

## Statutory interpretation and the role of the courts after Brexit

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*This article evaluates the impact of the European Union (Withdrawal) Act 2018 on statutory interpretation and on the role of the courts in the United Kingdom. The Act's new interpretative obligations create a myriad of issues that will occupy litigants and courts in the future. I explain how the complexities of the Act should be disentangled and how courts should exercise their policy choices under the terms of the Act. I show that the assumption that Brexit is a clear break from EU law is in several respects contradicted by the detail of the legislative scheme. The EUWA's strong theme of legal continuity has the consequence that domestic law will remain considerably intertwined and aligned with EU law after exit day. I also demonstrate that the 2018 Act adjusts the relationship between the courts and Parliament in a way that is not foreseen. EU membership has shaped this relationship and Brexit does not mean that it is profoundly restructured. The Act has the potential to strengthen rather than weaken the institutional and constitutional position of the courts.*

**Keywords:** European Union (Withdrawal) Act 2018; Brexit; Supreme Court; retained EU law; judicial law-making; statutory interpretation; parliamentary sovereignty

### 1 INTRODUCTION

As the United Kingdom is preparing to leave the European Union, the European Union (Withdrawal) Act 2018 (EUWA) converts most of existing EU law into domestic law.<sup>1</sup> In this process, the EUWA creates new interpretative obligations, which are riddled with ambiguity, vagueness and gaps. One key contribution of this article is that I (a) propose how the Act's complexities should be disentangled and (b) provide a coherent set of solutions to multiple unresolved interpretative issues that will occupy litigants and courts in the future. My main argument is that the general purpose of the EUWA - to ensure continuity of the law applicable

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<sup>1</sup> EUWA, Explanatory notes, paras 10-11, 23-24. See also Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (2017), Cm 9446, paras 1.12-1.13.

in the UK when it leaves the EU (legal continuity) - has a much further reach than is visible on the surface of the Act. Analysing the EUWA through the lens of this general purpose leads not only to a coherent set of solutions but also demonstrates that domestic law will remain considerably intertwined and aligned with EU law after exit day. This generates a number of surprising results, some of which can be aptly characterized as the ironies of Brexit. A second key contribution of this article is that I evidence that the current constitutional relationship between the courts and Parliament, which is shaped by courts' powers to disapply Acts of Parliament and the strong *Marleasing*<sup>2</sup> duty of interpretation, is not profoundly restructured after Brexit. Rather, the Act's theme of legal continuity goes deep into constitutional waters. It strengthens current trends in UK constitutional law and transfers practical legislative power from Parliament to the judiciary.

The article is structured as follows. After introducing the new body of 'retained EU law' created by the EUWA in the next section, the third section unpacks the general purpose of the Act to ensure legal continuity. The fourth section explores to what extent the EUWA achieves legal continuity of statutory interpretation. It will be demonstrated that the Act domesticates EU interpretative rules and principles, i.e. elements of EU legal culture, but falls short of incorporating the CJEU's teleological approach one-to-one. Section five shows that Parliament's decision to retain the principle of the supremacy of EU law creates legal continuity for the duty of EU-conforming interpretation in relation to pre-exit domestic legislation. Section six argues that the EUWA domesticates the powerful *Marleasing* obligation, which will continue to link directly to EU law after exit day. Even though the EUWA does not incorporate the Charter of Fundamental Rights of the European Union, I demonstrate in section seven how the Charter will remain highly significant for the interpretation of retained fundamental rights after exit day. My argument in section eight is that the EUWA (a) has the potential to extend judicial powers to re-interpret and alter the meaning of legislation, (b) has the potential to intensify instead of reverse the shifting of power from the legislature to the judiciary and (c) increases the courts' institutional position as policy innovators. The final section concludes.

## 2 RETAINED EU LAW

The EUWA creates a new body of law known as 'retained EU law' on exit day. Exit day was originally defined as 29 March 2019 at 11 PM in the EUWA, but was later amended by

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<sup>2</sup> C-106/89, *Marleasing v. La Comercial Internacional de Alimentación* [1990] I-4135 at [8].

statutory instrument twice. The current exit day is 31 October 2019 at 11.00 PM.<sup>3</sup> Since different interpretative obligations attach to different kinds of retained EU law, it is important to understand what exactly ‘retained EU law’ is. Retained EU law comprises the categories of ‘EU-derived domestic legislation’, ‘direct EU legislation’, retained EU law by virtue of s. 4 EUWA, ‘retained general principles of EU law’ and ‘retained case law’.<sup>4</sup> Section 2 EUWA deals with the saving of EU-derived domestic legislation. The provision mainly preserves domestic legislation made to implement EU obligations, which covers primary and delegated legislation implementing EU directives. Sections 3 and 4 EUWA convert a large amount of pre-exit<sup>5</sup> EU legislation into domestic law. ‘Direct EU legislation’ forms part of domestic law on and after exit day (s. 3(1)). That means that the entire text of this EU legislation is placed on the UK statute book. The category of retained direct EU legislation mostly covers EU regulations. The purpose of s. 4 is to recognize and make available in domestic law after exit day any remaining EU rights and obligations which do not fall within s. 2 and 3 of the Act.<sup>6</sup> For example, the provision converts directly effective rights contained within the EU Treaties.<sup>7</sup> Even if the EU right in question has no practical application or is considered inappropriate after exit, the effect of s. 4 is to convert these rights wholesale into domestic law.<sup>8</sup> This illustrates how the general purpose of the EUWA to ensure continuity of the law applicable in the UK when it leaves the EU permeates the Act. ‘Retained general principles of EU law’ refer to the general principles of EU law as recognized in pre-exit CJEU case law and so far as they relate to retained EU legislation post-exit.<sup>9</sup> The EUWA retains the general principles of EU law only

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<sup>3</sup> See s. 20(1), (3), (4) EUWA and the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019. The newly specified exit day aligns UK law with the end date of the second extension to the two-year art. 50(2) TEU period that was agreed between the European Council and the UK on 11 April 2019. Going forward, the UK government intends to amend the EUWA with primary legislation implementing the Withdrawal Agreement between the EU and the UK, which is currently in draft form and contains a time-limited transition period. During the transition period EU law will remain applicable in the UK. If this Agreement were to be approved by the UK Parliament and given domestic legal effect, exit day would *de facto* mean the day after the end of the transition period. See Department for Exiting the European Union, *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union* Cm 9674 (2018), paras 60, 69, 148-149.

<sup>4</sup> S. 6(7) EUWA.

<sup>5</sup> Subsequently, I will use the shorter form ‘pre-exit’ legislation to mean ‘pre-exit day’ legislation. Likewise, I will use the shorter form ‘post-exit’ legislation to refer to ‘post-exit day’ legislation.

<sup>6</sup> EUWA, Explanatory notes, para 92.

<sup>7</sup> For a non-exhaustive list of these rights, see *ibid.*, para 94.

<sup>8</sup> *Ibid.*, para 96. These retained rights are subject to being amended or repealed via statutory instrument under s. 8 of the 2018 Act or other primary legislation made in preparation for the UK’s exit from the EU; *ibid.*, para 96.

<sup>9</sup> S. 6(7) EUWA and para 2 of Schedule 1 to the EUWA.

for the purposes of statutory interpretation; an individual cannot rely on rights drawn from these principles to bring an action in domestic courts.<sup>10</sup>

With regard to the interpretation of retained EU law, s. 6(3) EUWA stipulates that unmodified retained EU law shall be construed and given effect in accordance with any relevant ‘retained case law’. The EUWA divides retained case law into two parts. First, unmodified retained EU law that was interpreted by a domestic court before exit day (‘retained domestic case law’) has to be construed in the same way after exit. This is subject to the rules of precedent, e.g. the Supreme Court would not be bound by a pre-exit decision of the Court of Appeal interpreting an EU regulation.<sup>11</sup> Second, retained case law includes pre-exit CJEU judgments that post-exit<sup>12</sup> relate to retained EU law (‘retained EU case law’).<sup>13</sup> The practical effect of section 6 is that it confers the same binding (precedent) status as Supreme Court decisions on pre-exit CJEU judgments,<sup>14</sup> unless and until the Supreme Court has departed from such a judgment. For courts other than the Supreme Court and the High Court of Justiciary,<sup>15</sup> this mirrors the pre-exit situation under s. 3 of the European Communities Act 1972 (ECA). Even though all domestic courts may have regard to post-exit CJEU judgments when construing retained EU law,<sup>16</sup> domestic courts other than the Supreme Court and the High Court of Justiciary (except where there is a further appeal to the Supreme Court) cannot rely on post-exit CJEU case law in order to depart from existing retained EU case law.<sup>17</sup> That means that the binding effect of the latter case law continues even if the CJEU departs from its own case law after exit day. This is an intended effect of s. 6, which achieves legal continuity and certainty.

### 3 LEGAL CONTINUITY

The EUWA and its explanatory notes do not explicitly use the term ‘legal continuity’. The term does not mean that the EUWA intends to achieve compatibility or homogeneity with post-exit EU law. Section 6(1) clearly says that judgments given by EU courts on or after exit day do

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<sup>10</sup> Para 3(1) of Schedule 1 to the EUWA. This is subject to transitional provisions in para 39 of Schedule 8 to the EUWA.

<sup>11</sup> S. 6(4)(c) EUWA.

<sup>12</sup> The term ‘post-exit’ in this article means ‘on or after exit day’.

<sup>13</sup> S. 6(7) EUWA.

<sup>14</sup> EUWA, Explanatory notes, paras 24, 113 (‘unlike other courts’), 114; Department for Exiting the European Union, *supra* n. 1, para 2.16.

<sup>15</sup> The Supreme Court and the High Court of Justiciary (except where there is a further appeal to the UKSC) are not bound by any retained EU case law, s. 6(4), (5) EUWA. Neither are these two courts bound by ‘retained general principles of EU law’; cf. EUWA, Explanatory notes, para 113.

<sup>16</sup> S. 6(2) EUWA.

<sup>17</sup> See the opening words of s. 6(2) EUWA ‘[s]ubject to this and subsections (3) to (6)’.

not bind domestic courts.<sup>18</sup> Instead, the EUWA takes a ‘snapshot’ of EU law on exit day. The same law shall apply before and after exit day in order to provide legal certainty.<sup>19</sup> Legal continuity therefore refers to the general purpose of the EUWA to ensure continuity of ‘the law’ applicable in the UK when it leaves the EU. This wide definition of legal continuity leaves open what ‘law’ means. Does it only refer to ‘law in the books’ or also ‘law in action’? Does legal continuity only include continuity of the positive law or also continuity of legal culture? Answering these questions determines how deeply engrained in the UK legal system EU law and legal culture will remain after Brexit.

In order to determine the depth of legal continuity that is intended by the EUWA, it is helpful to distinguish between multiple levels of law. Law is not limited to positive law. K. Tuori’s theory on the multi-layered structure of law distinguishes between three levels: the surface level, mainly formed by legislation and case law; the middle level, formed by legal culture; and the deep structure of law, formed by fundamental principles underlying the legal culture such as human rights and the rule of law.<sup>20</sup> Tuori himself notes that it is less important how many levels of law one identifies or how one draws their boundaries as long as one perceives that there is more to law than its visible surface level.<sup>21</sup> Other scholars do not distinguish between two sub-surface levels of law, but differentiate between positive law and legal culture, employing a wide definition of legal culture or distinguishing between different levels of legal culture.<sup>22</sup> What is important is that all levels of law are in constant interaction. The legal culture and the deep structure of the law create preconditions for and impose limitations on the material at the surface level.<sup>23</sup> The subsurface levels of law inform the interpretation of legislation. This

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<sup>18</sup> The treatment of post-exit CJEU case law in the EUWA is not enacted and conceived with a Withdrawal Agreement or future relationship between the UK and the EU in mind. In the event of a Withdrawal Agreement, the correct status of post-exit CJEU case law would require new (amending) legislation. See Lord Keen, HL Deb 23 Apr. 2018 vol 790, col 1402 and Lord Thomas of Cwmgiedd, HL Deb 23 Apr. 2018 vol 790, col 1405. For further discussion in relation to the draft Withdrawal Agreement between the EU and the UK, see House of Lords European Union Committee, *Brexit: The Withdrawal Agreement and Political Declaration* (5 Dec. 2018), HL Paper 245, paras 47-52.

<sup>19</sup> EUWA, Explanatory notes, para 10; Department for Exiting the European Union, *supra* n. 1, paras 1.12-1.13, 2.14.

<sup>20</sup> K. Tuori, *Critical legal positivism* 147-193 (Ashgate 2002). For a critical appraisal of Tuori’s theory, see R. Siltala, *A theory of precedent* 155-158 (Hart 2000).

<sup>21</sup> Tuori, *ibid.*, at 154; see also R. Michaels, *Legal culture*, in *The Max Planck encyclopedia of European private law Vol. II* 1059, 1060 (J. Basedow and others eds., OUP 2012).

<sup>22</sup> J. Bell, *English law and French law - not so different?*, 48 *Current Legal Problems* 63, 70 (1995); R. Manko, *Form and substance of legal continuity*, 17 *Zeszyty Prawnicze* 207, 217 (2017); M. von Hoecke and M. Warrington, *Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law*, 47 *Int. & Comp. L. Quarterly* 495, 498, 513, 519 (1998) (the authors distinguish between different levels of legal culture).

<sup>23</sup> Tuori, *supra* n. 20, at 147; cf. G. Helleringer and K. Purnhagen, *On the terms, relevance and impact of a European legal culture*, in *Towards a European legal culture* 3, 9 (G. Helleringer and K. Purnhagen eds., Beck/Hart/Nomos 2014).

means for the purposes of this article that EU legislation may operate differently in its domesticated version in the UK post-Brexit unless (a) the subsurface levels of EU law are also retained or (b) the legal cultures in the EU legal order and in the post-exit UK legal order are already sufficiently similar. Retained EU legislation may be reconstructed anew after exit day and its meaning may be transformed if neither of these two requirements is satisfied. This insight is confirmed by the literature on legal transplants.<sup>24</sup> Simply transplanting legislation from a foreign legal order into the domestic legal order does not in itself guarantee the same operation of the transplanted legal norms. The underlying reason is that the transplanted legislation may interact with the recipient legal culture in other ways than it does with the origin legal culture due to differences in legal culture in the two jurisdictions.<sup>25</sup>

Against this theoretical background, it is clear that the EUWA ensures legal continuity at the surface level, the level of positive law. Since the EUWA aims to provide a functioning statute book by avoiding gaps on the statute book after Brexit,<sup>26</sup> legal continuity first and foremost means legal continuity of legislation applicable in the UK. The EUWA achieves this goal by converting EU law and preserving EU-derived domestic law. The Act also retains existing domestic and EU case law. The Act thus intends to reach ‘continuity in how that law [retained EU law] is interpreted before and after exit day’.<sup>27</sup> This is a second strand of legal continuity. This strand is strengthened by the EUWA’s decision to effectively retain the binding status of pre-exit CJEU judgments. If this second strand were limited to the retention of case law, legal continuity would remain at the surface level of law. In the White Paper leading to the EUWA, however, the government stated that it intends to accomplish ‘maximum possible certainty as we leave the EU’, which includes maximum legal certainty about the interpretation of retained EU law.<sup>28</sup> This indicates that the EUWA’s purpose to achieve legal continuity goes deeper than law’s surface level. Retaining case law is a necessary but not a sufficient means to ensure legal continuity of statutory interpretation. The reason for this is that multiple factors like legal

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<sup>24</sup> For a good account of legal transplants, in particular (a) the debate about whether and how legal transplants will work in the transplant country, (b) the effects of legal transplants in the transplant country and (c) the factors that determine the ‘success’ of a legal transplant, see M. Siems, *Comparative Law* chapter 8 (2nd ed., CUP 2018).

<sup>25</sup> J. Carvalho, *Law, language, and knowledge: legal transplants from a cultural perspective*, 20 *German L. J.* 21, 22 (2019); E. Örüçü, *Law as transposition*, 51 *Int. & Comp. L. Quarterly* 205, 207-208 (2002); G. Teubner, *Legal irritants: Good faith in British law or how unifying law ends up in new divergences*, 61 *Modern L. Rev.* 11, 12, 19 (1998). For a detailed discussion, see Michaels, *supra* n. 21, at 1060. P. Legrand argues that legal transplants are not merely difficult but impossible due to these differences in contextual settings, (P. Legrand, *The impossibility of legal transplants*, 4 *Maastricht J. of Eur. and Comp. L.* 111, 113 (1997)).

<sup>26</sup> EUWA, Explanatory notes, paras 10, 21-23.

<sup>27</sup> Department for Exiting the European Union, *supra* n. 1, para 2.14.

<sup>28</sup> Department for Exiting the European Union, *supra* n. 1, paras 1.16 and 2.14.

methodology, style of legal reasoning, general principles of law and evaluative arguments inform the interpretation of retained EU law that was not interpreted by domestic or EU courts before exit day. Maximum certainty in statutory interpretation, which includes the element of predictability of judicial decision-making, can only be attained if these factors are retained as well or if they are sufficiently similar in the EU legal order and the post-exit UK legal order. These factors belong to the sub-surface levels of law, to legal culture. Even though the term legal culture is used with a variety of meanings in scholarship,<sup>29</sup> there is sufficiently wide agreement that legal culture includes legal methodology, style of legal reasoning and values.<sup>30</sup> This article uses the term legal culture to refer to the aggregation of these elements.

What is evident from s. 6(3) EUWA is that retained general principles of EU law influence the interpretation of retained EU law. Unwritten general principles of law express core values of an area of law or the legal system as a whole.<sup>31</sup> They are an element of legal culture.<sup>32</sup> This means that the EUWA domesticates an element of EU legal culture, which will become part of British legal culture post-Brexit. I will explore in the next section of this article to what extent the EUWA ensures legal continuity of statutory interpretation with regards to legal methodology, style of legal reasoning and evaluative arguments. This will determine the depth of legal continuity that is achieved by the EUWA and to what extent EU legal culture is domesticated.

#### 4 DOMESTICATION OF THE CJEU'S TELEOLOGICAL APPROACH?

When a domestic court interprets retained EU law, the first question that arises is which methods of statutory interpretation it must apply: EU or domestic methods? The explanatory notes to the 2018 Act clarify that a domestic court shall take a purposive approach to interpretation where the meaning of retained EU law is unclear. Importantly, this purposive

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<sup>29</sup> B. Fekete, *Inconsistencies in the use of legal culture in comparative legal studies*, 25 *Maastricht J. of Eur. and Comp. L.* 551-564 (2018); Michaels, *supra* n. 21, at 1063.

<sup>30</sup> See, e.g. J. Bell, *English law and French law - not so different?*, 48 *Current Legal Problems* 63, 70 (1995); D. Nelken, *Legal culture*, in *Elgar Encyclopedia of comparative law* 480, 482-483 (J. Smits ed., 2nd ed., Edward Elgar 2012); Teubner, *supra* n. 25, at 19; von Hoecke and Warrington, *supra* n. 22, at 514-515.

<sup>31</sup> T. Tridimas, *The general principles of EU law* 1 (2nd ed., OUP 2006); J. Bengoetxea, *General legal principles navigating space and time*, in *General principles of EU law and European private law* 45, 55 (U. Bernitz, X. Groussot and F. Schulvok eds., Wolters Kluwer 2013).

<sup>32</sup> von Hoecke and Warrington, *supra* n. 22, at 519; C. Semmelmann, *Legal principles in EU law as an expression of a European legal culture between unity and diversity*, in *Towards a European legal culture* 303, 323 (G. Helleringer and K. Purnhagen eds., Beck/Hart/Nomos 2014); Tuori, *supra* n. 20, at 177.

approach refers to the judicial reasoning employed by the CJEU.<sup>33</sup> This is because ‘retained EU case law’ is not limited to specific interpretations of specific EU provisions by EU courts. Instead, pre-exit CJEU judgments laying down interpretative rules and principles for EU law are also capable of falling under this category.<sup>34</sup> Hence, s. 6(3) creates legal continuity of statutory interpretation by incorporating EU interpretative rules and principles into domestic law. The provision thus retains another element of EU legal culture. It follows that the claim that retained EU law has to be interpreted in a vacuum as if it were mere letters on a page does not convince.<sup>35</sup> After exit day, a domestic court must determine the meaning of unmodified retained direct EU legislation and rights retained under s. 4 by employing interpretative maxims laid down in CJEU case law.<sup>36</sup> For example, the CJEU interpreted an EU Regulation in *Sturgeon* and held that the operative part of an EU act has to be interpreted in the light of the act’s recitals.<sup>37</sup> After exit day, *Sturgeon* relates to any retained direct EU-legislation in the form of an EU regulation. Section 3 confirms this finding as it does not only convert the text of direct EU legislation but also its recitals. The recitals will continue to influence the interpretation of the legal rule post-exit in the same way as before exit day.<sup>38</sup> Another example illustrating that the EUWA does not intend to create a clear break with EU legal methods is s. 3(4), which is the only explicit legislative deviation in the EUWA from EU interpretative rules and principles. The provision clarifies that the EUWA only domesticates the English language version of direct EU legislation. Yet, this ‘does not affect the use of the other language versions’ when discerning the meaning of retained direct EU legislation.<sup>39</sup> Two readings of s. 3(4) are possible: Either the provision does not divert from a national court’s *obligation* under EU legal methods to use other language versions as an aid to interpretation.<sup>40</sup> Or, as indicated by the explanatory notes, a domestic court *may* use other language versions for the purposes of interpreting

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<sup>33</sup> Cf. EUWA, Explanatory notes, para 111. For an overview of the methods of statutory interpretation employed by the CJEU, see G. Beck, *The legal reasoning of the Court of Justice of the EU* chapters 7, 9, 10 (Hart 2012); J. Bengoetxea, *The legal reasoning of the European Court of Justice - towards a European jurisprudence* 233-262 (Clarendon Press 1993); K. Riesenhuber, *Interpretation of EU secondary law*, in *European legal methodology* 231-260 (K. Riesenhuber ed., Intersentia 2017); R. Streinz, *Interpretation and development of EU primary law*, in *European legal methodology* 151-170 (K. Riesenhuber ed., Intersentia 2017).

<sup>34</sup> The definition of ‘retained EU case law’ in s. 6(7) EUWA refers to ‘any *principles* laid down by, and any decisions of, the European Court’ - italics added.

<sup>35</sup> For this claim, see D. Edward, *Can EU law be translated holus-bolus into UK domestic law?*, 8 *Journal of International Banking and Financial Law* 476, 477 (2018).

<sup>36</sup> The interpretation of EU-derived domestic legislation will be discussed in section six below.

<sup>37</sup> Joined Cases C-402/07 and C-432/07, *Sturgeon and Others v. Condor and others* [2009] ECR I-10923 at [42].

<sup>38</sup> EUWA, Explanatory notes, para 83, note 27.

<sup>39</sup> S. 3(4) EUWA.

<sup>40</sup> Case C-476/11, *HK Danmark v. Experian A/S*, ECLI:EU:C:2013:590, at [42].

retained direct EU legislation.<sup>41</sup> Even if this second reading is adopted, I propose that a domestic court should generally consider other language versions as an aid to interpretation in order to ensure maximum certainty in how retained EU law is interpreted before and after exit day.

I will analyse in the following whether s. 6(3) achieves a deep level of legal continuity of statutory interpretation by domesticating the CJEU's teleological approach *one-to-one* with regard to the interpretation of retained direct EU legislation and rights retained under s. 4. The CJEU's teleological approach goes beyond specific interpretative rules and principles laid down in the court's case law. It is an amalgam of elements of legal methodology, style of legal reasoning, EU values and ideology. Importantly, it deviates from the conventional British purposive approach to statutory interpretation.<sup>42</sup> Whereas the current British purposive approach is predominantly guided by the purpose of the provision under consideration in the particular context of the statute, the CJEU's teleological approach can be characterized by the frequent recourse to 'meta-teleological' arguments and 'meta-purposes' of the EU legal order as a whole like the spirit of the Treaties, the system of the Treaty, the effectiveness of EU law, the ever closer Union or the uniformity of EU law.<sup>43</sup> The CJEU does not approach EU law from a particular national legal mindset, but with a *communautaire* ethos.<sup>44</sup> The issue that arises after exit day is whether the EUWA ensures continuity of these elements, i.e. the meta-teleological arguments, meta-purposes and the *communautaire* ethos, of the CJEU's teleological approach. This issue may become a major point of contestation in British courts as the text of the EUWA does not provide a clear answer and as there are valid arguments on either side.

One reason why British courts may interpret retained EU law after exit day in the light of EU meta-teleological arguments and meta-purposes such as the 'spirit of the Treaties', the

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<sup>41</sup> EUWA, Explanatory notes, para 90.

<sup>42</sup> *Henn and Darby v. DPP* [1981] AC 850, 905 (Lord Diplock); *Revenue and Customs Commissioners v. IDT Card Services Ireland Ltd* [2006] EWCA Civ 29, at [71] (Arden LJ); F.A.R. Bennion, *Understanding common law legislation* 144-149 (OUP 2001); O. Jones, *Bennion on statutory interpretation* section 400 (6th ed., LexisNexis 2013).

<sup>43</sup> G. Conway, *The limits of legal reasoning and the European Court of Justice* 22 (CUP 2014); T. Horsley, *Reflections on the role of the Court of Justice as the 'motor' of European integration: legal limits to judicial lawmaking*, 50 *Common Mkt. L. Rev.* 931, 937 (2013); J. Komarek, *Legal reasoning in EU law*, in *The Oxford handbook of European Union law* 28, 46 (A. Arnall and D. Chalmers eds., OUP 2015); M. Lasser, *Judicial deliberations* 229-236 (OUP 2004); cf. Case C-283/81, *CILFIT v. Ministero della Sanità* [1982] ECR 3415 at [20].

<sup>44</sup> Beck, *supra* n. 33, at 8 and chapter 10; J. Bengoetxea, *Text and telos in the European Court of Justice*, 11 *Eur. Constitutional L. Rev.* 184, 189 (2015).

uniformity of EU law in the Member States or the autonomous interpretation of EU law<sup>45</sup> is that these meta-principles are ‘principles laid down by ... the European Court’.<sup>46</sup> They are part of retained EU case law. Furthermore, not adopting the CJEU’s teleological approach one-to-one risks an incoherent interpretation of retained EU law as the following example shows. A pre-exit interpretation of a provision *a* in retained direct EU legislation by the CJEU binds domestic courts other than the Supreme Court and the High Court of Justiciary. Let us assume that pre-exit case law determining the meaning of a neighbouring provision *b* in the same piece of legislation does not exist. If this provision *b* were construed based on a different legal methodology and if the same words appeared in both provisions but were given an autonomous meaning in provision *a* and a non-autonomous meaning in provision *b*, the interpretation of retained EU law would become a highly complex and fragmented exercise.

Despite these arguments, it is submitted that s. 6(3) EUWA should not be read as incorporating the CJEU’s teleological approach one-to-one. Whether adopting this approach one-to-one is possible may be doubted since national judges in domestic courts cannot simply ‘turn off’ their deeply ingrained and unconsciously functioning domestic legal culture when applying retained EU law.<sup>47</sup> Even if this possibility is not categorically excluded, it must be taken into account that the Treaties as such, the ever closer Union (art. 1 TEU) and the values and objectives of the EU legal order as enshrined in art. 2 and 3 TEU are not domesticated. Since the CJEU developed its teleological approach within this framework set by the Treaties, which is not retained, it appears impossible to integrate this approach one-to-one into a different cultural context with different values and objectives. The different cultural context refers to post-exit British legal culture in which EU law is no longer a source of domestic law due to the repeal of the ECA by s. 1 EUWA.<sup>48</sup> Another decisive argument is that the *communautaire* ethos and the meta-principles of the EU legal order are situated at a deep level of legal culture. They can be characterized as elements of an EU ideology.<sup>49</sup> Retaining these elements would mean that elements alien to the British purposive approach would be internalised after Brexit with the

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<sup>45</sup> An autonomous meaning does not depend on the meaning of national law of (any of) the Member States. EU law has to be interpreted autonomously because of the need for a uniform application of EU law throughout the Union. See Case C-195/06, *KommAustria v. ORG* [2007] I-8817 at [24]; *CILFIT*, *supra* n. 43, at [19].

<sup>46</sup> See the definition of ‘retained EU case law’ in s. 6(7) EUWA.

<sup>47</sup> Cf. K. Tuori, *European constitutionalism* 84 (CUP 2015) for the application of EU law in domestic courts.

<sup>48</sup> The spirit of the Treaties, the uniformity of EU law in the Member States, the autonomous interpretation of EU law and the ever closer Union are meta-principles of the EU legal order that do not have equivalents in the UK legal order.

<sup>49</sup> A common ideology is an element of and forms a deep level of a legal culture: von Hoecke and Warrington, *supra* n. 22, at 515, 519; cf. O. Kahn-Freund, *On uses and misuses of comparative law*, 37 *Modern L. Rev.* 1, 24 (1974).

effect that fundamental legal change were to occur at a deep level of British legal culture. Even though legal culture is subject to alteration and legal transplants can occur at the level of legal culture,<sup>50</sup> changing legal culture is a slower and more difficult process than changing law at its surface level.<sup>51</sup> The deeper down the levels of law or legal culture one descends, the less malleable and the more resistant to change the law becomes.<sup>52</sup> One may thus expect a high level of resistance by British judges to adopting these elements of the CJEU's teleological approach when interpreting retained EU law. Construing retained EU law with an EU mindset and with the goal that this law is applied uniformly throughout the EU seems strange after leaving the EU. It also remains to be seen whether British nationalism paired with anti-EU undertones, as opposed to an EU ideology, will develop and grow post-Brexit and influence the interpretation of retained EU law. Given that the EUWA does not explicitly domesticate the CJEU's teleological approach one-to-one, it appears unlikely that domestic courts will read s. 6(3) in this way.<sup>53</sup> One consequence of this viewpoint is that the EUWA gives rise to a new methodology for the interpretation of retained direct EU legislation and rights retained under s. 4. This methodology can be characterized as a hybrid as it combines elements of (retained) EU and domestic legal methods. It is neither identical with existing domestic legal methods nor with EU legal methods. It also has the potential to create legal uncertainty after exit day, similar to the uncertainty that existed before the interpretation of section 2(4) ECA and section 3(1) Human Rights Act 1998 (HRA) became settled case law in the Supreme Court.

The construction of s. 6(3) EUWA will also be informed by and interrelate with how domestic courts will understand s. 6(2). Section 6(2) stipulates that a domestic court 'may have regard to anything done on or after exit day by the European Court [...] so far as it is relevant to any matter before the court'. This provision will become particularly significant where post-exit CJEU case law concerns a previously undetermined question of EU law that is retained by the EUWA. The question to *what extent* a court can have regard to post-exit CJEU case law is largely left open by s. 6(2) and thus falls within the domain of the courts.<sup>54</sup> The Supreme

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<sup>50</sup> M. van Hoecke, *Legal culture and legal transplants*, in *Law, society and community* 273, 289-290 (R. Nobles and D. Schiff eds., Routledge 2014); Nelken, *supra* n. 30, at 486; M. Siems, *Malicious legal transplants*, 38 *Legal Studies* 103, 105 (2018); Tuori, *supra* n. 20, at 192.

<sup>51</sup> van Hoecke, *ibid.*, at 286; Tuori, *supra* n. 20, at 192.

<sup>52</sup> Tuori, *supra* n. 20, at 150, 184.

<sup>53</sup> The argument advanced here is independent of the Supreme Court's power to depart from retained EU case law. It is based on an interpretation of s. 6(3), which can be adopted by lower courts without infringing their duty to follow retained EU case law under s. 6 EUWA.

<sup>54</sup> Lord Keen, HL Deb 23 Apr. 2018 vol 790, col 1402. For a comparative study, highlighting factors for determining the relevance and persuasiveness of post-exit CJEU case law, see P. Giliker, *Interpreting retained EU private law post-Brexit: Can commonwealth comparisons help us determine the future relevance of CJEU case law?*, *Common L. World Rev.* 1-24 (2019).

Court's difficulties<sup>55</sup> in determining what 'take into account' means in section 2(1) HRA show that section 6(2) EUWA transfers a significant policy choice to the judges. Importantly, s. 6(2) is not modelled on s. 2(1) HRA. If s. 6(3) EUWA is understood as not domesticating the CJEU's teleological approach one-to-one, then limitations arise for the degree of persuasive authority that can be derived from post-exit CJEU case law for the interpretation of unmodified retained EU law. That is because different interpretative approaches for EU law in the EU legal order and for retained EU law in the UK legal order may lead to different interpretative outcomes even if the statutory texts of the provisions are the same. Even though this reasoning does not lead to only one plausible interpretation of s. 6(2), it excludes certain readings of the provision. For example, it would neither be justified to read s. 6(2) as incorporating a strong mirror-principle nor as incorporating a powerful presumption that clear and relevant post-exit CJEU jurisprudence is to be followed when construing unmodified retained EU law.

To conclude, hidden behind the term 'retained EU case law' lies the legislative choice to domesticate EU interpretative rules and principles. The EUWA thus incorporates elements of EU legal culture after Brexit. A consequence of this choice is an increased Europeanization of domestic legal methodology and domestic legal culture after exit day: an irony of Brexit. Even though the EUWA's strong theme of legal continuity extends to the subsurface level of law, the Act falls short of providing full legal continuity of statutory interpretation after exit day since not all of the culture-specifics of the origin legal order (EU) are retained. Neither is the CJEU's teleological approach domesticated one-to-one, nor is EU legal culture incorporated wholesale.

## 5 SUPREMACY OF RETAINED EU LAW AND THE DUTY OF EU-CONFORMING INTERPRETATION

In this section, I will demonstrate that Parliament's decision to retain the principle of the supremacy of EU law creates legal continuity for the duty of EU-conforming interpretation in relation to pre-exit domestic legislation. Domestic law has to be interpreted as far as possible in conformity with EU law. This duty of EU-conforming interpretation is very wide and not restricted to the case of EU directives: 'all national law must be interpreted in accordance with

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<sup>55</sup> Compare *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, at [20] (Lord Bingham) with *Manchester City Council v. Pinnock* [2010] UKSC 45, at [48] (Lord Neuberger) and *Commissioner of Police of the Metropolis v. DSD* [2018] UKSC 11, at [76-77] (Lord Kerr). For discussion, see N. Ferreira, *The Supreme Court in a final push to go beyond Strasbourg*, PL 367-375 (2015); P. Sales, *Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine*, PL 253-267 (2012).

all EU law'.<sup>56</sup> Section 5(2) domesticates this interpretative duty by stipulating that the 'principle of the supremacy of EU law continues to apply so far as relevant to the *interpretation*, disapplication or quashing' of pre-exit domestic legislation,<sup>57</sup> but not post-exit domestic legislation.<sup>58</sup> The explanatory notes to the EUWA explicitly state that s. 5(2) 'preserves this duty [EU-conforming interpretation] in relation to domestic legislation passed or made before exit.'<sup>59</sup> What is important to realize is that the term 'supremacy of EU law' in s. 5(2) does not govern the relationship between UK law and EU law, but the relationship between retained EU law and pre-exit domestic legislation.<sup>60</sup> Therefore, the term 'interpretation' in s. 5(2) has to be read as follows: unmodified<sup>61</sup> pre-exit domestic law must be interpreted as far as possible in conformity with EU law that is retained under s. 3 or 4,<sup>62</sup> even if the retained EU law is modified on or after exit day.<sup>63</sup>

A contentious question that arises from s. 5(2) is whether the provision domesticates the controversial CJEU case law that non-implementing domestic legislation can fall 'within the scope of EU law' and is thus subject to being interpreted as far as possible in conformity with general principles of EU law. For example, general principles of EU law are applicable when national legislation derogates from EU requirements on grounds provided by Union law.<sup>64</sup> That retained general principles of EU law remain relevant for the interpretation of retained EU law is clear from the text of s. 6(3).<sup>65</sup> What is not discernible from the text of s. 5(2) is whether

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<sup>56</sup> M. Bobek, *The effects of EU law in the national legal systems*, in *European Union Law* 143, 157 (C. Barnard and S. Peers eds., 2nd ed., OUP 2017). The CJEU generally refers to the 'principle of interpreting national law in conformity with EU law': Case C-505/14, *Klausner Holz Niedersachsen GmbH v. Land Nordrhein-Westfalen*, ECLI:EU:C:2015:742, at [31-32].

<sup>57</sup> S. 5(2) EUWA - italics added.

<sup>58</sup> S. 5(1) EUWA. A post-exit Act of Parliament prevails over a conflicting provision in retained EU law; see EUWA, Explanatory notes, para 102. For the treatment of the EU law principle of supremacy under the draft Withdrawal Agreement between the EU and the UK, see House of Lords European Union Committee, *supra* n. 18, paras 39-44.

<sup>59</sup> EUWA, Explanatory notes, para 104.

<sup>60</sup> Cf. EUWA, Explanatory notes, para 103 ('Where, however, a conflict arises between pre-exit domestic legislation and retained EU law [...]').

<sup>61</sup> The interpretation of modified pre-exit domestic legislation is governed by s. 5(3) EUWA.

<sup>62</sup> Interpretation in conformity with EU-derived domestic legislation (s. 2 EUWA) is discussed in the next section of this article.

<sup>63</sup> The definition of retained EU law in s. 6(7) EUWA suggests that 'the supremacy of EU law' automatically continues to attach to retained EU law even if it is modified post-exit. For an apparently different view, see Bingham Centre for the Rule of Law, *The EU (Withdrawal) Bill: A rule of law analysis of clauses 1-6* (21 Feb. 2018), paras 110-111, <https://binghamcentre.biicl.org/publications/reports>.

<sup>64</sup> See e.g. Case C-260/89, *ERT v. DEP* [1991] I-2925 at [42-43]; Case C-368/95, *Familiapress v. Heinrich Bauer Verlag* [1997] I-3689 at [24]; *Tridimas*, *supra* n. 31, at 31.

<sup>65</sup> S. 6(3) EUWA domesticates the obligation to interpret EU acts and national implementing legislation as far as possible in conformity with general principles of EU law. In relation to national implementing legislation, see Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989] 2609 at [19]; Case C-144/04, *Mangold v. Helm* [2005] I-9981 at [75]. In relation to EU legislation, see Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof v. Österreichischer Rundfunk* [2003] I-4989 at [68]; *Sturgeon*, *supra* n. 37, at [47-48].

retained general principles of EU law are relevant for the construction of pre-exit, non-implementing domestic legislation. It is submitted here that pre-exit domestic law has to be interpreted as far as possible in conformity with retained general principles of EU law if the pre-exit law falls (a) within the scope of EU law that is retained under s. 3 or 4 or (b) within the scope of an EU directive that was applicable before exit day.<sup>66</sup> This reading of s. 5(2) requires a wide construction of the word ‘relate’ in the definition of ‘retained general principles of EU law’ in s. 6(7). Some scholars have rejected this reading of s. 5(2);<sup>67</sup> others have rejected the view that the EUWA domesticates the notion of ‘acting within the scope of EU law’.<sup>68</sup> Both views do not convince. My reading of the provision is in harmony with the general purpose of the 2018 Act to provide legal continuity of statutory interpretation after exit day. Furthermore, the explanatory notes of the 2018 Act state that EU general principles apply to national legislation that falls ‘within the scope of EU law’.<sup>69</sup> The explanatory notes do not indicate that any CJEU case law on the scope of application of general principles shall be excluded.

## 6 THE POWERFUL *MARLEASING* OBLIGATION REMAINS

Another illustration of the EUWA’s strong theme of legal continuity relates to the powerful *Marleasing* obligation. The EUWA retains this interpretative duty, but splits it into two strands. I will first discuss the domesticated *Marleasing* obligation in relation to pre-exit domestic law (s. 5(2)) and then in relation to EU-derived domestic legislation (s. 6(3)). The obligation does not apply to post-exit domestic law. I will demonstrate that the *Marleasing* obligation will continue to link directly to EU law after exit day even though this direct link is not visible on the face of the EUWA. This is certainly a surprising and ironic outcome as it contradicts the idea that Brexit creates a break from EU law. Yet, this outcome is necessitated by Parliament’s decision not to domesticate (rights in) directives themselves outside the narrow scope of s. 4(2)(b) EUWA. This decision creates complex interpretative problems for the *Marleasing* obligation as I will show in the following.

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<sup>66</sup> The direct reference to EU directives (rather than to EU-derived domestic legislation) is necessary due to Parliament’s decision not to domesticate EU directives themselves. This will become clear in the next section of this article.

<sup>67</sup> A. Lang, V. Miller and J. Simson Caird, *EU (Withdrawal) Bill: the Charter, general principles of EU law, and Francovich damages* 17 (House of Commons Library: Briefing Paper No. 8140, 17 Nov. 2017).

<sup>68</sup> M. Elliott, S. Tierney and A. Young, *Human rights post-Brexit: the need for legislation?* (8 Feb. 2018), <https://publiclawforeveryone.com/2018/02/08/human-rights-post-brexit-the-need-for-legislation/>.

<sup>69</sup> EUWA, Explanatory notes, paras 59-60.

Domestic courts are required to interpret all national legislation within the scope of application of a directive as far as possible in conformity with the requirements of the directive.<sup>70</sup> The explanatory notes to the EUWA explicitly state that s. 5(2) preserves this so-called *Marleasing* obligation.<sup>71</sup> Since s. 5(1)-(3) govern the relationship between retained EU law and pre-exit domestic legislation, EU-derived domestic legislation is not pre-exit legislation for the purposes of s. 5(2) even though it is legislation made before exit day. S. 5(2) appears to mean that pre-exit domestic legislation has to be interpreted in conformity with EU-derived domestic legislation. This reading of s. 5(2) has indeed been suggested in the literature.<sup>72</sup> It is not convincing, however, because an equivalent duty does not exist before exit day in either EU or UK law. Non-implementing provisions that fall within the scope of application of a directive have to be interpreted in the light of the directive, but not in the light of domestic implementing legislation. An incorrect implementation of the directive into domestic law would be perpetuated post-exit if (a) a domestic court is unable to construe the implementing legislation, which becomes EU-derived domestic legislation post-exit, in conformity with the underlying EU directive and (b) other, non-implementing pre-exit domestic legislation has to be interpreted in conformity with this EU-derived domestic legislation rather than with the directive itself. Such an outcome is not intended by the EUWA. What is intended, I suggest, is that unmodified pre-exit domestic law that fell within the scope of application of a directive before exit day has to be interpreted in conformity with the requirements of the directive after exit day. This reading of s. 5(2) achieves legal continuity of statutory interpretation. The *Marleasing* obligation in s. 5(2) is modified compared to its pre-exit EU equivalent as it only refers to pre-exit interpretations of directives by the CJEU. This is the effect of s. 6(1).<sup>73</sup>

This proposed reading of s. 5(2) is in harmony with the explanatory notes. It is also covered by the wording of s. 5(2) due to the vague term ‘the principle of the supremacy of EU law’. The proposed reading of the provision breaks with the contextual argument that the provision and ‘the principle of the supremacy of EU law’ otherwise govern the relationship between retained EU law and pre-exit domestic legislation. However, this contextual argument lacks weight for two reasons. First, since the EUWA does not domesticate EU directives themselves and does not specifically govern the *Marleasing* obligation in its wording, a neat solution is simply not

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<sup>70</sup> *Marleasing*, *supra* n. 2, at [8]; Case C-212/04, *Adeneler et al v. Ellinikos Organismos Galaktos* [2006] I-6057 at [108].

<sup>71</sup> EUWA, Explanatory notes, para 104.

<sup>72</sup> Bingham Centre for the Rule of Law, *supra* n. 63, para 89.

<sup>73</sup> It is important to note that the scope of s. 6(1) is not limited to ‘retained EU law’.

possible. Second, EU-derived domestic legislation does not benefit from the supremacy of EU law proper as it was domestic legislation before exit day and hence cannot be relied on to disapply inconsistent pre-exit domestic legislation.<sup>74</sup> This shows that a fragmented reading of ‘the principle of the supremacy of EU law’ in s. 5(2) is possible and intended, which is also supported by the statutory words ‘so far as relevant’.

Whereas s. 5(2) concerns the interpretation of pre-exit domestic legislation, s. 6(3) governs the interpretation of retained EU law.<sup>75</sup> That is why s. 6(3) domesticates the *Marleasing* obligation in relation to EU-derived domestic legislation. A vexed issue arises in relation to CJEU case law interpreting directives. Retained EU case law refers to pre-exit CJEU judgments that post-exit ‘relate to anything to which section 2, 3 or 4 applies’.<sup>76</sup> Section 2 applies to legislation that was domestic legislation before exit day rather than to EU directives themselves. It is therefore possible to argue that CJEU case law interpreting a directive does not relate to anything to which s. 2 applies because the CJEU has no competence to interpret national legislation. In other words, the term ‘retained EU case law’ in s. 6(7) does not incorporate CJEU case law construing directives if the interpretation of EU-derived domestic legislation is at issue. Domestic courts would not be bound by this CJEU case law. This reading of the provision creates an unjustified inconsistency in the legislative scheme. If a right enshrined in a directive is retained via s. 4, a CJEU decision interpreting a provision in a directive is retained EU case law. Furthermore, the differential treatment of the binding effect of CJEU case law in relation to EU directives compared to EU regulations or Treaty rights is unlikely to be intended by the 2018 Act. I suggest that the inconsistency in the legislation can be avoided if a wide reading of ‘relate to’ in s. 6(7) is adopted for the definition of retained EU case law. This means that CJEU decisions interpreting provisions in directives ‘relate to’ s. 2 when a domestic court construes EU-derived domestic legislation. It follows that unmodified EU-derived domestic legislation that implements a directive into domestic law has to be interpreted as far as possible ‘in accordance with’ pre-exit CJEU case law construing the directive under s. 6(3). Even if there is no relevant pre-exit EU case law interpreting the directive, unmodified EU-derived domestic legislation has to be construed as far as possible in conformity with the EU directive that was applicable before exit day. That is because the *Marleasing* obligation itself is retained EU case

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<sup>74</sup> House of Lords Select Committee on the Constitution, *European Union (Withdrawal) Bill*, HL Paper 69, 29 Jan. 2018, para 82; Bingham Centre for the Rule of Law, *supra* n. 63, paras 106-107; M. Brenncke, *Judicial law-making in English and German courts* 405 (Intersentia 2018).

<sup>75</sup> The heading of s. 6 EUWA could not be clearer: ‘Interpretation of retained EU law’.

<sup>76</sup> S. 6(7) EUWA.

law. It ‘relate[s] to’<sup>77</sup> EU-derived domestic legislation as it governs how national implementing legislation has to be interpreted. This proposed reading of s. 6(3), (7) achieves legal continuity of statutory interpretation as it mirrors the pre-exit situation.

It is important to note in this context that EU-derived domestic legislation is construed based on domestic methods of interpretation.<sup>78</sup> British judges have in the past used the *Marleasing* obligation to go beyond ordinary, conventional canons of statutory interpretation by reading in, out or down of words in legislation.<sup>79</sup> Should British courts continue to apply the retained interpretative obligation in the same powerful way as before exit day? It is submitted that they should. First, pre-exit domestic case law laying down interpretative maxims for the *Marleasing* obligation is retained domestic case law. Second, legal continuity is preserved because pre-exit legislation that has been interpreted prior to exit day by means of judicial law-making in domestic courts does not have to be re-interpreted post-exit according to different interpretative maxims. Third, modifications of the doctrine of parliamentary sovereignty motivated Lord Oliver in *Pickstone* to depart from a number of well-established conventional canons of construction under the *Marleasing* obligation. These modifications of the doctrine were triggered by the supremacy of EU law. These modifications will not disappear after exit day as the EUWA domesticates the principle of the supremacy of EU law.<sup>80</sup> Fourth, the explanatory notes mention the phrase ‘as far as possible’ in relation to the *Marleasing* obligation, indicating that courts should continue to apply the same interpretative methods, limits and techniques after exit day.<sup>81</sup>

One consequence of the interpretation of s. 5(2) and s. 6(3) adopted here is that domestic courts will continue to interpret EU law (directives) based on EU legal methods after exit day. Lady Hale has revealed that when the Supreme Court interprets implementing legislation, ‘our practice has been to go straight to the Directive and ask what it, rather than the Regulations [UK regulations implementing an EU directive], means.’<sup>82</sup> She has also asked whether this practice can continue to apply after exit day if existing UK regulations imperfectly implement

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<sup>77</sup> *Ibid.*

<sup>78</sup> Cf. Case C-397/01, *Pfeiffer v. Deutsches Rotes Kreuz* [2004] I-8835 at [116]; *IDT Card Services Ireland*, *supra* n. 42, at [80-82] (Arden LJ).

<sup>79</sup> *Pickstone v. Freemans Plc* [1989] AC 66, 120-121 (Lord Templeman), 126 (Lord Oliver); *IDT Card Services Ireland*, *supra* n. 42, at [113-114] (Arden LJ); *British Gas Trading Ltd v. Lock* [2016] EWCA Civ 983, at [26, 112-114] (Sir Colin Rimer).

<sup>80</sup> This argument and the relationship between the principle of the supremacy of EU law after exit day and the doctrine of parliamentary sovereignty are explored in detail in Brennecke, *supra* n. 74, at 305, 308, 405-406, 412; cf. *Pickstone*, *supra* n. 79, at 126 (Lord Oliver).

<sup>81</sup> EUWA, Explanatory notes, para 104.

<sup>82</sup> Lady Hale, *The United Kingdom Constitution on the move* (Jul. 2017), 12, <https://www.supremecourt.uk/news/speeches.html>.

an EU directive. Based on the above analysis of s. 6(3), this question can be answered in the affirmative, at least when the relevant EU-derived domestic legislation remains unmodified.

## 7 THE HIGH SIGNIFICANCE OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

This section of the article deals with a deliberate element of legal discontinuity in the EUWA. Section 5(4) does not retain the Charter of Fundamental Rights of the European Union (the Charter). What is far less clear, and what has often been misunderstood in the literature so far,<sup>83</sup> is the remaining role of the Charter for statutory interpretation post-exit. I will demonstrate that the apparent break with EU law is deceptive. Legal continuity as a key theme of the EUWA has a further reach than is visible on the surface of the Act. I will evidence in this section that the Charter of Fundamental Rights of the European Union will remain highly relevant for statutory interpretation after exit day. After all the intense political debate about the decision not to retain the Charter, this finding is certainly ironic.

It is settled CJEU case law that secondary and tertiary EU legislation as well as domestic legislation within the scope of EU law have to be interpreted as far as possible in conformity with the Charter.<sup>84</sup> Since the EUWA does not domesticate the Charter, it follows that the EUWA does not domesticate the duty of Charter-conforming interpretation. This element of legal discontinuity in the EUWA is, however, mitigated by other provisions. Even though the interpretative principle itself is not retained case law due to s. 5(4), pre-exit domestic and CJEU case law construing domestic or EU legislation in conformity with the Charter will become retained case law after exit day.<sup>85</sup> This case law relates to EU law that is retained under s. 2, 3 or 4, which is why its retention is unaffected by s. 5(4). Unmodified retained EU law has to be interpreted in accordance with this case law.<sup>86</sup> Legal continuity of statutory interpretation is achieved. Contrary to what has been suggested in the literature,<sup>87</sup> the EUWA does not take the

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<sup>83</sup> M. Markakis, *Brexit and the EU Charter of Fundamental Rights*, PL 82, 90-91, 93 (2019); S. Peers, *The White Paper on the Great Repeal Bill: invasion of the parliamentary control snatchers* (31 Mar. 2017), <http://eulawanalysis.blogspot.com/2017/03/the-white-paper-on-great-repeal-bill.html>; S. Vesel and N. Peart, *Will the fundamental rights enshrined in the EU Charter survive Brexit?*, *European Human Rights L. Rev.* 134, 143 (2018).

<sup>84</sup> See e.g. Case C-131/12, *Google Spain v. AEPD*, ECLI:EU:C:2014:317, at [68]; Case C-414/16, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, ECLI:EU:C:2018:257, at [49, 53-55, 59].

<sup>85</sup> S. 6(3), (7) EUWA. Cf. EUWA, Explanatory notes, para 106.

<sup>86</sup> S. 6(3) EUWA.

<sup>87</sup> Peers, *supra* n. 83; Vesel and Peart, *supra* n. 83, at 143; cf. Markakis, *supra* n. 83, at 90-91.

Charter out of this case law, it does not try to remove an egg from an omelette, and there is no need for this. This is also clarified by para 39(2) of Schedule 8 to the EUWA.

This result is not put into question by s. 5(5). First, the provision clarifies that fundamental rights<sup>88</sup> which exist irrespective of the Charter in EU law before exit day, for example in the form of general principles of EU law,<sup>89</sup> are domesticated as provided for in the EUWA. Second, s. 5(5) adds in brackets that references to the Charter in any case law are ‘so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles’. The phrase ‘this purpose’ in the provision refers to the purpose of retaining fundamental rights in domestic law. Hence, the provision impacts on the meaning and ambit of retained fundamental rights that exist irrespective of the Charter and correspond with Charter rights. Does s. 5(5) create the irrefutable fiction that a corresponding fundamental right exists elsewhere in retained EU law, or does it have the effect of creating such a corresponding right? Contrary to one alternative explanation,<sup>90</sup> my position is that it does not. That is because the provision only applies for the purpose of retaining fundamental rights which exist in accordance with the EUWA.<sup>91</sup> Furthermore, Schedule 1, para 2 to the EUWA clarifies that a general principle of EU law is only retained if it was recognized as such by the European Court before exit day.<sup>92</sup> I therefore propose that s. 5(5) distinguishes between (a) the existence of a corresponding fundamental right and (b) its meaning and ambit, which relates to the extent of the right’s retention in domestic law. Section 5(5) only applies to (b).

That leaves to a court the task to identify a fundamental right in retained EU law that corresponds to a Charter right.<sup>93</sup> The *fundamental* rights are those that already existed in EU law and that underlie and are reaffirmed in the Charter.<sup>94</sup> The term ‘corresponding’ in s. 5(5) thus refers to these underlying fundamental rights. Nonetheless, it is not an easy task to identify an underlying retained fundamental right because Charter rights as interpreted by the CJEU do

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<sup>88</sup> S. 5(5) speaks of ‘fundamental rights or principles’. In this article, subsequently, I will use ‘fundamental rights’ to refer to both fundamental rights and principles.

<sup>89</sup> Examples of general principles of EU law include EU fundamental rights; EUWA, Explanatory notes, para 59.

<sup>90</sup> Markakis, *supra* n. 83, at 93.

<sup>91</sup> See the wording of s. 5(5) EUWA, ‘in accordance with this Act’.

<sup>92</sup> Fundamental rights can be general principles of EU law, which is why s. 5(5) EUWA does not have the effect of creating new fundamental rights in the form of retained general principles of EU law when read in the context of para 2 of Schedule 1 to the EUWA.

<sup>93</sup> The UK government has set out a list of corresponding retained fundamental rights or principles in HM Government, *Charter of Fundamental Rights of the EU: right by right analysis* (5 Dec. 2017), [http://data.parliament.uk/DepositedPapers/Files/DEP2017-0757/Analysis\\_of\\_the\\_Charter\\_of\\_Fundamental\\_Rights\\_of\\_the\\_European\\_Union.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2017-0757/Analysis_of_the_Charter_of_Fundamental_Rights_of_the_European_Union.pdf).

<sup>94</sup> EUWA, Explanatory notes, para 106.

not always mirror but can provide a higher level of protection than rights provided elsewhere in the EU *acquis*.<sup>95</sup> It follows that a narrow reading of the term ‘corresponding’ in s. 5(5) has the potential to reduce the level of substantive fundamental rights protection in the UK post-exit.<sup>96</sup> Alternatively, s. 5(5) also has the potential to significantly limit the impact of the non-retention of the Charter on substantive rights protection post-exit if domestic courts would always be able to identify a corresponding retained fundamental right.<sup>97</sup> The word ‘corresponding’ in s. 5(5) thus incorporates an important policy choice, which is delegated to the courts. I propose that British courts should apply a strong presumption that a corresponding fundamental right exists elsewhere in retained EU law. My reading of the word ‘corresponding’ is in harmony with the general purpose of the 2018 Act to achieve legal continuity. The key reason supporting this presumption can be found in statements in the explanatory notes to the 2018 Act, which assume that a ‘corresponding’ fundamental right exists elsewhere in the EU *acquis*. The ‘Charter did not create new rights, but rather reaffirmed rights and principles which already existed in EU law. [...] [T]hose underlying rights and principles will also be converted into UK law’.<sup>98</sup> The presumption applies to the question of whether or not a corresponding fundamental right *exists*. It does not apply to the question of whether the meaning and scope of the underlying fundamental right is the same as the Charter right. Once a court establishes correspondence, it follows automatically from s. 5(5) that the ambit and meaning of the retained fundamental right must be understood in the same way as the Charter right has been interpreted in pre-exit case law. It is submitted that this is an irrefutable fiction (‘as if’) as opposed to a rebuttable presumption or a kind of conforming interpretation. This fiction illustrates the strong theme of legal continuity in the EUWA.

So far, I have elucidated the effect of s. 5(5) on retained fundamental rights. What is not visible on the face of the provision is that it also affects the interpretation of legislation in conformity with corresponding retained fundamental rights if such an interpretative duty exists under the

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<sup>95</sup> Joint Committee on Human Rights, *Legislative scrutiny: The EU (Withdrawal) Bill: a right by right analysis* (26 Jan. 2018), HL Paper 70, para 5; C. McCorkindale, *Brexit and human rights*, 22 *Edinburgh L. Rev.* 126, 129 (2018); Vesel and Peart, *supra* n. 83, at 137-139.

<sup>96</sup> It is assumed here that the level of domestic fundamental rights protection post-exit without the Charter is lower than the pre-exit level with the Charter. For this argument, see in detail M. Amos, *Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill* (4 Oct. 2017), <https://ukconstitutionallaw.org/2017/10/04/morris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/>; Yong, *Forgetting human rights - the Brexit debate*, *European Human Rights L. Rev.* 469, 475-478 (2017).

<sup>97</sup> The non-retention of the Charter will still have a significant impact on other levels of fundamental rights protection. That is because there is no right of action on or after exit day based on a failure to comply with the Charter and because a court does not have a power to disapply domestic legislation on or after exit day on the grounds that it infringes the Charter.

<sup>98</sup> EUWA, Explanatory notes, para 106.

EUWA. Such a duty exists if a corresponding retained fundamental right is enshrined in a retained general principle of EU law or a Treaty right that is retained under s. 4.<sup>99</sup> It follows that the impact of not retaining the duty of Charter-conforming interpretation is limited. There are two caveats: First, a court must establish correspondence between a Charter right and a retained fundamental right. Second, legal discontinuity partly<sup>100</sup> prevails if the Charter right corresponds to a right retained in direct EU legislation or EU-derived domestic legislation. The reason for the second caveat is that s. 5(5) does not establish an interpretative duty that a court must construe other retained EU law as far as possible in accordance with corresponding retained fundamental rights.<sup>101</sup> Even though the contrary view seems to be envisaged by the government,<sup>102</sup> the government's view is not convincing. For example, a corresponding retained fundamental right can be provided for in EU-derived domestic legislation.<sup>103</sup> Is there an interpretative obligation to construe retained direct EU legislation in conformity with this right? No, there is not. Legislative acts in the form of directives and regulations occupy the same tier in the hierarchy of norms, which is why EU law does not know a duty to interpret regulations as far as possible in the light of rights enshrined in directives.<sup>104</sup> That is why the wording of s. 5(5) is silent about such an interpretative duty.

The complexity of s. 5(5) can be illustrated by the CJEU's *Egenberger* judgment, in which the Court interpreted art. 4(2) of the Equal Treatment Directive 2000/78/EC in conformity with art. 47 Charter.<sup>105</sup> This judgment will become retained case law after exit day. It relates to EU-derived domestic legislation, namely reg. 7 of the Employment Equality (Religion or Belief) Regulations 2003, and this provision has to be interpreted in accordance with *Egenberger*.<sup>106</sup> Article 47 Charter lays down the right of individuals to effective judicial protection of their

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<sup>99</sup> S. 6(3) and 5(2) EUWA. The duty to construe secondary and tertiary EU law as far as possible in conformity with the Treaties is also retained in s. 6(3) EUWA; cf. EUWA, Explanatory notes, para 111. It follows that unmodified retained secondary and tertiary EU legislation, which will mainly be retained direct EU legislation, has to be interpreted as far as possible in conformity with Treaty rights retained under s. 4 EUWA after exit day.

<sup>100</sup> But not in relation to pre-exit domestic law due to s. 5(2) EUWA.

<sup>101</sup> EUWA, Explanatory notes, para 107 is unclear in this respect.

<sup>102</sup> HM Government, *supra* n. 93, para 19; cf. EUWA, Explanatory notes, para 107.

<sup>103</sup> For an example, see C. Murray, A. O'Donoghue and B. Warwick, *Discussion paper on Brexit* (Nov. 2018), 15-16, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3260497](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260497).

<sup>104</sup> Likewise, EU law does not know a duty to interpret directives as far as possible in the light of rights enshrined in regulations. Therefore, there is no duty to interpret EU-derived domestic legislation in conformity with rights embodied in retained direct EU legislation after exit day.

<sup>105</sup> *Egenberger*, *supra* n. 84, at [49, 53-55, 59].

<sup>106</sup> S. 6(3), (7) EUWA.

rights under EU law, which is itself a general principle of EU law.<sup>107</sup> This is a clear case where the retained fundamental right as a general principle corresponds, in the sense of s. 5(5) EUWA, to Art. 47 Charter.<sup>108</sup> It follows that the CJEU's interpretation of art. 47 Charter determines the meaning and ambit of the retained general principle of EU law. References to art. 47 Charter in *Egenberger* are to be read 'as if' they referred to the corresponding retained general principle of EU law that individuals have a right to effective judicial protection of their rights under retained EU law. The CJEU's *Egenberger* judgment is also relevant for the duty to interpret unmodified retained EU law in accordance with retained general principles of EU law.<sup>109</sup> This does not matter in practice for a post-exit interpretation of reg. 7 of the 2003 Regulations itself as this provision has to be interpreted in accordance with *Egenberger*. It does matter, however, when a court construes another provision of retained EU law, which was either not interpreted by a court before exit day at all or not interpreted in conformity with the Charter before exit day.

## 8 THE SHIFTING OF POWER FROM PARLIAMENT TO THE COURTS

This section of the article demonstrates that the EUWA's new interpretative obligations have significant consequences for the institutional and constitutional relationship between the courts and Parliament. These consequences have not yet been spelled out in the literature. The article disagrees with the claim<sup>110</sup> that the EUWA will profoundly restructure the current institutional relationship between the judiciary and the legislature because courts will slowly lose their power to disapply Acts of Parliament over time. I will show instead that below the surface of the EUWA the theme of legal continuity strengthens current trends in constitutional law. I will argue that the EUWA (a) has the potential to extend judicial powers to re-interpret and alter the meaning of legislation, (b) has the potential to intensify instead of reverse the shifting of power from the legislature to the judiciary and (c) increases the courts' institutional position as policy innovators.

When assessing the impact of the EUWA on constitutional law, it is apt to go back to the ECA. The ECA has significantly enhanced the institutional powers of the courts vis-à-vis the

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<sup>107</sup> Case C-199/11, *Europese Gemeenschap v. Otis and Others*, ECLI:EU:C:2012:684, at [46]; Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373, at [54].

<sup>108</sup> Cf. HM Government, *supra* n. 93, at 68.

<sup>109</sup> S. 6(3) EUWA.

<sup>110</sup> T. Horsley, *Brexit and UK courts: awaiting fresh instruction*, in *The UK after Brexit: legal and policy challenges* 73, 93 (M. Dougan ed., Intersentia 2017).

legislature.<sup>111</sup> It has enabled domestic courts to disapply Acts of Parliament and to interpret domestic law as far as possible in conformity with EU law. Even though the EUWA repeals the ECA on exit day, it does not eliminate these two features of EU law. Instead, it retains them in modified form, but only in relation to pre-exit legislation in its s. 5(2). Pre-exit legislation will disappear or become less relevant with the passing of time, and so will these two features of the EUWA. The speed with which the courts' powers will wane depends on two things: First, it depends on whether pre-exit domestic legislation is repealed and replaced with new legislation or modified after exit day, since modified pre-exit legislation does not lose its pre-exit status.<sup>112</sup> Second, it depends on how courts will interpret s. 5(3). The provision stipulates that the domesticated principle of the supremacy of EU law continues to apply to the modified part of pre-exit legislation only if this is 'consistent with the intention of the modification'.

Despite the slow demise of the domesticated principle of the supremacy of EU law, it would be superficial to understand the constitutional ramifications of the EUWA as a sign of discontinuity. The ECA may have been the key trigger for judicial efforts to develop a common law constitution and for the modern self-confidence developed by the judiciary,<sup>113</sup> but the repeal of the ECA will not reverse and is unlikely to slow down this development. The UK constitution will not return to its pre-ECA status and an orthodox understanding of the doctrine of parliamentary sovereignty. Cracks have appeared in the façade of the doctrine of parliamentary sovereignty since the second half of the 20<sup>th</sup> century.<sup>114</sup> These cracks were not only caused by judges disapplying Acts of Parliaments but also by judges stretching what is possible under the guise of statutory interpretation. The principle of legality, the *Marleasing* obligation and s. 3(1) HRA come to mind.<sup>115</sup> Section 3(1) HRA and the *Marleasing* obligation go well beyond conventional canons of statutory construction and are used in courts to re-interpret and alter the meaning of legislation.<sup>116</sup> Both interpretative obligations involve the transfer of practical legislative power from Parliament to the judiciary.<sup>117</sup> The EUWA retains this transfer of power between both branches of the state in its s. 6(3) as the strong *Marleasing* obligation will continue to apply to EU-derived domestic legislation. EU-derived domestic

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<sup>111</sup> *Ibid.*, 87-88; F.G. Nicola, *Luxembourg judicial style with or without the UK*, 40 *Fordham Int. L. J.* 1505, 1527-1531 (2017).

<sup>112</sup> Cf. s. 5(3) EUWA.

<sup>113</sup> M. Gordon, *The UK's sovereignty situation: Brexit, Bewilderment and Beyond...*, 27 *King's L. J.* 333, 340 (2016).

<sup>114</sup> M. Elliott, *United Kingdom: Parliamentary sovereignty under pressure*, 2 *Int. J. of Constitutional Law* 545, 547-554 (2004).

<sup>115</sup> In detail Brennecke, *supra* n. 74, at chapters 3 and 4.

<sup>116</sup> *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, at [30-32] (Lord Nicholls); *IDT Card Services Ireland*, *supra* n. 42, at [85-89] (Arden LJ); P. Sales, *Judges and legislature: values into law*, 71 *Cambridge L. J.* 287, 293-295 (2012).

<sup>117</sup> Sales, *supra* n. 55, at 260 (for s. 3(1) HRA).

legislation will remain a highly significant part of domestic law for a long time to come due to its sheer volume. This creates a significant role for the *Marleasing* obligation post-Brexit. Litigation is likely to unearth interpretative problems, which will not have been prevented by amendment or repeal of EU-derived domestic legislation, in the statutory regime a long time after Brexit.<sup>118</sup>

Even outside the retained *Marleasing* obligation, it is argued here that the EUWA has the potential to intensify rather than reverse the shifting of power from the legislature to the judiciary. Even though s. 6(3) EUWA does not domesticate the CJEU's teleological approach one-to-one, the provision does not bar domestic courts from adopting certain elements of this interpretative approach in order to ensure a deep level of legal continuity of statutory interpretation after exit day. S. 6(3) does not oblige domestic courts to combine specific retained EU interpretative rules and principles with the conventional British purposive approach when discerning the meaning of retained EU law. This leads to the question whether domestic courts will adopt the CJEU's liberal approach to judicial law-making, which is an element of the CJEU's teleological approach, when interpreting retained direct EU legislation and rights retained under s. 4. The answer to this question is significant for the constitutional relationship between the courts and Parliament after Brexit because conventional British and EU methods of interpretation are different in the extent to which they allow judicial law-making. Based on EU methods, the CJEU has developed legal doctrines outside the written law and has engaged in statutory interpretation that restricts or extends the scope of application of a provision beyond or even against the possible semantic meanings of the statutory language.<sup>119</sup> The CJEU has overcome legislative inertia in the past through judicial law-making.<sup>120</sup> Under current British conventional canons of construction as applied in courts, however, a general power to fill in gaps in legislation does not exist and a strained construction is permitted only in comparatively rare cases.<sup>121</sup> Whereas this British judicial practice is

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<sup>118</sup> This is the lesson to be learnt from the application of pre-1922 British statutes which had remained on the Irish statute book in independent Ireland; see P. Fitzgerald, *The status of British law in independent Ireland: a guide for post-Brexit Britain?*, 20 *Irish J. of European L.* 24, 36-37 (2017).

<sup>119</sup> G. Itzcovich, *The interpretation of Community law by the European Court of Justice*, 10 *German Law Journal* 537, 556 (2009); J. Neuner, *Judicial development of law*, in *European legal methodology* 291, 305-314 (K. Riesenhuber ed., Intersentia 2017); Streinz, *supra* n. 33, at 166-170.

<sup>120</sup> Horsley, *supra* n. 43, at 944.

<sup>121</sup> *Shanning International Ltd v. Lloyds TSB Bank plc* [2001] UKHL 31, at [24] (Lord Steyn); *Holden & Co v. Crown Prosecution Service (No. 2)* [1994] 1 AC 22, 33 (Lord Bridge); O. Jones, *supra* n. 42, at section 311. Cf. *Greenweb Ltd v. London Borough of Wandsworth* [2008] EWCA Civ 910, at [28-32] (Stanley Burnton LJ); M. Arden, *The changing judicial role: human rights, Community law and the intention of Parliament*, 67 *Cambridge L. J.* 487, 489-490 (2008).

characterized by a reluctance to read in additional words into a statute,<sup>122</sup> no such reluctance exists under EU methods of interpretation, where the different language versions of a statute can diverge. What is more, the original intent of the founders of the Treaties or the actual intention of the enacting EU legislature do not seem to be an unsurmountable outer limit of statutory interpretation for the CJEU.<sup>123</sup> As it appears from CJEU case law,<sup>124</sup> interpretations that depart from the intention of the enacting legislature are not necessarily unconstitutional and do not necessarily exceed the judicial function of the CJEU under art. 19(1) TEU. That is different when a British court employs ordinary, conventional canons of construction since a judicial interpretation of legislation must be reconcilable with and cannot depart from the intention of the enacting Parliament.<sup>125</sup> The reason for this is that a British court is bound by the intention of the enacting Parliament under the doctrine of parliamentary sovereignty.<sup>126</sup>

Due to these differences in the EU and UK legal order, one may be inclined to predict that domestic courts will not adopt the CJEU's liberal approach to judicial law-making when construing retained EU law. The limits of judicial law-making demarcate the border between permissible statutory interpretation and impermissible judicial amendment of legislation. These limits impact on the separation of powers and are of fundamental constitutional importance. They are situated at a deep level of legal culture.<sup>127</sup> British judges may thus show a high level of resistance to domesticating the CJEU's judicial law-making function. It may be countered against this viewpoint that the CJEU's judicial law-making function is not necessarily incompatible with the fragmented doctrine of parliamentary sovereignty as currently understood and operated in British courts. The doctrine can and has evolved over time.<sup>128</sup>

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<sup>122</sup> P. Sales, *A comparison of the principle of legality and section 3 of the Human Rights Act 1998*, 125 LQR 598, 611 (2009).

<sup>123</sup> M. Potacs, *Effet utile als Auslegungsgrundsatz*, *Europarecht* 465, 483-487 (2009) with a discussion of case law; cf. Itzcovich, *supra* n. 119, at 556.

<sup>124</sup> An exemplary case is *Sturgeon*, *supra* n. 37. For discussion, see S. Garben, *Sky-high controversy and high-flying claims? The Sturgeon case law in light of judicial activism, Euroscepticism and Eurolegalism*, 50 *Common Mkt. L. Rev.* 15, 22 (2013); T. Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial lawmaking and its limits* 173-176 (CUP 2018). For a discussion of further CJEU case law that overrides or circumvents the EU legislature's policy choices, see Horsley, *ibid.*, 172-187.

<sup>125</sup> See to that effect in the area of updating construction: *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security* [1981] AC 800, 822 (Lord Wilberforce); *Fitzpatrick v. Sterling Housing Association Ltd* [2001] 1 AC 27, 34 (Lord Slynn), 45 (Lord Nicholls); cf. *R (Quintavalle) v. Secretary of State for Health* [2003] UKHL 13, at [36] (Lord Hoffmann), at [39] (Lord Millett).

<sup>126</sup> Brenneke, *supra* n. 74, at 104; R. Ekins, *Legislative freedom in the United Kingdom*, 133 L.Q.R. 582, 595 (2017); cf. N. Duxbury, *Elements of legislation* 229 (CUP 2013); J. Goldworthy, *Parliamentary sovereignty: contemporary debates* 253-254 (CUP 2010).

<sup>127</sup> Cf. Kahn-Freund, *supra* n. 49, at 17, who argues that rules which are designed to allocate rule-making, decision-making and policy-making powers in a constitution are the rules most resistant to transplantation.

<sup>128</sup> Space constraints prevent a further elaboration of this controversial issue. The reader is guided to the following sources: T. Bingham, *The rule of law* 167 (Penguin Books 2011); M. Gordon, *Parliamentary sovereignty in the UK constitution* 131-132 (Hart 2015); J. Goldworthy,

British courts have in the past used the *Marleasing* obligation and s. 3(1) HRA to depart from the intention of the enacting Parliament.<sup>129</sup> Domestic courts would also not be obliged to accept other elements of the CJEU's teleological approach like the *communautaire* ethos or meta-principles of the EU legal order. Furthermore, adopting the CJEU's approach to judicial law-making would allow courts to effectively deal with deficiencies in retained EU law that will not have been prevented, remedied or mitigated by legislation due to legislative oversight.<sup>130</sup> Ultimately, it will be for the Supreme Court to advance a convincing interpretation of s. 6(3) EUWA. The arguments presented here merely highlight that s. 6(3) has the potential to enhance the institutional position of the courts vis-à-vis the legislature as their existing powers to re-interpret and to alter the meaning of legislation may be extended to retained direct EU legislation and rights retained under s. 4 EUWA after exit day. If the Supreme Court were to adopt the CJEU's liberal approach to judicial law-making, it would create further cracks in the façade of the doctrine of parliamentary sovereignty and continue the doctrine's evolution. This would not only achieve a deep level of legal continuity for statutory interpretation but also a deep level of legal continuity at the constitutional level.

Another constitutional ramification of the EUWA is that it increases the courts' institutional position as policy innovators. The Act delegates significant policy choices to the judiciary. For example, in s. 5(5) contested questions about the extent of human rights protection after exit day are handed over to the judiciary. This is ironic given the political criticism that judicial interpretations of Convention rights protected under the HRA have received in the past, which has created calls to decide contested questions about the extent of human rights protection in Parliament rather than in the courts.<sup>131</sup> In s. 6(2), domestic courts are given the power to determine what weight is attached to post-exit CJEU case law. In s. 6(3), the question to what

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*The sovereignty of Parliament: history and philosophy* chapter 10 (OUP, 1999); P. Sales, *Legalism in constitutional law: judging in a democracy*, PL 687, 699 (2018).

<sup>129</sup> For s. 3(1) HRA: *Ghaidan*, *supra* n. 116, at [30] (Lord Nicholls); *Attorney General's Reference (No. 4 of 2002)* [2004] UKHL 43, at [28, 53] (Lord Bingham); *S v. L* [2012] UKSC 30, at [15] (Lord Reed). For the *Marleasing* obligation: *IDT Card Services Ireland*, *supra* n. 42, at [113] (Arden LJ), at [133] (Pill LJ); *Blackwood v. Birmingham and Solihull Mental Health NHS Foundation Trust* [2016] EWCA Civ 607, at [55] (Underhill LJ). For criticism of this judicial practice, see Brenneke, *supra* n. 74, at 203-208, 366-368.

<sup>130</sup> Even though this argument achieves continuity of statutory interpretation at one level (judicial law-making function), it does not aim at achieving continuity in how retained EU law is interpreted before and after exit day. That is because domestic courts would use the CJEU's liberal approach to judicial law-making in order to prevent or remedy a deficiency in retained EU law by deviating from EU law.

<sup>131</sup> Cf. Conservative Party, *Protecting human rights in the UK* (London, 2014), 5-6, [https://www.conservatives.com/~media/files/downloadable%20files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20files/human_rights.pdf); A. Speaight, *Mechanisms of a UK Bill of Rights*, in Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before us* (Vol. 1, London, 2012), 257-261, <https://webarchive.nationalarchives.gov.uk/20130206021312/http://www.justice.gov.uk/about/cbr/>.

extent the EUWA domesticates the CJEU's teleological approach is not clearly answered by the Act itself and is ultimately left to the judiciary. In s. 6(6), the phrase 'consistent with the intention of the modifications' leaves it to judges to determine whether modified retained EU law is interpreted differently or according to the same standards as unmodified retained EU law.<sup>132</sup> The vagueness inherent in these provisions is deliberate. It may be reduced but cannot be fully resolved with tools of statutory interpretation. It is a delegation of law-making power from Parliament to the courts.

Lord Neuberger 'warned' Parliament that the more policy decisions are delegated to the judges under the EUWA, the more judges think that they have more and more of a policy role.<sup>133</sup> His Lordship's statement indicates that judicial attitudes towards judicial law-making and policy-making are likely to be strengthened after exit day. A. Young has argued that the UK constitution is becoming more judicialized and that abstract and deductive judicial reasoning from broad constitutional principles is growing in British courts.<sup>134</sup> The EUWA confirms this. The 2018 Act creates legal continuity in the development towards legal constitutionalism. It is the 2018 Parliament itself that advances the 'partnership model'<sup>135</sup> between the courts and the legislature in constructing the ultimate meaning to be given to a statutory provision. Parliament provides the legislative framework and the courts plug the gaps and iron out the creases. This model carries the risk, however, that judges impose upon Parliament their view of what Parliament ought to have meant with the statutory words under the pretext of ascertaining presumed legislative intent.

## 9 CONCLUSION

There is no doubt that the EUWA's new interpretative obligations will impact significantly on statutory interpretation and the role of the courts in the United Kingdom after exit day. The drafting of these new obligations contains gaps and is riddled with ambiguity and vagueness. It has already been claimed that 'exit from the EU necessarily leads to a period of prolonged

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<sup>132</sup> Retained EU law which has been modified on or after exit day can be interpreted and given effect in accordance with any retained case law and any retained general principles of EU law 'if doing so is consistent with the intention of the modifications' (s. 6(6) EUWA). The amended retained EU legislation remains retained EU law, i.e. it does not lose this status merely because it has been modified; *see* the definition of 'retained EU law' in s. 6(7) EUWA.

<sup>133</sup> Lord Neuberger, giving oral evidence to the House of Lords Select Committee on the Constitution, 1 Nov. 2017, transcript at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/oral/73071.html>.

<sup>134</sup> A. Young, *The constitutional implications of Brexit*, 23 *Eur. Pub. L.* 757, 780-785 (2017).

<sup>135</sup> On the meaning of this partnership model, *see* A. Barak, *Purposive interpretation in law* 249-250 (Princeton University Press 2005); P. Sales, *Partnership and challenge: the courts' role in managing the integration of rights and democracy*, PL 456 (2016).

uncertainty in the withdrawing country’ and ‘the UK has, perhaps, entered a decade of uncertainty’.<sup>136</sup> The claim carries some truth as it was shown in this article that the EUWA increases the level of complexity and uncertainty of statutory interpretation after exit day compared to the pre-exit situation. One driver of uncertainty is that the EUWA does not domesticate the CJEU’s teleological approach one-to-one, with the effect that the legal methodology applicable to retained direct EU legislation and rights retained under s. 4 is in need of clarification by the Supreme Court. The claim seems nonetheless exaggerated. I showed in this article how the interpretative complexities in the EUWA should be disentangled. My main argument was that the general purpose of the EUWA to achieve legal continuity permeates the whole of the 2018 Act albeit falling short of ensuring full legal continuity of statutory interpretation after exit day. I demonstrated how analysing the EUWA through the lens of this general purpose leads to a coherent set of solutions to multiple unresolved interpretative issues. This creates much-needed legal certainty. Two consequences of the EUWA’s strong theme of legal continuity are that (a) the Act incorporates elements of EU legal culture and (b) domestic law will remain considerably intertwined and aligned with EU law after exit day. This generated a significant number of ironies of Brexit.

My investigation of the relationship between the courts and Parliament revealed the full magnitude of the EUWA’s goal to achieve legal continuity. I showed that Brexit does not profoundly restructure this relationship, which has been shaped by courts’ powers to disapply Acts of Parliament and the strong *Marleasing* duty of interpretation. The EUWA has the potential to strengthen rather than weaken the institutional and constitutional role of the courts. The weakening of Parliament’s position in the constitutional landscape is not restricted to Parliament’s relationship to the judiciary but also extends to its relationship to the executive. The EUWA has already been extensively criticized for shifting legislative power from the legislature to the executive.<sup>137</sup> An analysis of the EUWA’s impact on the relationship between the courts and the legislature has so far been missing. My article fills this gap in the literature. At a time when Parliament aims to take back control and when the Supreme Court arguably

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<sup>136</sup> P. Nicolaidis, “*The day after*”: *Exit-induced legal lacuna*, 24 *Maastricht J. of European and Comparative Law* 158, 160, 163 (2017).

<sup>137</sup> House of Lords Select Committee on the Constitution, *supra* n. 74, at 4; P. Craig, *Constitutional principle, the rule of law and political reality: The European Union (Withdrawal) Act 2018*, 82 *Modern L. Rev.* 319, 345-346 (2019); M. Elliott and S. Tierney, *Political pragmatism and constitutional principle: The European Union (Withdrawal) Act 2018*, PL 37, 48-52, 59 (2019); S. Pywell, *Something old, something new: busting some myths about statutory instruments and Brexit*, PL 102, 117-120 (2019).

strengthened the role of Parliament in *Miller*,<sup>138</sup> it is certainly ironic that the EUWA acts as a catalyst for the shifting of power from Parliament to the other two branches of the state.

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<sup>138</sup> G. Anthony, *Brexit and the common law constitution*, 24 Eur. Pub. L. 673, 686 (2018); A.W. Bradley, K.D. Ewing and C.J.S. Knight, *Constitutional & Administrative law* 140-141 (17th ed., Pearson 2018); Elliott and Tierney, *supra* n. 137, at 58-59.