, has been accessed on 9 April 2026.

[2] *In the matter of an application by Martina Dillon et al. for Judicial Review* [2026] UKSC 15 (Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Hamblen and Lord Stephens SCJJ), on appeal from [2024] NICA 59 [63].

[3] Obviously, constraints to parliamentary sovereignty do (and did) not derive exclusively by the UK's inter- and supranational commitments; for example, another relevant factor is devolution: see J. Morison, *"A Sort of Farewell": Sovereignty, Transition, and Devolution in the United Kingdom*, in R. Rawlings, P. Leyland and A. Young (eds.), *Sovereignty and the Law: Domestic, European and International Perspectives*, Oxford, Oxford University Press, 2013, pp. 120-144; M. Loughlin, S. Tierney, *The Shibboleth of Sovereignty*, in *The Modern Law Review*, 2021, p. 989, pp. 1005-1015.

[4] N. Skoutaris, *Between Two Unions: Brexit and the Secessionist Challenges in the UK*, in M. Belov (ed.), *Territorial Politics. Constitutional and International Law Dimensions*, London, Palgrave Macmillan, 2021, pp. 165-190.

[5] G. Baldini, E. Bressanelli, E. Massetti (eds.), *The Brexit Effect What Leaving the EU Means for British Politics*, Abingdon, Routledge 2023.

[6] G. Martinico, *The Tangled Complexity of the EU Constitutional Process. The Frustrating Knot of Europe*, Abingdon, Routledge, 2022.

once these interactions have occurred, it is quite difficult to revert them, disentangling and separating the relevant components, as Brexiters, instead, wished to do.
Having pointed to some examples, in Section 3, we will focus the discussion on the field of the protection of fundamental rights and, particularly, on the *Dillon* litigation, arising in the context of the Windsor Framework addressing the status of Northern Ireland after Brexit. The Supreme Court had to decide whether to accept the Secretary of State's appeal, and thus to severely limit the reach of the disapplication remedy granted under the Windsor Framework, or to uphold the previous decisions, allowing individuals in Northern Ireland to seek the judicial disapplication of Acts of Parliament for their incompatibility with the EU Charter of Fundamental Rights in a very wide range of cases. As we will show, the Court agreed with the Secretary of State. In our view, the litigation at issue offers valuable insight not only into the somewhat specific issue of the protection of fundamental rights under the Windsor Framework, but also on the more general discussion on the judicial protection of fundamental rights in the UK and on the role of international sources in that regard. From this perspective, we submit, the litigation at issue is a valuable piece—as it helps clarify, together with other decisions, the stance of the Supreme Court—in the broader mosaic of the discussion on UK constitutionalism in the context of a push towards a return to a strong understanding thereof in terms of political constitutionalism and progressive attempts at reducing the domestic relevance of international law.

2. **Brexit as a Return to the *Status Quo Ante*?**

In an article published within hours of the vote for the United Kingdom (UK) to exit from the European Union (EU), Nigel Farage wrote: «We are just hours away from the opportunity of a lifetime: the opportunity to get our country out of the European Union and in doing so get our borders back, our democracy back and for us to embark upon an exciting future as an independent nation»[7].
From these lines we understand that the EU is perceived by Eurosceptics as something other than state democracy, a non-democratic entity that is often reduced to the image of external constraint, a set of limits that conditions (conditionality is a key word) state democratic processes[8]. In this article, assuming the perspective of a comparative public law scholar, we will attempt to analyse the legal implications of this (alleged) return to democracy advocated by Farage and other Brexit supporters.
In this respect, it is necessary to clarify a premise: for a constitutional law scholar, democracy also includes the protection of minorities through legal protection instruments, such as access to the courts. In other words, apart from electoral mechanisms and majority rule, the rights that form the constitutional order of a country are also part of the democratic system. For the purposes of this article, a constitution does not only mean a written document approved by a constituent assembly or granted by a sovereign. Constitutions may also be unwritten or only partially written. Indeed, the United Kingdom does not have a

[7] N. Farage, *Why we must vote LEAVE in the EU referendum*, in *Express*, 21 June 2016, available at: https://www.express.co.uk/comment/expresscomment/681776/nigel-farage-eu-referendum-brexit-vote-leave-independence-ukip.
[8] P. Castillo Ortiz, G. Martinico, *The Eurosceptic Mobilization of Constitutional Law*, Oxford, Oxford University Press, p. X.

document called a constitution, but constitutional law scholars refer to the UK constitution by referring to principles, conventions and statutes considered fundamental to the political system. The UK system was historically defined as characterised by a political and evolutionary constitution. In some systems of so-called legal constitutionalism, the prevalence of constitutions is guaranteed by the existence of special courts, called constitutional courts, through the mechanism of judicial review of legislation, which allows judges to declare invalid Acts of Parliament that are contrary to the constitution[9]. In systems of political constitutionalism[10], on the other hand, constitutions are interpreted by political actors and are not conceived as rules that are imposed on political processes, but as reflections of political dynamics. In this sense, according to evolutionary constitutionalism, «the constitution is no more and no less than what happens»[11]. Even though some important authors have highlighted the profound changes that have occurred[12], particularly in recent years, we believe that the UK can still be defined as a legal system primarily inspired by the logic of political constitutionalism. Some of these fundamental changes have been caused by EU law, as we will see.

Having clarified this aspect, in this contribution we will try to explain why in reality Brexit has not produced a return to the *status quo*, to national democracy as imagined by politicians like Farage. Indeed, in the years of European membership the UK system has been enriched with new rights and procedural remedies that have changed its initial characteristics. This evolution has also been upheld several times by the UK courts. For example, in *Bulmer (HP) Ltd v. J Bollinger SA,* a famous case, Lord Denning, one of the most influential lawyers in the history of the United Kingdom, described the impact of Community law over the UK legal system by using the image of the «incoming tide» which «flows into the estuaries and up the rivers. It cannot be held back»[13].

In this sense, Brexit was all about repelling the tide in order to come back to the original conformation of British sovereignty. It was inspired by this goal: a titanic challenge against history which aims to achieve what Lord Denning could not even conceive in the 1970s. In this sense, Brexit can be defined as an effort to push the tide of EU law back to recover the original meaning of British sovereignty, understood as parliamentary supremacy in a context characterised by a partly written constitution[14].

Indeed, as Douglas Scott emphasised, sovereignty was a key word in the pro-Brexit campaign, even if it was deliberately used ambiguously:

«A mantra of Leave campaigners seems to have been the desire to "take back control". There has been much talk of sovereignty, although less clarity on what it actually means. However, at its most basic, there are at least three notions of sovereignty that are relevant

[9] There are also systems of legal constitutionalism in which ordinary courts perform judicial review of legislation without the need for special constitutional courts. This is the case in the United States of America, for example.
[10] R. Bellaour, *Political Constitutionalism*, Cambridge, Cambridge University Press, 2009.
[11] J.A. Griffith, *The Political Constitution*, in *Modern Law Review*, 1979, pp. 1-21, p. 19.
[12] C. Barnard, *Taking Back Control? Rule by Law(s) and the Executive in the Post-Brexit World*, *Oxford Review of Economic Policy*, 2022, pp. 11-26, p. 13.
[13] *HP Bulmer Ltd & Anor v. J. Bollinger SA & Ors* [1974] EWCA Civ 14, [1974] 2 All ER 1226.
[14] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Oxford, Oxford All Souls College, 1885; C. Barnard, *op. cit*.

y, which is said to have particular resonance in the UK because, due to the vagaries of the uncodified UK Constitution, the Westminster Parliament has been recognised as a body with unlimited legislative power. Yet the parliamentary sovereignty of a representative democracy may seem to be at odds with popular sovereignty as exercised in a referendum. Popular sovereignty also has other implications, such as in Scotland, where an indigenous Scottish tradition claims that sovereignty resides in the Scottish people, in spite of the alternative claims of Diceyan parliamentary sovereignty. Thirdly, there is external sovereignty: whereby a country may be sovereign and recognised as independent by the international community»[15].

Brexit was also a landmark event in the characterisation of the relationship between the EU and its Member States. The 'incoming tide' described by Lord Denning showed all its force in the moment of maximum friction, that is, the withdrawal of EU membership. Confirmation of that can be found in the famous *Miller I* saga[16].

On those occasions, both the High Court of England and Wales and the UK Supreme Court denied the Government's ability to exercise the power of notification of the intention to leave the Union under Article 50 TEU to the European Council without parliamentary involvement, through the approval of a statute[17]. The non-revocability of the notification had been one of the fundamental pillars of the judges' reasoning and served as an external— referring to a non-national norm—premise of that judgment. However, Article 50 TEU offered margins for either option as scholars had already pointed out:

«The point is arguable either way. It could be argued that since a notification to withdraw is subject to a Member State's constitutional requirements, the Treaty therefore leaves to each Member State the possibility of rescinding that notification in accordance with those requirements. On the other hand, it could also be argued that Article 50 only provides for two possibilities to delay the withdrawal of a Member State from the EU once notification has been given (an extension of the time limit, or a different date in the withdrawal agreem-

[15] S. Douglas Scott, *Brexit, the Referendum and the UK Parliament: Some Questions about Sovereignty*, in *UKCLA Blog*, 28 June 2016, available at: https://ukconstitutionallaw.org/2016/06/28/sionaidh-douglas-scott-brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/. See also S. Douglas Scott, *Brexit, Union, and Disunion: The Evolution of British Constitutional Unsettlement*, Cambridge, Cambridge University Press, 2023, pp. 297-333. O. Garner, *The Brexit Sovereignty Problem*, 17 April 2024, available at: https://rev-dem.ceu.edu/2024/04/17/the-brexit-sovereignty-problem/.

[16] *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2016] HRLR 23; *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 1 All ER 593. See P. Birkinshaw, *Brexit's Challenge to the UK's Unwritten Constitution*, *European Public Law*, 2020, pp. 29-44.

[17] Indeed, other forms of parliamentary involvement (e.g. the passage of secondary legislation, or a vote on a motion) would not have satisfied the judgment.

ent). There's no suggestion that this is a non-exhaustive list. Therefore, the notification of withdrawal can't be rescinded».[18]

On those occasions, the reference to Article 50 TEU was appropriate. Over the years, UK membership in the Union has created complex rules in the etymological sense of the term[19]: a set of norms that are the result of a tangled knot between domestic law and European law. This made the reference to the law of the EU Treaties inevitable for the correct reading of the question posed to the UK courts in the case of the *Miller I* saga. The wording itself of Article 50 TEU, moreover, refers to domestic law when it reads that «[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements». This confirms the legal interweaving created by the European integration process.[20]

The complexity of the EU-UK relationship

As the brief reference to the *Miller* saga has suggested, and as we shall discuss in more detail in the following, understanding the EU-UK legal and constitutional relationship as a complex system goes a long way in shedding light into why EU law creates ties that bind even after exit, implying that Brexit cannot be defined as a return to the *status quo*. Unlike reversible processes, in fact, where it is possible to return to the starting condition from the final condition, complex systems are non-reversible due to the non-linearity of the evolution[21].

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[18] S. Peers, *Article 50 TEU: The uses and abuses of the process of withdrawing from the EU*, in *EU Law Analysis*, 8 December 2014, available at: http://eulawanalysis.blogspot.com/2014/12/article-50-teu-uses-and-abuses-of.html. See also J. Rylatt, *The Irrevocability of an Article 50 Notification:* Lex Specialis *and the Irrelevance of the Purported Customary Right to Unilaterally Revoke*, in *UKCLA Blog*, 27 July 2016, available at: https://ukconstitutionallaw.org/2016/07/27/jake-rylatt-the-irrevocability-of-an-article-50-notification-lex-specialis-and-the-irrelevance-of-the-purported-customary-right-to-unilaterally-revoke/; C. Streeten, *Putting the Toothpaste Back in the Tube: Can An Article 50 Notification Be Revoked?*, Ibid, 13 July 2016, available at: https://ukconstitutionallaw.org/2016/07/13/charles-streeten-putting-the-toothpaste-back-in-the-tube-can-an-article-50-notification-be-revoked/. O. Garner, *Can the United Kingdom Unilaterally Revoke its Article 50 Notification to Withdraw from the EU? Wightman v Secretary of State for DexEU [2018] CSIH 62'*, 24 September 2018, available at: https://www.europeanlawblog.eu/pub/can-the-united-kingdom-unilaterally-revoke-its-article-50-notification-to-withdraw-from-the-eu-wightman-v-secretary-of-state-for-dexeu-2018-csih-62/release/1?readingCollection=1307cfaa.

[19] G. Martinico, *The Tangled Complexity of the EU Constitutional Process*, cit.

[20] However, precisely because of the impact that the question of revocability of the notification had on the margin of manoeuvre of the UK Parliament, commentators stressed the excessive brusqueness of some of the relevant passages in the *Miller I* saga. They also criticised the choice not to consult with the Court of Justice, in accordance with the preliminary reference mechanism governed by Article 267 TFEU: S. Peers, *Brexit: can the ECJ get involved?*, in *EU Law Analysis*, 3 November 2016, available at: http://eulawanalysis.blogspot.com/2016/11/brexit-can-ecj-get-involved.html.

[21] P. Davies, *The cosmic blueprint. new discoveries in the nature's creative ability to order the universe*, New York, Simon and Schuster, 1989, p. 14«The Newtonian world was also "reversible." This means that "time exists merely as a parameter for gauging the interval between events. Past and future have no real significance. Nothing actually happens». This is a particularly interesting feature that defies common sense but made perfect sense in the Newtonian world. The Newtonian world is therefore a "clean machine," like a clockwork. Interestingly, it reflects the same static view of the world before Newton, which was considered a perfect, pre-ordained, Godgiven hierarchical order, in which «nothing actually happens, because the Laws of Nature are the Laws of God, and these Laws are perfect, therefore no change occurs, is necessary, or even possible»: A. Montuori, *Foreword: Edgar Morin's path of complexity*, in E. Morin *On Complexity. Advances in Systems Theory, Complexity, and the Human Sciences*, Cresskill, NJ, Hampton Press, 2008, pp. vii – xliv, p. xxx.

The EU can be considered a complex legal system because it is based on the existence of an inextricable legal (and political) knot between national legal systems and supranational treaties.[22] Moreover, the EU is characterised by principles – first and foremost primacy and direct effect, fundamental elements in the supranational structure – that cannot be traced back to the initial legal conditions, having been introduced by the case law of the Court of Justice.

In complex systems, new properties that cannot be explained from the properties of individual elements emerge as a result of the interactions among levels/poles. Such features are usually called emergent properties and correspond to those constitutional principles that cannot be entirely reduced to the national or supranational levels. In this sense, a complex system should not be understood as a mere sum of its components, but as something characterised by an added value which is the product of all the interactions among them. The idea of emergent properties refers to those entities that "arise" out of more fundamental entities and yet are "novel" or "irreducible" with respect to them. The emergence of these properties is frequently associated with evolutionary dynamics which shape and reshape the natural order stemming from the different types of interactions possible among actors operating at the different levels/poles.

The case law of the ECJ confirms this. For example, in *Wightman*, the Court of Justice recalled that:

«According to settled case-law of the Court, that autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law. EU law is characterized by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. **Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other** (judgment of 6 March 2018, Achmea, C-284/16, EU:C:2018:158, paragraph 33 and the case law cited)».[23]

According to this passage, the autonomy of EU law is derived from three principal sources: firstly, its independent source, namely the Treaties; secondly, its primacy over national laws; and thirdly, the direct effect of its provisions, which collectively create a network of binding legal relations among the EU and its members.

This "network of principles" cannot be traced back to the letters of the EU Treaties or in the letters of the national Constitutions and cannot, thus, be reduced to their application. This non reducibility is another fundamental feature of complex systems, where the result of the relationship between diversities does not present itself as a mere sum of the latter, but is something different. Indeed, it is impossible to "find" the legal basis for the principles of supremacy and their direct effect in the text of the EU Treaties or national constit-

[22] G. Martinico, *The Tangled Complexity*, *cit.*
[23] Case C-621/18, *Wightman*, ECLI:EU:C:2018:999.

utions. In *Van Gend en Loos*[24], and *Costa*[25], in fact, the ECJ found the roots of such principles to be in the "spirit" of the Treaties and, also, in the indirect will of the States signing the Treaties[26].

The interaction between the Treaties and national systems thus creates a core of principles that cannot be distinguished because they cannot be traced back to any original component. It is no coincidence that the most obvious legacy of supranational membership to the UK context is precisely the persistence of European norms that, though converted into domestic norms, carry with them the jurisprudence of the Court of Justice.

Complexity in the post-Brexit scenario: the persistence of EU law

So far, we've discussed how the Brexiters' project to "take back control" had to face the tangled complexity of the EU-UK relationship, which impeded, even after Brexit, a simple return to the *status quo ante* of full, unfettered parliamentary sovereignty. In this paragraph, we shall look at evidence of the residual persistence of EU law in the UK after withdrawal.

To begin with, the clearest case of a residual persistence of EU law is that of retained legislation. For those interested in Brexit as a political and legal phenomenon, the concept of "retained legislation" is probably familiar, but it might be useful to briefly reconstruct the relevant legal framework. "Retained legislation" is not a homogeneous concept and covers different types within it[27], but it can be defined as referring to legal provisions originating in European Union law that were incorporated into the domestic legal framework of the United Kingdom following its withdrawal from the EU. Its primary objective is to ensure the preservation of legal stability and continuity in the post-Brexit legal order.

In a nutshell, the idea behind the European Union (Withdrawal) Act 2018 was to repeal the 1972 Act and proclaim the restoration of parliamentary sovereignty. However, this reassertion of sovereignty has not entailed a full erasure of EU law's constitutional legacy. Instead, the Act created a new category of 'retained EU law,' which remains part of UK law unless and until amended or repealed. This retained law includes direct EU regulations, case law of the Court of Justice of the EU (as it stood at the end of the transition period), and principles developed under EU law[28].

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[24] Case C-26/62, Van Gend en Loos, ECLI:EU:C:1963:1.
[25] Case C- 6/64, Costa v. ENEL, ECLI:EU:C:1964:66.
[26] «The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals», Case C-26/62, Van Gend en Loos, ECLI:EU:C:1963:1.
[27] J. Segan, The European Union *(Withdrawal)* Act 2018: Ten Key Implications for **UK** Law and Lawyers, in UKCLA Blog, 26 July 2018, available at: https://ukconstitutionallaw.org/2018/07/26/james-segan-the-european-union-withdrawal-act-2018-ten-key-implications-for-uk-law-and-lawyers/: «The Act divides retained EU law into three main classes, being "retained direct principal EU legislation" (s. 7(6)), "retained direct minor EU legislation" (s. 7(6)) and "retained EU law by virtue of section 4" (s. 7(4)). In very broad terms, the first and third categories are made akin to primary legislation: they can be modified by delegated legislation only if made under the Act itself, or an existing recognised Henry VIII power (s. 7(2), (4)). By contrast, the second category can be modified by any existing or future powers to make, confirm or approve subordinate legislation (section 7(3) and Schedule 8)».
[28] See s. 6 of the European Union (Withdrawal) Act 2018.

In particular, paragraph 3 of section 6 of the European Union (Withdrawal) Act 2018 stated that: «Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it— (a)in accordance with any retained case law and any retained general principles of EU law, and b)having regard (among other things) to the limits, immediately before exit day, of EU competences».
The following paragraph 4 clarified 'the Supreme Court is not bound by any retained EU case law,» and introduced partial exemptions for the High Court of Justiciary. These provisions have led to a form of constitutional hybridisation. UK courts must now navigate a body of law that is no longer linked to a supranational authority, but that retains its origin in a different legal system. They must decide when to follow or depart from pre-Brexit ECJ rulings, and how to interpret and apply retained EU law in light of domestic legal principles.
In this sense, the constitutional influence of EU law continues to be felt—not as an external constraint, but as an internal legacy that shapes legal reasoning and the structure of legal frameworks. Decisions such as *TuneIn Inc. v Warner Music Group* and *Lipton v BA City Flyer* by the England and Wales Court of Appeal confirmed that abandoning the established case law of the Court of Justice would result in considerable legal uncertainty, thereby underscoring the enduring legacy of EU law[29]. The debate on retained legislation is still very much alive, despite the attempt by the previous Government to progressively emancipate judges from referring to the case law of the Court of Justice. In 2023, in fact, the Retained EU Law (Revocation and Reform) Act 2023 introduced the concept of assimilated legislation, amending the European Union (Withdrawal) Act 2018[30].
The new UK government has partially slowed down this process, delaying the implementation of some key provisions of the Retained EU Law (Revocation and Reform) Act 2023. Moreover, in the meantime, there have been some relevant court cases that have shown that despite this transition – only partial for now – to assimilated legislation is not producing the results hoped for by the previous UK Government. This should not be too surprising. The Court of Appeal in the *Merck Serono* case in particular questioned the possibility of moving away from retained legislation and the case law of the Court of Justice, putting forward an interesting judicial test that makes it very complex to deviate from the interpretation of the Court of Justice, primarily for reasons of legal certainty and consist-

[29] *TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [2022] 2 All ER 35; Lipton v BA City Flyer [2021] EWCA Civ 454, [2022] 1 All ER 120. See F. Nania (2021), *La Retained EU Law e la sua interpretazione: spunti di riflessione a partire da due decisioni della Corte di Appello d'Inghilterra e Galles*, in Nomos. Le attualità nel diritto, 2023, vol. 1.
[30] K. De Blasio, *Recent Developments on the Status of EU Derived Case Law*, in *UKCLA Blog*, 20 November 2023, available at: https://ukconstitutionallaw.org/2023/11/20/katia-de-blasio-recent-developments-on-the-status-of-eu-derived-case-law/: «The framework described above is going to be amended by the Retained EU Law (Revocation and Reform) Act 2023, which has the purpose of removing the supremacy of EU law and general principles of EU law from the law in the United Kingdom. The Act also aims to make it easier for domestic courts to depart form EU derived case law. Section 5 of the Act prescribes that after the end of 2023 "retained case law" will become "assimilated case law" (composed of "assimilated EU case law" and "assimilated domestic case law"). This modification intends to eliminate any reference to the European source of said case law, although in section 6 of the Act, amending section 6 of the EUWA, there are still some references to "retained EU case law", while, in accordance with what stated in section 5 of the same Act, it should have been called "assimilated EU case law"».

ency[31]. Here, the nature of the common law system clearly allows for the preservation of what remains of EU law, and this says a lot about the fact that Brexit was not a return to the status quo as its supporters had claimed. That is why, as commentators have noted in relation to this and other cases, «EU law will nonetheless continue to play an interpretative role even for matters arising after 2023»[32]. If the concept of "retained legislation" confirms that EU law has introduced a series of new rights that UK constitutional law itself did not want to give up, the added value of EU law is not limited to this. In fact, over the years EU law has introduced something revolutionary also in terms of remedies in case of violation of rights.

Indeed, EU law has changed the nature of the UK legal system thanks to the power given to national judges in light of the *Simmenthal* doctrine[33]. According to this doctrine, it is incumbent upon national judges to guarantee the full impact of EU law, by disapplying those national laws that are in conflict with EU law norms provided with direct effect. In the *Simmenthal* case, the ECJ ruled that national courts must invalidate any conflicting national legislation, thereby ensuring the effective and uniform application of EU law across all member states.

As Bogdanor pointed out, the *Simmenthal* doctrine transformed the political constitution into something different[34]. Indeed, in his view, the European Union Withdrawal Act 2018 sought «to do something quite unprecedented in the constitutional history of the modern world by withdrawing Britain from a protected constitution into an unprotected one»[35]. This also explains why soon after Brexit the populist government of Boris Johnson targeted the judicial power and the UK Supreme Court in particular[36]. The EU integration, moreover, has created ties that bind even after the exit and all the added value in terms of protection of fundamental rights created by years of European integration has been converted into domestic laws. This confirms, again, that the «incoming tide» has changed the geology of the UK legal system. Another confirmation of that is the persisting role of the Court of Justice according to the text of the Withdrawal Agreement, which maintained its jurisdiction during and even beyond the transition period.

Apart from the ECJ's jurisdiction over cases or proceedings pending at the end of the transition period, or events occurring before that date, the ECJ will also have some jurisdiction over entirely new cases arising after that date. In this sense, as Peers clarified, there are four different categories of «continued jurisdiction», each of which relates to specific

[31] *Merck Serono v Comptroller-General of Patents* [2025] EWCA Civ 45. A. Holder Ross, *Coulda, shoulda, woulda – whether to depart from assimilated EU case law*, in *UK-EU Relations Blog*, 13 March 2023, available at: https://eurelationslaw.com/blog/coulda-shoulda-woulda-whether-to-depart-from-assimilated-eu-case-law (accessed on 9 April 2026).
[32] J. Williams, *The interpretative role of EU law from 2024*, in *UK-EU Relations Blog*, 29 August 2023, available at: https://eurelationslaw.com/blog/the-interpretative-role-of-eu-law-from-2024.
[33] ECJ, 106/77 *Simmenthal* [1977] ECR I-62.
[34] V. Bogdanor, *Beyond Brexit: Towards a British Constitution*, London, I.B. Tauris, 2019.
[35] V. Bogdanor, *Brexit and our unprotected constitution*, London, The Constitution Society, 2018.
[36] J. Croft, J. Blitz, *Lawyers fear Tories are planning "revenge" against Supreme Court*, in The Financial Times, 11 December 2019 Available at: https://www.ft.com/content/60f97382-1b4e-11ea-97df-cc63de1d73f4.

norms of the Withdrawal Agreement[37]. They have to do with citizens' rights[38], financial settlement[39], the Protocol on Ireland and Northern Ireland and that on Cypriot bases.

A striking case in this regard has been that of the *Micula* saga. Indeed, in March 2024, the ECJ found the United Kingdom in breach of its obligations under EU law following a ruling by its Supreme Court[40]. The ECJ clarified that it had jurisdiction over such actions for breaches of EU law committed before the end of the transition period (31 December 2020), and within the four years following that date, according to the Withdrawal Agreement. The Court emphasised that the obligation to comply with EU law is binding on all authorities of Member States, including courts and found that the UK Supreme Court erred in concluding that EU State aid provisions were not applicable due to the ICSID Convention predating the UK's EU accession[41].

The Court of Justice determined that the UK Supreme Court erred in its judgment regarding the applicability of EU law, and particularly the State aid provisions, to the UK's obligation under the ICSID Convention to enforce an arbitral award. Moreover, and perhaps more relevantly, the ECJ found a breach of the duty of sincere cooperation, in that the UK Supreme Court had proceeded, without referring a preliminary question to the ECJ, with interpreting and applying EU law to the arbitral award implementation, despite the matter being under Commission scrutiny and awaiting EU court adjudication.

Summing up, while Brexit has surely had a huge impact on the activity of the EU institutions after the 2016 referendum, it has not really represented a crisis for the EU as such. Brexit could have represented the source of major internal fractures among the EU Member States, but this was not the case. On the contrary, the EU has acted as a whole in a firm and almost coherent manner and because of that it was also accused of acting in a too tough manner *vis-à-vis* the UK[42].

Admittedly, issues have been raised even after the exit of the UK, in particular with regard to the situation in Northern Ireland and perhaps in the long run the EU will pay the price of such a political divorce, but Brexit also showed how difficult and problematic leaving the EU is. In this respect, with all its flaws, Article 50 TEU managed to politically tame an issue that in other contexts would have led to a violent conflict.

In this respect, Article 50 TEU can be compared to secession clauses, although some scholars have distinguished between withdrawal and secession[43]. Secession clauses are

[37] S. Peers, *The End – or a New Beginning? The EU/UK Withdrawal Agreement*, in *Yearbook of European Law*, 2020. pp. 122-198. On the process behind the Withdrawal Agreement see M. Dougan, *The UK's Withdrawal from the EU: A Legal Analysis*, Oxford, Oxford University Press, 2021, pp. 95-137 and F. Fabbrini (ed.) *The Law & Politics of Brexit: Volume II*, Oxford: Oxford University Press, 2021.
[38] Art. 158 of the Withdrawal Agreement.
[39] Art. 160 of the Withdrawal Agreement.
[40] C-516/22, *Commission v United Kingdom (Judgment of the Supreme Court)*, ECLI:EU:C:2024:231. The Supreme Court decision is *Micula v Romania* [2020] UKSC 5, [2020] 2 All ER (Comm) 1.
[41] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done in Washington on 18 March 1965 (entered into force on 14 October 1966), UNTS 575, p. 159.
[42] J.H.H. Weiler, *Brexit, the Irish Protocol and the "Versailles Effect"*, in *EJIL Talk*, 8 September 2021, available at: https://www.ejiltalk.org/brexit-the-irish-protocol-and-the-versailles-effect/.
[43] C. Closa Montero, *Interpreting Article 50: Exit, Voice and … What About Loyalty?*, in ID. (ed.), *Secession From a Member State and Withdrawal From the European Union: Troubled Membership*, Cambridge: Cambridge University Press, 2017, pp. 187-214.

itionally ambiguous and rarely aim at facilitating the exit[44]. On the contrary, they are frequently drafted to make secession difficult and conditional upon the respect of some procedures and values—thus preserving axiological continuity and respect of the rule of law[45]. Article 50 TEU represents such ambiguity in both the lack of an explicit mention of the possibility of revoking the notification and in clarifying how many times the extension can be requested.

3. Evidence of the Persistence of EU Law in the UK: The Protection of Fundamental Rights at the Occasion of the *Dillon* Litigation

One might look for evidence of the persistence of EU law in the legal order of the UK in many areas: the present discussion will focus on the field of the protection of fundamental rights, particularly by analysing the perduring relevance of the EU Charter of Fundamental Rights in Northern Ireland and its implications for the broader framework of the UK constitution[46].

Indeed, over the last few years, courts in the UK, and, more precisely, in Northern Ireland, have been considering the possibility of disapplying various legislative provisions enacted by the Westminster Parliament due to their alleged incompatibility with EU law and the EU Charter of Fundamental Rights. This has occurred in the field of access to justice for victims of Troubles-related offences[47], immigration[48], and abortion[49]. As we shall see, in its recent *Dillon* judgement, the Supreme Court effectively curbed this remedy, limiting quite severely its availability to individuals.

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[44] S. Mancini (2012) *Secession and Self-Determination*, in M. Rosenfeld, A. Sajó A (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, pp. 481-500.

[45] As Norman recalled 'the perceived advantages of handling secessionist politics and secessionist contests within the rule of law rather than as 'political' issues that lie outside of, or are presumed (by the secessionists) to supersede, the law', W. Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession in the Multinational State*, Oxford, Oxford University Press, 2006, p. 178). See also G. Martinico, *A Message of Hope": A Legal Perspective on the Reference*, in G. Delledonne, G. Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference*, London, Palgrave, 2019, pp. 249-263; T. Ginsburg, M. Versteeg, *From Catalonia to California: Secession in Constitutional Law*, in Alabama Law Review, 2019, pp. 923-984.

[46] This is obviously linked to the special constitutional status of Northern Ireland: see, generally, A. McCormick, *The Constitutional Status of Northern Ireland. Consent, Acquiescence, Subjugation, Indifference*, London, The Constitution Society, 2024; E. Stradella, *Riflessioni sullo stato della devolution nell'Irlanda del Nord*, in *this Review*, 2025, pp. 84-101; M. Frau, 'La specialità della "Costituzione di Belfast"', in *this Review*, 2025, pp. 206-226.

[47] *Dillon v. Secretary of State for Northern Ireland* [2024] NICA 59 [63], on appeal from [2024] NIKB 11. The decision was appealed by the Secretary of State and is currently before the Supreme Court, permission to Appeal having been granted on 7 April 2025: see cases UKSC/2025/0013 and UKSC/2025/0013A (the Cross Appeal).

[48] See *Re NIHRC and JR295's applications for judicial review* [2024] NIKB 35, disapplying, because of their incompatibility with Article 2(1) WF, a number of provisions of the Illegal Migration Act 2023 concerning the duty to remove, the treatment of victims of modern slavery or human trafficking, and children. See also *Re Angesom's Application for Judicial Review* [2023] NIKB 102; *Re Jordan's application for judicial review* [2024] NIKB 26; *Re Shima Esmail's application for judicial review* [2024] NIKB 64.

[49] *SPUC Pro-life Ltd v Secretary of State for Northern Ireland* [2023] NICA 35. Limitedly to what is of interest here, the applicant argued that the Abortion (Northern Ireland) Regulations 2021 and the Abortion Services Directions 2021 were invalid under art. 2(1) of the Ireland/Northern Ireland Protocol of the EU Withdrawal Agreement in so far as they permitted abortion on the grounds of severe foetal impairment. Keegan LCJ, affirming the decision of Colton J ([2022] NIQB 9), held that the applicant could not rely on the EU Charter of Fundamental Rights or EU general principles because the issue of abortion was not an EU competence.

Indeed, despite the clarity of s. 5(4) European Union (Withdrawal) Act 2018, reading «the Charter of Fundamental Rights is not part of domestic law on or after exit day», under certain conditions, claimants in Northern Ireland were able to rely on the Charter to seek the disapplication of contrasting legislation enacted by the UK Parliament. This is the result of a complex legal construction, to which we shall return in a moment, centred upon the attribution of direct effect to art. 2(1) Windsor Framework ('WF', formerly known as the Ireland/Northern Ireland Protocol to the Withdrawal Agreement), aiming at ensuring that no reduction in the level of protection offered by the 1998 Good Friday Agreement occurs as a result of the withdrawal from the EU.

This legal construction closely recalls the *Simmenthal* mandate[50], bestowed upon British Courts by the UK membership in the EU, whereby courts were called to disapply parliamentary legislation found incompatible with EU law and, particularly, at least in the perspective of this article, with the EU Charter of Fundamental Rights, provided it was applicable to the matter at hand.

This topic—the direct invocability of the EU Charter of Fundamental Rights under art. 2(1) WF—has been widely discussed[51]. In the following, we shall address a specific issue arising in connection with Article 2(1) WF, namely the breadth of the remedy of disapplication, which hinges on whether the granting of such remedy requires not only that Article 2(1) WF be directly effective, but also that the norms stemming from the Good Friday Agreement and EU law integrating Article 2(1) be so. This issue is at the heart of the proceedings in the *Dillon* litigation, addressing the (Northern Ireland) Troubles and Legacy Act 2023[52], and is significant also for the wider discussion on the (judicial) protection of fundamental rights in the UK.

In passing, it should be mentioned that, after the High Court had made a number of Declarations of Incompatibility under s. 4 HRA 1998, the new Labour Government, already before the Court of Appeal, dropped the appeal insofar as it concerned those Declarations and has presented to Parliament an Order in Council under s. 10 HRA amending the Act and remedying the incompatibility[53].

Moreover, after the Irish Government took issue with the 2023 Act and brought an application before the ECtHR[54], in September 2025, the two Governments unveiled a Joint Framework to tackle these concerns, and, in October, the British Government introduced in Parliament the Northern Ireland Troubles Bill 2024-26, seeking to repeal and replace

[50] M. Claes, *The National Courts' Mandate in the European Constitution*, Oxford – Porland, Or., Hart Publishing, 2006.

[51] See G. Rizzoni, *La tutela dei diritti fondamentali in Irlanda del Nord fra Accordi del Venerdì Santo e Windsor Framework*, in *this Review*, 2025, pp. 60-81. See also A. Deb, *Article 2 of the Windsor Framework: The Powerful Re-Emergence of EU Law after Brexit*, in *Edinburgh Law Review*, 2024, pp. 434-439; A. Deb, E. Frantziou, T. Lock, *The EU Charter of Fundamental Rights in Northern Ireland under the Windsor Framework*, in *Northern Ireland Legal Quarterly*, 2024, pp. 488-521; A. Deb, C.R.G. Murray, *Article 2 of the Windsor Framework, the Legacy Act and the Illegal Migration Act: Adjusting to Post-Brexit Realities*, in *Public Law*, 2025, pp. 477-499.

[52] On the substantive aspects of this legislation, see L. Bonifati, *Troubled Legacies: The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and the Thin Line Between Impunity and Reconciliation*, in *Perspectives on Federalism*, 2024, no. 3, pp. 1-18; M. McKinney-Perry, *Rethinking Amnesty: A Critical and Prescriptive Response to Amnesty in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023*, in *Cambridge Law Review*, 2024, pp. 17-37.

[53] The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (Remedial) Order 2025, laid before Parliament on 14 October 2025.

[54] Ireland's Application before the ECtHR is no. 1859/24. See M. Castellaneta, *Troubles Legacy Act: alla Corte europea dei diritti dell'uomo la verifica sulla compatibilità con la Convenzione*, in *this Review*, 2025, pp. 258-280.

the 2023 Act, which has, at the time of writing, completed its second reading in the Commons[55].

In the following paragraphs, we shall initially address the technicalities of Article 2(1) WF as discussed in the *Dillon* litigation, turning then to the issue of their significance for the greater picture of the UK constitution.

The legal construction of Article 2(1) Windsor Framework

As anticipated, the disapplication of legislative provisions under art. 2(1) WF for their incompatibility with Charter rights is the result of a rather complex legal construct, which could be well represented by the image of Russian dolls. The core issue here to be discussed lies somewhat at the core of this imaginary set of Russian dolls, with the consequence that, to discuss it, one must go through the outer shells.

At the outer level, s. 7(A) of the European Union (Withdrawal) Act 2018 ('EUWA') – inserted into the 2018 Act by s. 5 of the European Union (Withdrawal Agreement) Act 2020 – gives domestic effect to the Withdrawal Agreement, specifically providing that «all such rights, powers, liabilities, obligations and restrictions, and all such remedies and procedures from time to time provided for by or under the withdrawal agreement are to be recognised and available in domestic law, and enforced, allowed and followed accordingly». This provision reproduces s. 2 European Communities Act 1972, merely substituting the term "the Treaties" of the 1972 provision with that "the withdrawal agreement". That provision was characterised by a majority of 8 Supreme Court Justices as a «conduit pipe by which EU law is brought into the domestic UK law [and whose] effect is to constitute EU law an independent and overriding source of domestic law»[56]. The same, if only limitedly to the provisions of the withdrawal agreement is true of s. 7(A): «if Parliament uses the same words, it means the same thing. Parliament chose in the 1972 Act to limit its sovereignty, and it chose to do so again in the 2018 Act»[57]. In *Allister*, Lord Stephens SCJ reached a similar conclusion, holding that s. 7(A) «made provision for the Withdrawal Agreement to form part of UK law and give rise to legal rights and obligations in domestic law»[58].

The subsequent Russian doll represents Article 4 of the Withdrawal Agreement ('WA') – given effect through s. 7(A) EUWA –, which requires that «the provisions of this

[55] UK Government – Government of Ireland, *The Legacy of the Troubles: A Joint Framework between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland*, 19 September 2025, available at: https://www.gov.uk/government/publications/the-legacy-of-the-troubles-a-joint-framework-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-o. For an overview, see W. Worster, *Ireland v. United Kingdom (Again): The UK's 1977 "Five Techniques" Undertaking and the Legacy Act*, in *Opinio Juris*, 9 March 2026, available at https://opiniojuris.org/2026/03/09/ireland-v-united-kingdom-again-the-uks-1977-five-techniques-undertaking-and-the-legacy-act/.

[56] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [65], [2017] 1 All ER 593 (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge SCCJJ).

[57] R. Cormacain, *Seeking Asylum on the Outgoing Tide of EU Law – Supremacy of EU Law in Northern Ireland under the WF*, in *UKCLA Blog*, 23 May 2024, accessible at: https://ukconstitutionallaw.org/2024/05/23/ronan-cormacain-seeking-asylum-on-the-outgoing-tide-of-eu-law-supremacy-of-eu-law-in-northern-ireland-under-the-windsor-framework/.

[58] *Allister v. Secretary of State for Northern Ireland* [2023] UKSC 5, [2024] AC 1113 [74] (Lord Stephens SCJ).

Agreement and the provisions of Union law made applicable by this Agreement […] produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law».

Taken together, s. 7(A) EUWA and Article 4 WA grant the direct effect and primacy to the norms embedded in the Withdrawal Agreement, including its Protocols, and to retained legislation, provided that the relevant conditions are met.

The subsequent layer of the Russian doll – now closing in on its core – consists of Article 2(1) of the WF, which reads: «the United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms».

This provision, read in light of s. 7(A) EUWA and Article 4 WA, has been understood by the Northern Ireland High Court, first, and by the Northern Ireland Court of Appeal, later, as being directly effective, in that it contains «a straightforward negative obligation», which is «clear and unconditional»[59]. The content of said obligation is understood as one of non-regression: the level protection afforded in Northern Ireland to the rights comprised in the Rights, Safeguards and Equality of Opportunity ('RSEO') Chapter of the 1998 Good Friday Agreement should not be diminished as a result of the withdrawal from the Union. In other words, the level of protection of said rights should not fall below what would have been prevented by EU law – and by the remedy of disapplication – had the UK remained in the EU.

This rule is further broken down and operationalised through a six-step test initially developed in *Re SPUC* and subsequently generally employed in the litigation arisen under Article 2(1) of the WF. According to this test,

> «the appellant, in making this challenge, has to establish a breach of Article 2 satisfying the six elements test, namely:
>
> i. A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged.
> ii. That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.
> iii. That Northern Ireland law was underpinned by EU law.
> iv. That underpinning has been removed, in whole or in part, following withdrawal from the EU.
> v. This has resulted in a diminution in enjoyment of this right; and
> vi. This diminution would not have occurred had the UK remained in the EU»[60].

[59] *In the Matter of an Application by Martina Dillon and others* [2024] NICA 59 [85] (Keegan LCJ).
[60] *SPUC Pro-life Ltd v Secretary of State for Northern Ireland* [2023] NICA 35 [54] (Keegan LCJ). As we shall see, the Supreme Court has adopted a simplified and synthetic version of this test, which, however, is substantially equivalent.

Thus, Article 2(1) of the WF – as interpreted by courts in Northern Ireland – implicitly requires its integration by three sets of norms, which constitute the final layer of Russian dolls in the present discussion. Accordingly, claimants must identify a right included in the RSEO Chapter of the Good Friday Agreement which is allegedly diminished by the contested legislation, a domestic provision giving it effect in Northern Ireland before the withdrawal from the Union, and a norm of EU law incompatible with the contested legislation and which would have prevented its application had the UK remained in the EU.

The interpretation of Article 2(1) Windsor Framework in the *Dillon* litigation by the Northern Ireland Court of Appeal

In *Dillon*, applying the *Re SPUC* test, the Northern Ireland Court of Appeal found, as to the first limb of the test, that a number of provisions of the Northern Ireland Troubles and Legacy Act 2023 were to be disapplied in that they diminished the protection offered by s. 1 of the RSEO Chapter of the Good Friday Agreement, insofar as it affirmed the parties' «commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community», particularly relying on the mention of civil rights[61]. Furthermore, the Court also relied on ss. 11 and 12 of the RSEO Chapter[62]. The former affirms the parties' belief «that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation»; the latter recognises the victims' «right to remember as well as to contribute to a changed society».

The Court further found that such norms – namely, the rights enshrined in Articles 1, 11, and 12 of the RSEO Chapter – had been given effect in Northern Ireland through the incorporation of the ECHR by the Human Rights Act 1998, and specifically through the incorporation of Articles 2, 3, 6, and 14 ECHR[63]. Moreover, the Court made reference to the Victim Charter (Justice Act (Northern Ireland) 2015) Order (Northern Ireland), which, in implementing the Victims Directive[64], gave effect, particularly at Articles 11 and 16, to the relevant norms of the RSEO Chapter.

Finally, as to the last part of the *Re SPUC* test (points iii – vi), first, it naturally follows from the Court's reconstruction that the norms of the Victim Charter were underpinned by the Victims Directive in that the former was adopted to implement the latter (point iii). Furthermore, after the UK's withdrawal, the Victims Directive had ceased to apply to the UK because it was not retained (point iv). As to whether the Troubles and Legacy Act 2023 resulted in a diminution of the rights protected by the Good Friday Agreement (point v), the Court held that this was indeed the case, because numerous provisions of the Act severely limited the right to access to justice of victims of Troubles-related offences. The Court then concluded its discussion by observing, specifically as to point vi) of the *Re SPUC* test, that «the diminution of rights would not (and could not, compatibly with EU law) have occurred but for withdrawal. […] The diminution in rights would have been

[61] *In the Matter of an Application by Martina Dillon and others* [2024] NICA 59 [114], [115] (Keegan LCJ).
[62] Ibid [117] (Keegan LCJ).
[63] Ibid [115] (Keegan LCJ).
[64] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14 November 2012, p. 57.

unlawful and therefore would not have been possible had the UK remained in the EU»[65].

The Secretary of State's appeal before the Supreme Court

Having sketched out the legal argument developed by the claimants and ultimately endorsed by the Court of Appeal, we can now turn to those the Secretary of State for Northern Ireland put forward in their appeal against the decision of the Court of Appeal.
The arguments the Secretary of State put forward in their appeal before the Supreme Court were not entirely original. To the contrary, the very same arguments were already used both in the earlier phases of the *Dillon* litigation and in the other cases arisen under Article 2(1) of the WF: in all of those cases, both the Northern Ireland High Court and the Court of Appeal have dismissed such lines of reasoning. The Supreme Court accepted them, at least partly.
According to the Secretary of State for Northern Ireland, the legal test for disapplying UK legislation under Article 2(1) of the WF consists of three levels: 1) the aspect of Article 2(1) itself which is relied upon; 2) the aspect of the RSEO Chapter of the Good Friday Agreement which is relied upon; and 3) the provision of EU law underlying the RSEO aspect[66].
The appellant's case is that, for the claimants to obtain the disapplication of the contested UK legislation, the norms relied upon at each of these three levels must be sufficiently clear, precise and unconditional[67]. This submission is supported by the argument that, the question of whether the duty of non-diminution enshrined in Article 2(1) is sufficiently clear, precise and unconditional to have direct effect «can only sensibly be answered by reference to whether the incorporated document (or the relevant part of that document) is itself sufficiently clear, precise and unconditional»[68].
In this regard, the Secretary of State argues that no norm at any of the three levels of the *Re SPUC* test satisfies such requirements.
First, the Secretary of State for Northern Ireland argues that the «aspect» of Article 2(1) relied upon – i.e. the obligation for the UK not to diminish rights set out in the RSEO Chapter of the Good Friday Agreement – cannot be considered directly effective[69]. To the contrary, they argue, the «commitment» contained in Article 2 is of primarily political nature, with the consequence that the issues eventually arising under said article «would be political issues requiring political resolution between the UK and EU on the international

[65] *In the Matter of an Application by Martina Dillon and others* [2024] NICA 59 [134], [135] (Keegan LCJ).
[66] UKSC, *Secretary of State For Northern Ireland (Appellant) v. Dillon (Respondent)*, Case no. UKSC/2025/0013 and UKSC/2025/0013A, Appellant's Written Case [39].
[67] Ibid.
[68] Ibid. [40]. On this issue, the Court of Appeal had been rather assertoric, by merely affirming that «the important point is that the non-diminution obligation the applicants sought to enforce has direct effect […]. It is then a question of law for the court considering whether there has been a breach of that obligation whether the relevant right of safeguard falls within the RES Chapter of the Belfast-Good Friday Agreement»: see *In the Matter of an Application by Martina Dillon and others* [2024] NICA 59 [83] (Keegan LCJ).
[69] The appellant does, however, concede that Article 2(1) might contain a directly effective non-diminution obligation insofar as it refers to diminutions of rights or equality of opportunity resulting of a departure from the specified provisions of Union law listed in Annex 1 to the Protocol: Ibid [35]. The reference to Article 2(1) would be, however, superfluous in that case, because WF makes the listed provisions themselves applicable, without the need to further rely on the non-diminution clause.

plane»[70].

This submission is based upon four considerations[71]. First, Article 2 is excluded from the jurisdiction of the Court of Justice provided for by Article 12; instead, Article 14 creates a political redress mechanism in connection with Article 2. Second, the WF arguably employs different terminology between Article 2 and other provisions which are clearly intended to have direct effect: in the latter case, expression such as "apply" or "are made applicable" are used. Third, the general purpose of the Withdrawal Agreement as a whole is for the UK to withdraw from the EU and EU law to cease to apply domestically, the retention of EU law being the exception. As such, the intention to make, «for the first time», the RSEO Chapter a source of domestically legally enforceable rights and obligations «would have been expected to be expressly stated given the scale of the departure form the established constitutional position in Northern Ireland»[72]. Finally, reference is made to the second paragraph of Article 2, obliging the UK to facilitate the work of the institutions and bodies set up pursuant to the 1998 Agreement in upholding human rights and equality standards. This is said to constitute a political commitment, coherent to that undertaken in paragraph 1 of Article 2, which, however, does not translate into a precise and unconditional legal standard. This consideration – it is argued – is confirmed by the fact that, in order to implement this commitment, Parliament amended the Northern Ireland Act 1998 by introducing ss. 78A-78E[73].

These were sweeping arguments, that ultimately failed. Had they been accepted, they would radically have prevented individuals from directly relying on Article 2(1).

Conversely, the arguments advanced as to the second level of the test the appellant argues must be satisfied for Article 2(1) to be considered directly effective were more limited in scope: they succeeded. Here, the appellant argued that, for Article 2(1) to be directly effective, the norms of the RSEO Chapter rights or equality of opportunity that have allegedly been diminished must equally be sufficiently clear, precise and unconditional[74].

In this regard, the Secretary of State argued that the Westminster Parliament had never sought to directly implement the Good Friday Agreement; instead, the Agreement is a fundamentally political settlement, which was given effect to through various legislative measures over time[75]. Moreover, the appellant took issue with the very broad and vague language of the engaged provision of the RSEO Chapter, and especially of the notion of «civil rights» in s. 1 thereof, which was central to the judgement of the Court of Appeal. The appellant further submitted that allowing claimants to directly invoke Article 2(1) of the WF by alleging a diminution of protection of their «civil rights» would result in the admissibility of claims entirely removed from the issue of the Troubles, as was admittedly the case with the disapplication of a number of provisions of the Illegal Migration Act

[70] UKSC, *Secretary of State For Northern Ireland (Appellant) v. Dillon (Respondent)*, Case no. UKSC/2025/0013 and UKSC/2025/0013A, Appellant's Written Case [27], [14].
[71] Ibid [27]-[34].
[72] Ibid [33].
[73] Ibid [34].
[74] Ibid [40]-[47].
[75] The appellant (Ibid [42]) cites in their support *Re Ní Chuinneagain's Application for Judicial Review* [2021] NIQB 79 [23]-[27] (Scoffield J): «the Belfast Agreement (or the British-Irish Agreement), as an international agreement, is not enforceable as a matter of domestic law, unless and until (and only insofar as) it is incorporated into domestic law» (at para. 23).

2023[76].

With the argument just summarised, the appellant does not seek to radically exclude the direct effect of Article 2(1) of the WF. Instead, more limitedly, what they seek is to constrain its scope of application to diminution in the protection of a narrower set of norms set out in the RSEO Chapter of the Good Friday Agreement and, more specifically, only to those being sufficiently precise, clear and unconditional, which is clearly not the case of the protection of «civil rights», of the belief «that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation», or of the victims' «right to remember as well as to contribute to a changed society».

The decision of the Supreme Court

On 7th May 2026, the UK Supreme Court rendered its Judgement in *Dillon*[77]. Here, we shall point out the most relevant passages of the Judgement, albeit limited to the focus of this article—that is, the persisting relevance of EU law and the Charter under the Windsor Framework.

In short, when it came to the key issue of direct effectiveness of Article 2(1) WF, as anticipated, the Court sided with the Secretary of State.

According to the Court, there are three consecutive stages to the discussion of the effects of Article 2(1) WF. First, there is the question of whether Article 2(1) has direct effect so that it gives rise to justiciable rights before domestic courts. Second, that of whether there has been a diminution in rights protection because of withdrawal from the EU. Third and final, that of whether the disapplication of the relevant provisions of the Act at issue is required. As should be clear in light of the earlier discussion, no aspect of this reconstruction is particularly innovative; on the contrary, it consolidates patterns of argumentations already presented in this and other litigations before lower courts.

The most relevant contribution of this decision, instead, lies in the reasons why the Court denies that, in this case, Article 2(1) WF can be deemed directly effective. In this regard, the Court held that «in considering whether article 2(1) is capable of having direct effect it is necessary to focus on "rights, safeguards or equality of opportunity, as set out in [the RSEO Chapter]". It is necessary to identify a clear and precise obligation in EU law by reference to the RSEO chapter. It is only in this way that the obligation not to diminish rights, safeguards or equality of opportunity acquires any content. […] We consider it necessary to read article 2(1) of the Windsor Framework in conjunction with the RSEO chapter in order to identify a clear and precise obligation which satisfies the test for direct effect»[78]. Here, the Court perfectly endorses the submission by the Secretary of State, rejecting, instead, the reasoning previously adopted by both the High Court and the Court of Appeal. Accordingly, for the duty of non-regression set out in Article 2(1) to be sufficiently clear, precise and unconditional—and thus enjoy direct effect—it is necessary that

[76] UKSC, *Secretary of State For Northern Ireland (Appellant) v. Dillon (Respondent)*, Case no. UKSC/2025/0013 and UKSC/2025/0013A, Appellant's Written Case [42] – the case referred to is *Re NIHRC and JR295's applications for judicial review* [2024] NIKB 35.

[77] *In the matter of an application by Martina Dillon et al. for Judicial Review* [2026] UKSC 15 (Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Hamblen and Lord Stephens SCJJ).

[78] Ibid. [116], [117].

also the allegedly diminished rights enshrined in the RSEO Chapter of the Good Friday Agreement also be sufficiently clear, precise and unconditional.
Against this standard, the applicants' case could not but fail because the provisions of the RSEO they invoked were considered too vague[79].
However, the Court did not take the radical view of holding that Article 2(1) WF cannot —ever—acquire direct effect. To the contrary, the Court appeared to clearly envision this possibility, particularly in cases that would fall within the scope of the six antidiscrimination Directives referred to in Appendix 1 of the Windsor Agreement. In any case, the Court left such a question open, requiring it to be addressed and resolved on a case-by-case basis[80].
For the purposes of solving the case, it would have arguably been enough for the Court to conclude—as it did—that Article 2(1) WF did not enjoy direct effectiveness in this case. However, the Court decided to further expound and clarify the test to be applied to ascertain whether a breach of Article 2(1) has occurred. First, the Court reframed the six-step test for the direct effectiveness of Article 2(1) as originally developed in *Re SPUC* and subsequently employed by both the NIKB and NICA by adopting the three-step test proposed by the Secretary of State, because it «essentially covers the same ground and simplifies the analysis»[81].
These three steps entail verifying: 1) whether a right, safeguard or equality of opportunity that falls within the RSEO chapter of the Belfast Agreement has been engaged; 2) if so, whether that right, safeguard or equality of opportunity had legal effect in Northern Ireland on 31 December 2020 and whether it was underpinned by EU law; 3) whether there was a diminution of that right, safeguard or equality of opportunity as a result of the United Kingdom's withdrawal from the EU?[82]
In applying this test to the facts of the case and to the Northern Ireland Troubles and Legacy Act 2023, the Court concluded that neither Article 1, nor Article 12 of the RSEO Chapter were engaged. According to the Court, first, the provisions of the Victims Directive upon which the claimants relied did not concern civil rights, nor could they be traced back to the subject matter of Article 12. The Court appeared more dubious on the possibility of considering Article 11 to be engaged, but ultimately did not rule on the issue, considering that, in any case, the Victims Directive would not have been applicable to the case even if the UK had remained within the Union. This—the Court held—because the Victim Directive is concerned with ensuring certain rights in the context of actual prosecutions and not with the broader question of «when prosecutions should be pursued, such as a national policy on immunity for the purpose of achieving reconciliation following conflict»[83]. Thus, even if a limitation of fundamental rights had been found to result from the 2023 Act, according to the Supreme Court, EU law would not have prevented it.
One should note that, just as the Court could have decided the case on the basis of the finding that Article 2(1) WF, in this specific case, does not enjoy direct effect, so the Court could have decided it by invoking the argument just recalled and thus by holding that, in

[79] Ibid. [114].
[80] Ibid. [118].
[81] Ibid. [128].
[82] Ibid.
[83] Ibid. [135].

any case, the Victims Directive would not have been applicable to the case at hand, even if the UK had remained in the EU, leaving undecided the wider question concerning Article 2(1) WF[84]. Instead, the Court decided to address the central issue of Article 2(1) WF: this—despite some criticism— is both to be welcomed, because leaving the question open would only have contributed to legal uncertainty, and expected, given that, in the meantime, the question of the merits of the Northern Ireland Troubles and Legacy Act had lost a lot of its salience due to the likely and imminent enactment of the Northern Ireland Troubles Bill 2024-26, aimed at the repeal of the previous Act[85].

Now, the Court apparently adopted an intermediate solution between the sweeping claim by the Secretary of State, holding Article 2(1) Windsor Framework non-justiciable *tout court*, and that of the respondents, who argued for upholding the judgments by the lower Courts and for not requiring the engaged RSEO norms themselves to be capable of being directly applicable.

While this might appear a moderate solution, it has significant inherent pitfalls, which can be captured by the notion of «quasi-justiciability»[86]. Accordingly, falling outside the scope of the six antidiscrimination Directives listed in Annex 1 of the Windsor Framework, the risk is that this decision, by not radically ruling out justiciability, and by simultaneously setting the bar very high for its requirements to be met, only provides a mirage of justiciability, with the consequence of downplaying the impact such an interpretation has on the possibility to invoke EU law under the Windsor Framework, and of potentially tying down individuals in lengthy and costly litigation with little to no chances of success[87].

The significance of the dispute for the wider constitutional framework

Amidst of the fine print of the arguments we just surmised, lies a core constitutional question, namely that of the role of the judiciary in the protection of fundamental rights, especially insofar as courts might rely on non-national instruments such as the EU Charter of Fundamental Rights or the European Convention on Human Rights.

In this regard, the alternative before the Supreme Court was entirely clear, its implications reaching well beyond the matter of the *Dillon* case: the claimants' case implied a favour for legal, rather than political, constitutionalism and, ultimately, for the wide-ranging domestic applicability of the EU Charter of Fundamental Rights; that of the appellant, just as the Court's decision, conversely, endorsed a political conception of constitutionalism and minimises the domestic relevance of non-state sources.

Now, it might be argued that that of the WF is a very peculiar legal settlement, giving rise to a rather unique and exceptional situation. Accordingly, with Brexit, the full «reconquest» of sovereignty and, in more accurate constitutional terms, of parliamentary sovereignty has taken place, with a relatively limited exception having been carved out in Northern Ireland. The Court's decision arguably supports such a reading.

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[84] As noted, with disappointment and criticism, by C. Murray, *Hollowing out Northern Ireland's Post-Brexit Rights Protections in* Re Dillon *[2026] UKSC 15*, in *UK Constitutional Law Association Blog*, 14 May 2026, available at https://ukconstitutionallaw.org/2026/05/14/colin-murray-hollowing-out-northern-irelands-post-brexit-rights-protections-in-re-dillon-2026-uksc-15/, accessed 20 May 2026.
[85] Supra, fn. 55 and accompanying text.
[86] Ibid.
[87] Ibid.

On the contrary, had the Court upheld the previous judgements, this would have enabled individuals in Northern Ireland to challenge a very wide range Acts of Parliament, seeking to disapply them for their incompatibility with the EU Charter of Fundamental Rights. This, together with the inevitable rise in strategic litigation in Northern Ireland, would have resulted in a strong risk of territorial inhomogeneity in the application of the law and would have significantly reduced the impact of s. 5(4) European Union (Withdrawal) Act 2018, according to which «the Charter of Fundamental Rights is not part of domestic law on or after exit day».

Quite obviously, these proceedings, together with the whole discussion on the Windsor Framework, and on the persistence of EU law and, especially, of the Charter of Fundamental Rights in the UK, are not isolated from the rest of the legal order. Particularly, these proceedings have taken place in a context in which the polemics against foreign judges and authorities has vigorously rekindled: with Brexit finalised, and the courts' *Simmenthal* mandate repealed, the focus has now shifted on the Convention system.

The controversies over the role of the judiciary in the protection of fundamental rights and on the domestic authority of the ECHR arguably reached a peak in the last legislature under Tory Governments with the enactment, in the wake of the Supreme Court's decision prohibiting the transferral of asylum seekers to Rwanda on the grounds of Article 3 ECHR[88], of the Safety of Rwanda Act 2024, containing sweeping ouster and notwithstanding clauses, and for which the Government was not able to make a declaration of compatibility under Section 19 HRA[89]. In the same period, Parliament had enacted a number of contentious legislative instruments containing many notwithstanding and ouster clauses, limiting the judicial review of administrative decisions[90]. These events ultimately culminated in the (failed) British Bill of Rights Bill, which would have dramatically reduced the domestic authority of the case-law of the ECtHR as well as the powers of the courts to review, if only for the purpose of issuing a declaration of incompatibility, the legislative choices made by the Parliament[91].

These vicissitudes tested the institutional balance devised under the HRA so much so that, on the one hand, the idea of withdrawing from the ECHR, or more realistically, that of repealing the HRA, circulated with some insistence[92], while, on the other, the never exting-

[88] *R (on the application of AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 W.L.R. 4433.

[89] See s. 3 of the Act. For an overview of the issue, see P. Birkinshaw, *The Rwanda Bill, Boat People and International Law*, in *European Public Law*, 2024, pp. 77-100; P. Leyland, *The UK's Rwanda Asylum Policy and the Courts: Reflections on the Constitutional Consequences?*, in *DPCE Online*, 2024, pp. 767-782.

[90] See Illegal Migration Act 2023, s. 5; Victims and Prisoners Act 2024, s. 69. The Northern Ireland Troubles and Legacy Act 2023 can also be mentioned in this regard, in that it effectively ended or precluded many judicial proceedings concerning Troubles-related offences.

[91] Bill of Rights Bill (withdrawn), Bill 117 2022-23. See especially Sections 1, 3, and 8.

[92] For a discussion, see K. Dzehtsiarou, V.P. Tzevelekos (eds.), *The 'Special' Relationship between the United Kingdom and the European Convention of Human Rights*, in *The European Convention on Human Rights Law Review*, 2024, pp. 1-7.

uished debate on the possibility of introducing the judicial review of legislation in the UK was rekindled[93].

The end of the legislature, together with the abandonment of the British Bill of Rights Bill and the success of the Labour party in the general elections, had given the impression (and, to some, the hope) that such tensions would be eased. This appears not to be the case. Particularly, amidst vehement polemics on the – misrepresented[94] – role of the Convention and of the European Court of Human Rights in impeding the adoption of policies aimed at tackling more vigorously the irregular migration, calls for the UK's withdrawal from the Convention have multiplied[95].

Reform UK was the first to advance this objective and also introduced a Bill to this effect[96]. In Parliament, Nigel Farage clearly linked Brexit to the withdrawal from the ECHR, considering them both parts of a single endeavour to reclaim British (and parliamentary) sovereignty, and observed that «Brexit cannot be complete all the while we are subject to a foreign Court and a piece of legislation brought in by the Blair Government on which judges can choose their own political interpretation. We are not sovereign all the while we are part of the European convention on human rights, the Council of Europe and its associated court. It is as simple as that»[97].

Reform UK was later joined in this proposal by the Conservative party, whose leader suggested that immigration judges «are inventing new and comically ludicrous interpretations of vague [Convention] articles in order to allow foreign criminals and illegal immigrants to stay in the country»[98]. The Labour party currently in government appears to favour of reforming the Convention[99], and, for this purpose, has undersigned the Joint Statement of 27 States parties to the Convention of 10 December 2025[100].

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[93] A. Tucker, *The Rwanda Policy, Legal Fiction(s), and Parliament's Legislative Authority*, in *UKCLA Blog*, 22 November 2023, available at: https://ukconstitutionallaw.org/2023/11/22/adam-tucker-the-rwanda-policy-legal-fictions-and-parliaments-legislative-authority/; M. Elliott, *Is the UK Heading for a Constitutional Crisis Because of the Rwanda Bill?*, in *Public Law for Everyone*, 12 December 2023, available at: https://publiclawforeveryone.com/2023/12/12/could-the-rwanda-bill-provoke-a-constitutional-showdown/; J. King, *The House of Lords, Constitutional Propriety, and the Safety of Rwanda Bill*, in *UKCLA Blog*, 26 January 2024, available at https://ukconstitutionallaw.org/2024/01/26/jeff-king-the-house-of-lords-constitutional-propriety-and-the-safety-of-rwanda-bill/; C. Crummey, *The Safety of Rwanda (Asylum and Immigration) Bill and the Judicial "Disapplication" of Statutes*, in *UKCLA Blog*, 26 March 2024, accessible at: https://ukconstitutionallaw.org/2024/03/26/conor-crummey-the-safety-of-rwanda-asylum-and-immigration-bill-and-the-judicial-disapplication-of-statutes/.

[94] V. Adelmant, A. Donald, B. Çali, *The European Convention on Human Rights and Immigration Control in the UK: Informing the Public Debate*, Bonavero Report 3/2025, Bonavero Institute of Human Rights.

[95] See, for an overview, K. Dzehtsiarou, *Reforming What? Reforming Why? In Memory of Professor Conor Gearty*, in *The European Convention on Human Rights Law Review*, 2025, pp. 423-427; A. Donald, *A Badge of Dishonour*, in *Verfassungsblog*, 29 September 2025, available at: https://doi.org/10.59704/0668446830f51f3f; M. Elliott, *The "Othering" of Human Rights and the Agenda Underlying Calls for ECHR Withdrawal*, in *Public Law for Everyone*, 7 November 2025, available at: https://publiclawforeveryone.com/2025/11/07/the-othering-of-human-rights-and-the-agenda-underlying-calls-for-uk-withdrawal-from-the-echr/.

[96] European Convention on Human Rights (Withdrawal) Bill. The Bill, a ten-minute Bill, was eventually rejected.

[97] Hansard HC Deb., 29 October 2025, vol. 774, col. 353.

[98] *Conservatives Announce ECHR Exit Policy*, in *Conservatives.com*, 4 October 2025, available at: https://www.conservatives.com/news/conservatives-announce-echr-exit-policy.

[99] L. Aqui, *Keir Starmer's Approach to the European Question*, in *British Politics*, 2026, no. 8, pp. 1-8.

[100] Ministry of Justice, in *GOV.UK*, 10 December 2025, available at: https://www.gov.uk/government/news/joint-statement-to-the-conference-of-ministers-of-justice-of-the-council-of-europe.

One might question what exactly the *Dillon* litigation has to do with the debate on the possible withdrawal of the UK from the European Convention on Human Rights. It is our submission – supported also by the very words of the Brexiters, as we just saw – that they form part of the same inward turn of the UK inaugurated with Brexit, which purports to return to an unfettered and unlimited version of parliamentary sovereignty, limiting the role of courts in enforcing individuals' fundamental rights against the political power. Particularly, in this "return to" or "reconquest of" sovereignty, the role of foreign authorities – be them EU law and the Charter, the ECHR, or international unincorporated treaties 'passported' through the ECHR and the HRA[101] – is minimised. Instead, the project of common law constitutionalism, whereby the common law is the main – and, in the perspective of a future withdrawal from the ECHR, the only – source of protection of the rights of individuals is rekindled[102].

The *Dillon* litigation adds a piece to this mosaic, further clarifying the broader picture, at a time in which many commentators—some approvingly[103], some disapprovingly[104]—have noted a conservative turn in the case-law of the Supreme Court, favouring a political—rather than legal—constitutional stance on the issue of fundamental rights protection and adopting a rather restrictive position as to the role of foreign sources in this context[105]. Indeed, the solution the Supreme Court just adopted, addressing the question of the direct effect of Article 2(1) of the WF not only determines the relevance of EU law to the protection of fundamental rights in Northern Ireland under the Windsor Framework, but

[101] P. Sales, J. Clement, *International Law in Domestic Courts: The Developing Framework*, in *Law Quarterly Review*, 2008, pp. 388-421; P. Sales, *The Developing Jurisprudence of the Supreme Court on Convention Rights*, in *Public Law*, 2024, pp. 444-462. For the opposing view, favouring the domestic applicability of unincorporated human rights treaties, see at least E. Bjorge, *Can Unincorporated Treaty Obligations Be Part of English Law?*, in *Public Law*, 2017, pp. 571-591.

[102] J. Laws, *The Common Law Constitution*, Cambridge, Cambridge University Press, 2014; J. Finnis, *Judicial Power: Past, Present and Future*, 20 October 2015, available at: https://policyexchange.org.uk/blogs/john-finnis-judicial-power-past-present-and-future/; Lord Briggs of Westbourne, *Protecting Human Rights: The Common Law as the Starting Point*, Justice Annual Conference – 25 Years of the Human Rights Act, 10 November 2025, available at: https://supremecourt.uk/uploads/speech_lord_briggs_101125_37cc02c5c9.pdf. This project is certainly not new: for an overview, see T. Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, in *Oxford Journal of Legal Studies*, 2003, pp. 435-454; R. Masterman, S. Wheatle, *A Common Law Resurgence in Rights Protection?*, in *European Human Rights Law Review*, 2015, pp. 57- 65. For a powerful critique, see C. Gearty, *On Fantasy Island*, Oxford, Oxford University Press, 2016; see also M. Elliott, *Beyond the European Convention: Human Rights and the Common Law*, in *Current Legal Problems*, 2015, pp. 85-117, arguing that the common law would provide a much narrower protection of fundamental rights than the ECHR.

[103] R. Ekins, *The Government's Judicial Review Legislation Is Welcome, but Could Go Even Further*, in *Conservative Home*, 22 July 2021, available at: https://conservativehome.com/2021/07/22/richard-ekins-the-governments-judicial-review-legislation-is-welcome-but-could-go-even-further/, pointing to «encouraging signs that the Supreme Court, now led by Lord Reed rather than Lady Hale, may be moving towards a more disciplined approach».

[104] C. Gearty, *In the Shallow End*, in *London Review of Books*, 27 January 2022, https://www.lrb.co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end; ID., *Unwelcome Remnant. Conor Gearty on the threat to the Human Rights Act*, Ibid., 9 October 2025, available at: https://www.lrb.co.uk/the-paper/v47/n18/conor-gearty/unwelcome-remnant.

[105] See, for an overview, L. Graham, *Has the UK Supreme Court Become More Restrained in Public Law Cases?*, in *The Modern Law Review*, 2024, pp. 1073-1110; A. Dean, *The Government Wanted to Rein in the Supreme Court. Now It May Not Need To*, available at: https://dlv.prospect.gcpp.io/politics/38065/the-government-wanted-to-rein-in-the-supreme-court.-now-it-may-not-need-to. On the specific issue of the role of foreign sources, see L. Graham, *The Supreme Court's Recent Approach to Unincorporated Human Rights Treaties*' in *European Human Rights Law Review*, 2024, pp. 49-56.

is also going to inform the general debate on the judicial protection of fundamental rights and on the possibility to rely on international sources in that context.

4. Final Remarks

In conclusion, the motto of Brexiters was to "take back control", their aim that of "reconquest[ing] sovereignty": in short, a return to the *status quo ante* and a restoration of a strong, if not absolute, version of parliamentary sovereignty.

The discussion of the case of the enduring relevance of the EU Charter of Fundamental Rights and of the remedy of disapplication of conflicting national legislation under the Windsor Framework, has shown that this reconquest of sovereignty has proven impossible thus far. Indeed, the UK's EU membership has created legal ties that persist long after withdrawal. The impossibility of such a return to the old days of unfettered sovereignty – we've submitted – can be explained by understanding the EU as a complex system, based on the existence of an inextricable legal (and political) knot between national legal systems and supranational treaties. As such, it is characterised by emergent properties, whose emergence and affirmation cannot be traced back any of its original components, but is, instead the result of their interaction. This is why complex systems are irreducible, in that they cannot be reduced to the sum of their simple components, and irreversible, because they cannot be restored to their original status.

To illustrate this point we shall, once more, borrow from Lord Denning's metaphor, describing the impact of Community law over the UK legal system as an «incoming tide» which «flows into the estuaries and up the rivers. It cannot be held back»[106]. To remain in metaphor, Brexit and the following Acts implementing the UK's withdrawal from the EU, pushed back the tide, which mostly left the British estuaries and rivers. However, in the decades of the UK membership in the EU, this tide has been seeping in the British soil, getting irreversibly mixed with it, and some of it has been left behind once Brexit was finalised and the EU law-tide had left the British rivers.

The question is thus not whether it is possible for the UK to revert back to the *status quo* prior to accession (which is not), but rather to what degree and how deeply EU law has penetrated in the UK's legal order and, perhaps more relevantly, constitutional culture.

From this perspective, the *Dillon* litigation, which has just been decided by the Supreme Court, offers an excellent vantage point into the question of the degree of persistence of the EU law in the UK legal order. At the same time, further clarifies the stance of the Supreme Court on the political or legal protection of fundamental rights and on the role, in such a context, of international sources, at a time in which many commentators have described a conservative turn of the Supreme Court and the critique of foreign sources and judges – first and foremost, the ECHR and its Court – has greatly rekindled.

[106] *HP Bulmer Ltd & Anor v. J. Bollinger SA & Ors* [1974] EWCA Civ 14, [1974] 2 All ER 1226.