14

Constitutional Identity in the United Kingdom

An Evolving Concept

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1 Introduction

This chapter considers the constitutional identity of the UK, in the context of relations between the UK and the EU. There is an inevitable poignancy to the analysis, given the Brexit vote and the UK's impending exit from the EU. There is nonetheless value in considering this issue from a UK perspective as part of this more general study concerning constitutional identity and the EU.

The discussion begins by considering the relationship between UK constitutional identity and EU law. The focus thereafter shifts to consideration of the content of UK constitutional identity, which is followed by discussion of the consequences of finding that there is a tension between a facet of UK constitutional identity and EU law. The chapter concludes with examination of the relationship between constitutional identity and multilevel constitutionalism and the difficulties entailed in ascertaining and applying conceptions of constitutional identity.

2 UK Constitutional Identity and EU Law: The Relationship

The initial step of the inquiry concerns the relationship between UK constitutional identity and EU law. This has arisen primarily in the context of litigation concerning the supremacy of EU law and the extent to which this can be accommodated in the UK legal order. The central feature of this relationship from a domestic perspective is that the UK courts will determine for themselves the fundamental precepts of the UK constitutional order, and the extent to which EU claims to supremacy can be accommodated with them. This was made clear most recently in the *HS2*[1] case.

[1] *R (on the application of HS2 Action Alliance Ltd)* v. *Secretary of State for Transport* [2014] UKSC 3.

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The case sheds important light on the legal relationship between the UK and the EU, and more specifically the conceptual foundation on which EU law is accorded supremacy in the event of a clash with UK law. While the ECJ made clear from the outset that EU law has supremacy over national law in the event of a clash, it is for each Member State to decide whether it accepts this supremacy and whether to ground its acceptance in the ECJ's communautaire reasoning, or in domestic constitutional principle, or in some admixture of the two.[2]

The communautaire approach is based on the ECJ's reasoning in the seminal *Costa* decision,[3] where it provided justificatory rationales for the supremacy of EU law over national law that were contractarian, functional, egalitarian, and analytical. The contractarian argument was that EU law should be accorded primacy because it flowed from the agreement made by the Member States when they joined the EU, through which they limited their sovereign rights. This position was reinforced by a more functional argument, to the effect that the aims of the Treaty could not be achieved unless primacy was accorded to EU law. The egalitarian argument was related to but distinct from the functional. Ratification of a multilateral treaty is akin to joining a club, from which the recipient gains benefits and accepts constraints on autonomous individual action. This is indeed the logic of collective action.[4] If a Member State claims that its law should be accorded priority in the event of a conflict with EU law, it is therefore seeking unequal treatment by continuing to take all benefits of membership while refusing to accept the attendant obligations. This was reinforced by an analytical argument that the obligations undertaken by the Member States in the EEC Treaty would be merely contingent rather than unconditional if they were to be subject to later legislative acts by Member States that could trump EEC law.

The reality is, however, that the great majority of Member States have chosen to base acceptance of supremacy of EU law on a provision of national constitutional law. Lord Bridge's reasoning in *Factortame*[5]

[2] P. Craig and G. de Burca, *EU Law, Text, Cases and Materials* (Oxford University Press, 6th ed., 2015), chap. 9.

[3] Case 6/64 *Flaminio Costa* v. *ENEL* [1964] ECR 585.

[4] M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965); J. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1965).

[5] *Factortame Ltd* v. *Secretary of State for Transport* (No 2) [1991] 1 AC 603, 658.

contained elements of both approaches. His Lordship acknowledged the functional argument by recognising that the supremacy of Community law could be regarded as inherent in the EEC Treaty, given its objectives. He noted also the contractarian line of reasoning when he stated that such supremacy was well established when the UK joined the Community and therefore it knew the terms of the agreement that it entered into, with the consequence that 'whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary'.[6] These arguments cohered with those used by the ECJ and were reinforced by national legal foundations, viz. the terms of the 1972 Act under which 'it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law'.[7]

Subsequent case law has nonetheless emphasised the domestic acceptance of supremacy. This was evident in the reasoning of Laws LJ in *Thoburn*.[8] He held that the constitutional relationship between the UK and the EU was not to be decided by the ECJ's jurisprudence, which could not itself entrench EU law within national law. The constitutional relationship between the EU and the UK, including the impact of EU membership on sovereignty, was to be decided by the common law in the light of any domestic statutes.

This approach was reinforced by the reasoning in *HS2*. The Supreme Court considered the extent, if any, to which the principles in Article 9 of the Bill of Rights concerning the limits of judicial intervention in the parliamentary process might be said to have been implicitly qualified, or even abrogated, by the European Communities Act 1972. The argument was that if the ECJ were to hold that national courts were obliged to scrutinise the parliamentary process in the manner indicated by Advocate General Sharpston[9] and Advocate General Kokott,[10] then the UK courts would be bound to accept this result. This was because the UK had accepted the supremacy of EU law, with the consequence that the European Communities Act 1972 would be regarded as qualifying the

[6] Ibid. 658.
[7] Ibid. 658.
[8] *Thoburn* v. *Sunderland City Council* [2003] QB 151.
[9] Cases C-128-131, 134-135/09 *Boxus* [2011] ECR I-9711, [84].
[10] Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias*, EU:C:2011:651, [136]–[137].

force of Article 9 of the Bill of Rights Act 1689. Lord Reed in *HS2* rejected this argument in the following terms.[11]

> Contrary to the submission made on behalf of the appellants, that question cannot be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the 1972 Act. If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom. Nor can the issue be resolved, as was also suggested, by following the decision in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603, since that case was not concerned with the compatibility with EU law of the process by which legislation is enacted in Parliament.

Lord Reed found it unnecessary to develop this point further, because he concluded that EU law did not require the kind of national oversight of the parliamentary process suggested by the claimants to follow from the Opinions of Advocate General Sharpston and Advocate General Kokott.[12] Lord Reed's dictum reinforces the view of Laws LJ in *Thoburn* that supremacy of EU law does not per se flow from the jurisprudence of the ECJ but from its acceptance in and through the European Communities Act 1972. The corollary is that any conflict between the 1972 Act and another constitutional principle will be resolved by UK courts as a matter of UK constitutional law, even where the reason for the inconsistency flows from EU law. Lord Reed's reasoning reinforces the more general proposition that the UK courts regard issues concerning UK constitutional identity as falling within their domain, with the consequence that while the UK was a member of the EU such precepts of identity would frame the acceptance of EU law in the domestic legal order. The more precise impact of concepts of constitutional identity will be considered in the ensuing discussion.

While this stance can be accepted it does not therefore mean that in determining the impact of EU membership on UK sovereignty the arguments used by the ECJ are or should be irrelevant. The contractarian, egalitarian, functional, and analytical arguments can properly be regarded as having force when deciding as a matter of UK constitutional law on the effect of EU membership on sovereignty. They should be regarded as having

[11] *HS2* (n 1) [79], see also [203]–[205].
[12] Ibid. [109]–[110].

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normative force in terms of their ability to persuade, as opposed to being accepted merely by virtue of their authority as stemming from the ECJ.

3 UK Constitutional Identity: Content

The UK courts have not expressly addressed themselves on the issue of constitutional identity in those terms. They have, however, as will be seen, spoken about constitutional statutes, and there is a conceptual connection between the two concepts. The analysis within this section will, therefore, draw together the elements that comprise constitutional identity as it pertains in the UK.

3.1 Parliamentary Sovereignty

There is a paradoxical duality as regards parliamentary sovereignty and constitutional identity. There is, on the one hand, little doubt that parliamentary sovereignty would be regarded as a cornerstone of constitutional identity in the UK. Its centrality is attested to by its key role in UK constitutional law, as the cornerstone of the unwritten UK constitution. There is, on the other hand, the fact that, taken literally, it could be read so as to deny the possibility of any other facets of constitutional identity, being the sole occupant of the conceptual terrain of constitutional identity within the UK legal order.

The orthodox reading of parliamentary sovereignty is that Parliament is omnipotent, and thus can be subject to no substantive or procedural limits. This precept is subject to one exception, which is that Parliament cannot bind its successors. The thesis is thus one of continuing parliamentary sovereignty, such that each successive Parliament is invested with the same omnipotence as its forbears, thereby reflecting the normative claim that each Parliament is entitled to the same authority flowing from the fact that it has equal democratic pedigree to the Parliaments that preceded it. It might therefore be contended that parliamentary sovereignty thus conceived precludes recognition of any other feature of constitutional identity, since it would always be open to a later Parliament to override, pursuant to its continuing parliamentary sovereignty, matters that might have been regarded as elements of constitutional identity by its forbears. There is some truth in this proposition, viewed at a certain level of abstraction. It should not, however, be pressed too far, and does not capture UK constitutional reality. This is so for three reasons that are related, albeit distinct.

The first reason is that the orthodox proposition concerning parliamentary sovereignty is empirical, not a priori. It is dynamic and not static and hence can alter over time. The rule concerning parliamentary sovereignty, as set out earlier, can be regarded as the rule of recognition of the UK system, in the sense that it is the ultimate rule of the legal system, to which the validity of all other legal rules can be traced. Its validity is not, however, dependent on the rules that constitute its content at any point in time, since that would be bootstrapping. It is, rather, dependent upon social acceptance by those within the polity.[13] The proposition that statutes duly enacted have the force of law – and that subject to this condition so too do judicial decisions – constitutes the core of the rule of recognition because it is accepted by those within the system, including the legislature and the courts. The enactment of a statute attesting to this fact could not itself invest statute with this status. A statute cannot therefore, in itself, alter the rule of recognition, but it can act as the catalyst for a shift in the social acceptance on which the rule of recognition depends. It follows that the rule of recognition is inherently dynamic, not static. The version we currently operate with, that Parliament can do whatsoever it likes through statute duly enacted, has not always been so. It was certainly not the ultimate test of legal validity prior to the latter part of the seventeenth century, and it is over-simplistic to imagine that Parliament's status thereafter was secured in the manner that it is commonly regarded to now. The dynamic nature of the concept means, moreover, that the rule might change and having done so might revert in the future to the status quo ante, as the result of developments that trigger shifts in the social acceptance that underpin the concept.[14]

Secondly, while a later Parliament can repeal what was enacted by its predecessor, the earlier law remains in force until this has occurred, and it might well embody important precepts concerning constitutional identity that are relevant to relations between the UK and the EU. This is exemplified by the European Union Act 2011, which introduced a far-reaching regime of statutory and referendum 'locks'.[15] While the European Union Act 2011 was not directly concerned with constraints on the supremacy of EU law, it contained far-reaching limits to the acceptance of EEC Treaty change and certain other EU decisions within the UK. This was achieved through a regime of referendum and statutory locks.

[13] H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961), 97–107.

[14] Ibid. 144–50.

[15] P. Craig, 'The European Union Act 2011: locks, limits and legality' (2011) 48 *Common Market Law Review* 1881.

Section 2 dealt with treaty amendment pursuant to the ordinary revision procedure in Article 48(2)–(5) TEU and specified that there must be an Act of Parliament plus a positive vote in a national referendum, unless the exemption condition applied. Section 3 set the same conditions for treaty change undertaken through the Simplified Revision Procedure in Article 48(6) TEU, unless the exemption or significance condition applied. Sections 6–8 imposed constraints on ministerial approval of certain EU decisions. The obligation to hold a referendum was determined by section 4(1), which covered every conceivable case of extension of competence and/or conferral of power, subject to limited exceptions in section 4(4).

Thirdly, the very idea of an omnipotent Parliament that is subject to no substantive or procedural limits must be read in conjunction with judicial interpretive precepts that shape how statutes enacted by Parliament are to be read. It would in theory be open to Parliament to enact legislation that runs counter to these interpretive precepts, but unless Parliament does so expressly and unequivocally, then current legislation will be read so as to conform to such principles. A more detailed description of the rule of recognition would therefore include the following: Parliament can do anything it likes by statute duly enacted, subject to the interpretive precepts that the courts will not read general statutory words so as to interfere with fundamental rights; that constitutional statutes will only be regarded as having been repealed or amended by express provision or absolutely necessary implication; and that while we are in the EU, legislation will be construed so as to be in conformity with EU law unless Parliament indicates the contrary in unequivocal manner. This formulation of the rule of recognition is more accurate than that set out earlier, and it became empirically grounded after judicial recognition of the principle of legality, constitutional statutes, and the status of EU law while the UK was a member of the EU.

3.2 Principle of Legality and Constitutional Statutes

The principle of legality and constitutional statutes can both be regarded as part of UK constitutional identity. It is important to convey a little more as to the nature of these principles, and their inter-relationship.

The principle of legality was fashioned by the courts and took shape prior to the enactment of the Human Rights Act 1998. It took the form of what can be termed a priority rule, to the effect that legislation would not be held to allow an interference with a common law constitutional right unless this

was sanctioned by Parliament. Thus, in *Witham*[16] Laws J held that access to the court was a constitutional right and that the Executive could only abrogate that right if it was specifically permitted to do so by Parliament. Laws J accepted that Parliament might expressly limit this right, but stated that he could not conceive of anything short of this which would convince the court that the right had been limited by implication. The class of case where the right might be limited by necessary implication was a class with no members.

A similar approach is apparent in *Simms*.[17] Legislation was to be read subject to a principle of legality, which meant that fundamental rights could not be overridden by general or ambiguous words. This was, said Lord Hoffmann, because there was too great a risk that the full implications of their unqualified meaning might have passed unnoticed in the democratic process. In the absence of express language, or necessary implication to the contrary, the courts would therefore presume that even the most general words were intended to be subject to the basic rights of the individual. Parliament had, therefore, to squarely confront what it was doing and accept the political cost. Lord Hoffmann left open the possibility that a fundamental right could be overridden by necessary implication, as well as by express words. It seems clear that he would only accept that this was so in extreme cases, and this is the import of the phrase 'necessary implication'. Viewed in this way, his approach was very similar to that of Laws J.

The idea that there was a category of statutes that had a particular constitutional status was confirmed by the Supreme Court in the *HS2* case.[18] Prior to that case, the general orthodoxy was that parliamentary sovereignty meant that Parliament had unlimited power, and subject to one exception it could not bind its successors, either as to substance or as to the manner and form in which legislation was enacted.[19] The latter proposition was contested by those who argued that manner and form provisions could bind a later Parliament.[20] Subject to this, it was generally accepted that Parliament could repeal or amend earlier legislation not only expressly but also impliedly, and that this would occur if later legislation was inconsistent with that enacted previously.

[16] *R* v. *Lord Chancellor*, ex p. Witham [1998] QB 575, 585–6.

[17] *R* v. *Secretary of State for the Home Department*, ex p. Simms & O' Brien [2000] 2 AC 115; R (*Morgan Grenfell & Co Ltd* v. *Special Commissioner of Income Tax* [2003] 1 AC 563; *R (Anufrijeva)* v. *Secretary of State for the Home Department* [2004] 1 AC 604; *A* v. *HM Treasury* [2010] 2 AC 534.

[18] *HS2* (n 1).

[19] H.W.R. Wade, 'The basis of legal sovereignty' [1955] *Cambridge Law Journal* 172.

[20] Sir I. Jennings, *The Law and the Constitution* (University of London Press, 5th ed., 1959), chap. 4; R.F.V. Heuston, *Essays in Constitutional Law* (London: Stevens, 2nd ed., 1964), chap. 1; G. Marshall, *Constitutional Theory* (Oxford University Press, 1971), chap. 3.

There was, however, some authority for recognition of a category of constitutional statutes which would have implications for the possibility of implied repeal or amendment. Thus in *Thoburn*,[21] Laws LJ held that the common law had modified the traditional concept of sovereignty in the sense that it had created exceptions to the doctrine of implied repeal; ordinary statutes were subject to this doctrine. What Laws LJ referred to as 'constitutional statutes', which conditioned the legal relationship between citizen and state in some overarching manner, or which dealt with fundamental constitutional rights, were not subject to the doctrine of implied repeal – at least not in the way that it applied as between ordinary statutes.[22] The repeal of such a statute, or its disapplication in a particular instance, could only occur if there were some 'express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible'.[23] The ECA 1972 was regarded as just such a constitutional statute. It contained provisions that ensured the supremacy of substantive EU law in the event of a clash with national law and was not subject to implied repeal. Commentators were divided as to the impact of the case, and as to the significance of Laws LJ's recognition of constitutional statutes.[24]

The existence of such a category was, however, recognised by the Supreme Court in *HS2*. Lord Neuberger and Lord Mance echoed the disquiet felt by Lord Reed as to the possible impact on Article 9 of the Bill of Rights 1689 if EU law were held to require the kind of scrutiny of the legislative process that appeared to be suggested by Advocate General Sharpston and Advocate General Kokott.[25] They accepted that, pursuant to the European Communities Act 1972, UK courts acknowledged that EU law required them to treat domestic statutes, whether passed before or after the 1972 Act, as invalid if they could not be interpreted consistently with EU law.[26] Lord Neuberger and Lord Mance nonetheless held that it would be difficult for a UK court to comply with the approach suggested by the Advocates General 'without addressing its apparent conflict with other

[21] *Thoburn* (n 8).
[22] Ibid. [62].
[23] Ibid. [63].
[24] A. Tomkins, *Public Law* (Oxford University Press, 2003), 124; G. Lindell, 'The statutory protection of rights and parliamentary sovereignty: guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188; A. Kavanagh, 'Constitutional review, the courts and democratic scepticism' (2009) 62 *Current Legal Problems* 293.
[25] *HS2* (n 1) [203]–[204].
[26] Ibid. [206], citing *Factortame Ltd (No 2)* [1991] 1 AC 603.

principles hitherto also regarded as fundamental and enshrined in the Bill of Rights',[27] since it could entail questioning and potentially impeaching Parliament's internal proceedings in a manner that a UK court had not hitherto done. Lord Neuberger and Lord Mance then stated,[28]

> The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.[29]

The concept of constitutional statutes qualifies the continuing sovereignty of the current Parliament to a limited extent, insofar as it entails the conclusion that such statutes are not subject to implied repeal. This is, however, warranted – in part because of the very normative importance of the statute adjudged to be constitutional and in part because although each Parliament partakes of sovereignty based on its democratic credentials, it operates in a line of successive legislatures that collectively embody the values and culture of the UK. When viewed from this perspective, it is surely legitimate to work on the assumption that successive holders of this legislative sovereignty respect prior statutes that reflect the values and culture of the nation, such as to demand that they are not readily overturned by mere inconsistency with a later enactment.

There is, moreover, a proximate normative connection between the principle of legality and constitutional statutes as features of UK constitutional identity. It is therefore not fortuitous that Laws LJ, who was one of the judicial architects of the principle of legality, should be mindful of this connection when he also played a role in the intellectual foundations for constitutional statutes in *Thoburn*.[30] The argument is simple and compelling. If the courts

[27] Ibid. [206].
[28] Ibid. [207].
[29] Their Lordships did not decide unequivocally whether Article 9 of the Bill of Rights would count as such a constitutional instrument, but said that the issue was too important to be decided without full argument, ibid. [208].
[30] *Thoburn* (n 8) [62].

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have recognised a category of common law rights that are regarded as constitutional or fundamental, with the consequence that they can only be limited by express statutory enactment or necessary implication, then the same must surely be true for statutes that are constitutional or fundamental. Laws LJ, writing extra-judicially, expanded on the connection, stating that adjustment of the applicability of implied repeal in the context of constitutional statutes 'does no more than replicate an approach already taken by the courts to common law constitutional principles'.[31] This connection is further reinforced by the fact that the Supreme Court's reasoning concerning constitutional instruments included common law principles that are fundamental to the rule of law.[32] To argue that the principle of legality can be sustained without thereby endorsing the idea of constitutional statutes does not withstand examination – for two related, albeit distinct, reasons. It would mean according greater normative weight to common law rights than those emanating from statute. It would also lead to the absurd consequence that if, for example, common law fundamental rights were enshrined in statute in a purely declaratory manner, then they would have less protection than hitherto from subsequent legislation when in statutory form.

3.3 The Rule of Law

There is little doubt that the rule of law would also be regarded as part of UK constitutional identity. This is attested to by, for example, the fact that the Supreme Court in *HS2* stated that 'there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation',[33] thereby signifying the importance of fundamental common law principles as well as constitutional statutes. There is, however, greater uncertainty as to which conception of the rule of law would be regarded as part of UK constitutional identity.

The formal conception of the rule of law demands that there should be lawful authority for the exercise of power, and that individuals should be able to plan their lives on the basis of clear, open, and general laws. These dictates can be met by non-democratic societies. The rule of law does not,

[31] Sir J. Laws, 'Constitutional guarantees' (2008) 29 *Statute Law Review* 1, 8.
[32] *HS2* (n 1) [207].
[33] Ibid. [207].

on this view, provide the foundation for particular substantive rights. The reason for restricting the concept has been articulated by Raz[34]: if the rule of law is to be taken to demand certain substantive rights, then it becomes tantamount to propounding a complete social and political philosophy, and the concept would then no longer have a useful role independent of that political philosophy. Adherents to the formal model believe that individuals ought to have certain substantive rights but argue that these rights should be articulated separately, in their own terms.

The rule of law has also been imbued with a more substantive connotation, as exemplified in the common law world by Dworkin's work. He recognises that those who adhere to a formal conception of the rule of law care about the content of the law,[35] 'but they say that this is matter of substantive justice, and that substantive justice is an independent ideal, in no sense part of the ideal of the rule of law'.[36] His preferred version is what he terms the rights conception. This conception of the rule of law does not distinguish, as does the formal conception, between the rule of law and substantive justice: 'on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights'.[37] This version of the rule of law directs us to the best theory of justice. My own preference is for this second sense of the rule of law.[38]

There is a third sense of the rule of law. Advocates of this view are unhappy with the purely formal version of the rule of law but are also mindful of the dangers of making the rule of law synonymous with some particular vision of substantive justice. They seek, therefore, to incorporate within the rule of law some substantive rights, while at the same time trying to avoid tying these too closely to any specific conception of justice.[39] It is, however, difficult to specify particular rights and not others that would be agreed to by proponents of differing conceptions of liberalism or democracy. The chosen list reflects the principles which would be agreed to by those who subscribe to a particular version of liberalism

[34] J. Raz, 'The rule of law and its virtue' (1977) 93 *Law Quarterly Review* 195.
[35] R. Dworkin, *A Matter of Principle* (Harvard University Press, 1985), 11–12.
[36] Ibid. 11.
[37] Ibid. 11–12.
[38] P. Craig, 'Constitutional foundations, the rule of law and supremacy' [2003] *Public Law* 92.
[39] T.R.S. Allan, *Law, Liberty and Justice* (Oxford University Press, 1993), chap. 2; 'The rule of law as the rule of reason: consent and constitutionalism' (1999) 115 *Law Quarterly Review* 221; and *Constitutional Justice, A Liberal Theory of the Rule of Law* (Oxford University Press, 2001).

and does not include principles which advocates of other conceptions of liberalism, or other political theories, would regard as equally, or more, important.[40]

A fourth sense of the rule of law is a process-based conception which accords pre-eminence to the values of accountability and participation. The focus is on public rational justification and on the 'citizen as active participant in the legal order and not on the substance incorporated into law'.[41] It is clear that any theory of justice will entail some notion of participation and accountability. The meaning accorded to participation and accountability will, however, vary depending on the democratic theory, or theory of justice, being espoused. It is, moreover, equally clear that process and substance interact. The idea that the rule of law can be explicated principally or solely in terms of participation and accountability is untenable, because the meaning accorded to such ideas is dependent on, and resonates with, substantive principles.[42]

This still leaves for identification the common law principles that are fundamental to the rule of law, which are included as among the foundational precepts, such that it could not be assumed that when Parliament enacted a statute such as the ECA 1972 it contemplated or authorised their abrogation.[43] Lord Neuberger and Lord Mance did not amplify on the more particular common law principles that they had in mind. It is nonetheless possible to make some reasoned conjecture.

It is clear from existing case law that the mere fact that EU law or ECHR law demand a different standard of judicial review than that used in domestic cases, as in the choice between proportionality and rationality, is not problematic in this regard. It is for the national court to decide whether to use such standards of review in purely domestic cases, but that does not alter the operative point, which is that having to modify our standard of review in cases that fall within the remit of EU or ECHR law is not felt to be constitutionally problematic. It is clear also that our national courts have accepted that common law principles of judicial

[40] Craig (n 38) 96–102.

[41] D. Dyzenhaus, 'Form and substance in the rule of law: a democratic justification for judicial review', in C. Forsyth (ed.), *Judicial Review and the Constitution* (Oxford: Hart, 2000), 171.

[42] L. Tribe, 'The puzzling persistence of process-based constitutional theories' (1980) 89 *Yale Law Journal* 1063; P. Brest, 'The substance of process' (1981) 42 *Ohio State Law Journal* 131; R. Dworkin, 'The forum of principle' (1981) 56 *New York University Law Review* 469.

[43] *HS2* (n 1) [207].

review may be supplemented by requirements from systems such as the ECHR, as exemplified by the requirement that the decision maker must not only be unbiased but also independent.

It would seem, therefore, that the common law principles the abrogation of which could not be taken to be authorised or contemplated by enactment of the ECA 1972 must be more fundamental. This might be because the relevant common law norm was felt to be more foundational, such as access to court, process rights, or fundamental rights embedded in the common law, especially where limitations thereon were sweeping and difficult to justify. If such limitations flowed from EU legislation, they would however be subject to review by the ECJ pursuant to the Charter of Rights. The inclusion of such common law principles in the Supreme Court's reasoning is therefore predicated on the assumption that the ECJ upholds the legislation notwithstanding such challenge. The reasoning in *HS2* then provides the foundation from which UK national courts could resist the conclusion that they were bound to accept the ECJ decision as a result of the supremacy of EU law mediated through the ECA 1972.

3.4 Devolution

The devolution settlements whereby power has been accorded to Scotland, Wales, and Northern Ireland should be regarded as part of constitutional identity, more especially given that we are speaking of this concept in relation to the United Kingdom as a whole. The Scotland Act 1998 established the devolution regime for Scotland. The Government of Wales Act 1998 did the same for Wales, but only provided for executive devolution, such that the National Assembly for Wales assumed the responsibilities hitherto exercised by the Secretary of State for Wales. This was changed by the Government of Wales Act 2006, which now provides the framework for Welsh devolution. There are separate devolution arrangements for Northern Ireland.

There are in essence two approaches that can be adopted to devolution settlements. The central government can devolve all its power to the other body, with the exception of reserved matters. It can, alternatively, devolve specified matters, with the corollary that all other matters remain within the power of the central authority. Both strategies have been employed in the past in the UK. The Government of Ireland Act 1920 adopted the first of these approaches, the Scotland Act 1978 the second. There is no reason why the first approach will be more generous to the body to which power is devolved than the second, because so much turns on the list of reserved matters.

A common feature of the devolution settlements is that they do not formally affect the capacity of the Westminster Parliament to make laws for the devolved regions.[44] This does not preclude recognition of the devolved settlements as part of UK constitutional identity. This is reflected in the Sewel Convention, to the effect that the Westminster Parliament will not legislate on devolved matters without the consent of the Scottish Parliament. There is no doubt that it would in general be regarded as constitutionally and politically unacceptable for changes to be made to the devolved regimes without the consent of the devolved legislatures.

4 UK Constitutional Identity and Legal Relations with the EU: Consequences

The discussion now shifts to the legal consequences of a finding that an EU measure might impact on UK constitutional identity. It is important in this respect to disaggregate interpretive and substantive consequences. They will be considered in turn.

4.1 Interpretive Consequences

If the UK courts are concerned that EU law might impact adversely on an aspect of UK constitutional identity, they will use interpretive precepts in order to read EU law in a manner that is consonant with the relevant precept of UK constitutional identity. The idea that national courts should, in the spirit of cooperation, read ECJ judgments so as to avoid an interpretation that conflicts with valued national principles, or that places in question the identity of the national constitutional order, gains force from Article 4(2) TEU, the subject matter of this study, which was added to the Lisbon Treaty.[45]

The idea that national constitutional identity can be protected in part through interpretation can be exemplified by the *HS2* case. The Supreme

[44] See, e.g., Scotland Act, s. 28(7).

[45] L. Besselink, 'National and constitutional identity before and after Lisbon' (2010) 6 *Utrecht Law Review* 36; A. von Bogdandy and S. Schill, 'Overcoming absolute primacy: respect for national identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417; T. Konstadinides, 'Constitutional identity as a shield and as a sword: the European legal order within the framework of national constitutional settlement' (2011) 13 *Cambridge University Yearbook of Legal Studies* 195; B. Guastaferro, 'Beyond the exceptionalism of constitutional conflicts: the ordinary functions of the identity clause' (2012) 31 *Yearbook of European Law* 263; A. Arnaiz and C. Llivina (eds.), *National Constitutional Identity and European Integration* (Cambridge: Intersentia, 2013); E. Cloots, *National Identity and the European Court of Justice* (Oxford University Press, 2014).

Court held that ECJ judgments should be interpreted whenever possible so as to avoid conflict with national law, more especially where that could be serious. This interpretive precept was used when considering whether EU law should be construed so as to require a national court to undertake the kind of in-depth review of the quality of the legislative process that would be problematic from the perspective of UK constitutional law. The Supreme Court, when developing this reasoning, drew on the approach of the Bundesverfassungsgericht. Lord Reed put the matter in the following way:[46]

> [I]t appears unlikely that the Court of Justice intended to require national courts to exercise a supervisory jurisdiction over the internal proceedings of national legislatures of the nature for which the appellants contend. There is in addition much to be said for the view, advanced by the German Federal Constitutional Court in its judgment of 24 April 2013 on the Counter-Terrorism Database Act, 1 BvR 1215/07, para 91, that as part of a co-operative relationship, a decision of the Court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order.

The same sentiment was voiced by Lord Neuberger and Lord Mance when considering how the ECJ's jurisprudence on the meaning of Article 1(4) of the Environmental Impact Assessment Directive should be read. They also drew inspiration from the approach of their German judicial counterparts:[47]

> [T]he Court was here concerned with the fundamental institutions of national democracy in Europe. It was concerned with a provision which deliberately distinguished projects approved by legislative process from projects approved by the ordinary planning process. It is not conceivable, and it would not be consistent with the principle of mutual trust which underpins the Union, that the Council of Ministers should, when legislating, have envisaged the close scrutiny of the operations of Parliamentary democracy suggested by the words used by Advocates General Sharpston and Kokott. The Court will also have been well aware of the principles of separation of powers and mutual internal respect which govern the relations between different branches of modern democracies (as to which see, in the United Kingdom context, *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262, (para 125, per Lord Hope of Craighead). The Court cannot have overlooked or intended to destabilise these. In a not so dissimilar context, the German Federal Constitutional Court noted in its judgment of 24 April 2013 – 1 BvR 1215/07, (para 91) – that decisions of the European Court of Justice must be understood in the context of the cooperative relationship … which exists between that Court and a national constitutional court such as the Bundesverfassungsgericht or a supreme court like this Court.

[46] *HS2* (n 1) [111].
[47] Ibid. [202].

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The interpretive consequences already adumbrated in this discussion should be seen against the more general backdrop of how national legal orders respond to the legal interaction flowing from membership in international organisations, and more generally from being part of a world where regulatory norms are increasingly globalised. This issue has featured prominently in legal and extra-legal discourse, primarily in relation to the legal consequences of UK membership of the ECHR and EU. There are various dimensions to the jurisprudence, but there is nonetheless a discernible theme, which is the judicial desire to assert some degree of independence in the relations between the UK and other legal orders consistent with our obligations as signatories of the respective treaties. There is thus an autochthonous strain within UK jurisprudence connoting the descriptive and normative ideal of attachment to indigenous or native values.[48] It stands in counterpoise to themes of globalisation expressive of the desire to maintain some degree of national control.[49]

4.2 Substantive Consequences

The substantive consequences of a finding that an EU measure impacts on UK constitutional identity depend more specifically on the particular aspect of national constitutional identity that is thus impacted. To put the same point in another way, it is not possible to generalise that the UK system will treat features of constitutional identity as absolute or not, since so much will depend upon the content of a particular aspect of constitutional identity. This can be exemplified through the substantive consequences that flow from the UK's recognition of constitutional statutes as a feature of UK constitutional identity.

The salient point for the present study is the substantive consequence of the UK's court characterisation of a statute as a constitutional statute for the purposes of the inter-relationship between EU law and national law. If the statute is so regarded, then a later Parliament may still choose to amend or repeal it expressly and unequivocally. If, however, there is mere inconsistency, with no express repeal, and nothing to indicate that Parliament intended for the earlier constitutional statute to be amended or repealed, then the UK courts will conclude that implied repeal is not applicable in

[48] V. Rosivach, 'Autochthony and the Athenians' (1987) *Classical Quarterly* 294; P. Geschiere, *The Perils of Belonging: Autochthony, Citizenship, and Exclusion in Africa & Europe* (Chicago University Press, 2009), chap. 1.

[49] P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015), 271–300.

this instance because of the normative importance of the earlier statute. The consequence of recognition of a statute as capturing part of the UK's constitutional identity is therefore that in the event of a clash between it and a norm of EU law, the UK courts will not readily accept that the constitutional statute has been impliedly overruled, qualified, or disapplied. While it would be difficult to sustain the conclusion that implied repeal has no application at all in the realm of constitutional statutes,[50] the standard of proof would be very high – along the lines suggested by Laws LJ, who stated that in the absence of express repeal, there would have to be words in the later statute 'so specific that the inference of an actual determination to effect the result contended for was irresistible'.[51]

5 Conclusion: Constitutional Identity and Multilevel Constitutionalism

There are clear indications that the Supreme Court has been influenced by German law when framing UK jurisprudence on relations between the UK and the EU, more especially concerning constitutional limits to the grant of power to the EU. There is a proximate connection between concepts of constitutional identity and multilevel constitutionalism, insofar as the former can be regarded as setting parameters to the realm of EU law, thereby also providing the content of the constitutional domain that is reserved to the Member State.

The political reality of Brexit means that it is unlikely that the interrelationship between these constitutional spheres will be tested in the UK. We should nonetheless be mindful of the difficulties entailed by identity locks. The German jurisprudence reveals how the imposition of locks can be controversial, in terms of both content and application. Thus, the empirical and conceptual foundation of the identity lock has been questioned by German scholars.[52]

[50] A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart, 2009), chap. 2.

[51] *Thoburn* (n 8) [63].

[52] F. Schorkopf, 'The European Union as an association of sovereign states: Karlsruhe's ruling on the Treaty of Lisbon' (2009) 10 *German Law Journal* 1219; D. Halberstam and C. Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) 10 *German Law Journal* 1241; D. Thym, 'In the name of sovereign statehood: a critical introduction to the Lisbon judgment of the German Constitutional Court' (2009) 46 *Common Market Law Review* 1795; F. Mayer, 'Rashomon in Karlsruhe: a reflection on democracy and identity in the European Union' (2011) 9 *I-CON* 757.

If a legal system decides to apply locks, then it must determine their content and how to apply them. The creator of the lock has to live with the very constraint that it has fashioned. The tighter the lock, the more demanding it is for the creator – not just for the person or institution constrained. This can be problematic if the creator becomes equivocal about the lock that it has created. It then has to find ways of 'softening' the constraint that it has devised, without thereby losing credibility and opening itself to the critique that its tough talk is not matched by tough action.[53]

The application of any such locks is equally important. A national court should be wary of condemning the ECJ for activist interpretation of the kind that the national court itself regularly engages in at the domestic level.[54] It remains to be seen how the identity lock is applied in subsequent case law. Claimants are likely to challenge EU legislation before the German courts on the ground that it transgresses one of the identity limits listed in the judgment. The *Lisbon* ruling[55] may then prove a dilemma for the German Federal Constitutional Court, which created the identity lock. The BVerfG will be faced with a difficult choice. It can take the identity lock seriously, with the consequence that it thereby comes into repeated conflict with the EU in relation to the five areas listed in the judgment. It can, alternatively, soften application of the identity lock in ways analogous to the modification of the ultra vires lock, with the consequence that it is criticised for not 'taking locks seriously'. The indications from the President of the Federal Constitutional Court are that the BVerfG may well soften this lock.[56]

The fact that the UK has no written constitution means that there can be difficulties in ascertaining the key features of constitutional identity. It is nonetheless clear from experience elsewhere that this task is not rendered uncontroversial or straightforward by the existence of a written constitution. The decision as to which aspects of a written constitution should be regarded as sufficiently important to form part of constitutional identity and the decision as to the legal consequences of being thus described are inherently contestable.

[53] The German courts have softened other constraints on EU law over time, such that it is now more difficult to for a claimant to resist the supremacy of EU law before the German courts based on fundamental rights and competence/ultra vires.

[54] P. Craig, 'The ECJ and *ultra vires* action: a conceptual analysis' (2011) 48 *Common Market Law Review* 395.

[55] 2 BvE, 2/08, 30 June 2009.

[56] A. Voßkuhle, 'Multilevel cooperation of the European constitutional courts, *Der Europäische Verfassungsgerichtsverbund*' (2010) 6 *EuConst* 175.