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THE DISSOLUTION OF DUALISM

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ABSTRACT. *This article argues that the concept of dualism has ceased to operate as a reliable indicator of, or guide to, the relationships between domestic and international laws in the UK's constitutional order. Dualism, it is argued, provides only a partial account of the complex interactions between domestic and international laws, cannot accommodate the hybrid products of interactions with European legal orders and ignores the post-"incorporation" processes of domestication through which international and domestic norms are reconciled. The connections between domestic and international laws are – in contrast to dualism's binary simplicity – multi-dimensional and interconnected with the UK's (recently turbulent) constitutional politics.*

KEYWORDS: *dualism*, *constitutional law*, *UK constitution*, *European Union law*, *European Convention on Human Rights*, *Human Rights Act*.

I. INTRODUCTION

The relationship between municipal and international law within the UK constitutional order is typically regarded as governed by the dualist principle. A separation is said to exist between laws of international and domestic origin; these two bodies of laws – as the UK Supreme Court noted in *R. (SC) v Secretary of State for Work and Pensions* – "operate in independent spheres".[1] This separation is a product of, and serves to uphold, the domestic allocation of constitutional authority between Parliament, executive and courts.[2] Parliament's role as primary legislator is, so the argument goes, protected from interference by the executive in the discharge of its foreign affairs prerogatives by a requirement that international treaty obligations are effective in domestic law only when

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[1] *R. (on the application of SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] A.C. 223, at [78] (Lord Reed).

[2] P. Sales and J. Clement, "International Law in Domestic Courts: The Developing Framework" (2008) 124 L.Q.R. 388.

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incorporated by legislation.[3] Dualism, it is argued, secures a stable relationship between domestic and international legal orders that respects the municipal division of governmental power.[4]

Endorsements of the dualist principle are commonplace. The UK Government uses the language of dualism to justify policy.[5] Legislators rely on dualism in describing the UK's constitutional arrangements,[6] to explain the autonomy of domestic law from international legal obligations,[7] and for its (supposed) methodological stipulation that treaty obligations have domestic legal effect only when incorporated into domestic law by legislation.[8] Judicial decisions suggest a clear division between domestic and international legal orders,[9] specifically in relation to treaties to which Parliament has, and has not, chosen to give domestic effect.[10] The dualist principle, it seems, remains strongly influential as a *description of* and *normative guide* to UK constitutional law.

Our argument is that the principle has, in fact, ceased to operate effectively as either. First, we contend that, as a doctrinal guide dualism provides only a *partial* account of the relationships between international law and domestic laws which focuses on the *direct* effects – or absence of such effects – of treaty obligations. The very concept of dualism directs attention towards oppositional alternatives; according to dualist orthodoxy, norms of international origin are in the domestic context either incorporated or they are not; they either have domestic legal effect or they do not.[11] Dualism therefore has something of a reductive character, leaving (or failing to account for) significant grey spaces between the various divisions – internal/external; justiciable/non-justiciable; effective/non-effective – which it seeks to preserve. The simplistic nature of the principle, we suggest, fails

[3] *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] A.C. 61, at [57].

[4] *JH Rayner (Mincing Lane) Ltd. v Department of Trade and Industry* [1990] 2 A.C. 418, 480–81 (Lord Templeman), 483–84 (Lord Griffiths), 500 (Lord Oliver on "the constitutional law of the United Kingdom"), 514–15 (Lord Oliver on "an issue which is not justiciable by an English court"); see also *Attorney General of Canada v Attorney General of Ontario* [1937] A.C. 326, 347 (Lord Atkin) (P.C.).

[5] The (2019–2022 Boris Johnson) UK Government's proposals to enact a Bill of Rights in place of the Human Rights Act 1998, for instance, were motivated by a desire to "reinstate" a clear division between domestic protections for human rights and judgments by the Strasbourg Court (Ministry of Justice, *Human Rights Reform: A Modern Bill of Rights*, CP 588 (London 2021), especially at [190]–[201]).

[6] See e.g. HL Deb. vol. 797 col. 409 (8 April 2019) (Lord Faulks); HC Deb. vol. 797 col. 246 (11 January 2011) (Sir David Lidington M.P.).

[7] HC Deb. vol. 743 cols. 725–26 (16 January 2024) (Sir William Cash).

[8] See e.g. HL Deb. vol. 801 col. 999 (20 January 2020) (Lord Wallace of Saltaire); HL Deb. vol. 823 col. 128GC (27 June 2022) (Lord Sharpe of Epsom).

[9] E.g. *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [55]; *R. (on the application of Friends of the Earth Ltd.) v Secretary of State for International Trade* [2023] EWCA Civ 14, [2023] 1 W.L.R. 2011; *R. (on the application of FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin), [2025] 2 W.L.R. 107.

[10] E.g. *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, at [78] (Lord Reed).

[11] Though see G. Gaja, "Dualism: A Review" in J.E. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford 2007); E. Bjorge and E. Smith, "United Kingdom" in F.M. Palombino (ed.), *Duelling for Supremacy: International Laws vs. National Fundamental Principles* (Cambridge 2019).

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to capture more complex yet commonplace interactions between the domestic and international legal orders.

Second, we argue that dualism's emphasis on a qualitative distinction between laws of domestic and international origin fails to account adequately for the significant body of *hybrid* norms in the UK constitution – that is, norms (predominantly in the spheres impacted by EU and European Convention on Human Rights influences) that are better understood as cogenerated products of the interaction between domestic and international legal orders. Dualism therefore reflects a dichotomy which, as a matter of constitutional practice, has been undermined by decades of proximity between the domestic and international legal orders.

Third, dualism focuses on the *event* or moment – incorporation, for example – which determines whether an international legal norm is or is not domesticated. This "event" focus distracts from the processual nature of the interaction between domestic and international legal orders. Dualism ignores dynamic, evolutionary developments and pressures that complicate and destabilise the supposedly linear relationship between international and domestic laws. We argue that the domestication of an international legal norm should be seen as a long-term and potentially fluctuating process.

In summary, this article reconsiders dualism's viability as *the* explanatory constitutional principle on the relationship between UK domestic and international legal orders. We argue that dualism depicts a relatively simple, coherent and stable nexus between the domestic and international legal orders and that this is at odds with a relationship that is, on our analysis, best seen as complex, fragmented and dynamic.

In the opening substantive section ("The 'Dualist' Constitution") we offer an orthodox, dualist account of the UK constitution. In the next section ("A Fragmented Relationship") we address the fragmented nature of the relationship between the UK domestic and international legal orders, dividing our analysis into three subsections. We contend, first, that dualism's basis in oppositional alternatives – incorporated/unincorporated, for example – creates a *partial*, incomplete picture of the relationship that fails to recognise the complexity of the interaction between the domestic and the international; second, that the dualist notion that a norm or legal instrument is either domestic *or* international fails to account for *hybrid* norms, cogenerated through the interaction between domestic and international legal processes; and third, that dualism treats domestication as an *event* when, on our analysis, it is a process.

In the third and final section, we examine connections between the fragmented and complex relationship between the UK domestic and international legal orders and the recent UK political environment. We

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consider alternative means of conceptualising the relationship between the UK domestic and international legal orders and conclude that its complexity defies neat categorisation.

Throughout this article and in each aspect of our analysis we contend that, contrary to dualism's emphasis on simplicity, coherence and stability, there is a fragmented relationship between UK domestic law and international law: a relationship involving multiple moving parts that do not fit together as a coherent or neatly expressable whole. For some audiences coherence, simplicity and neatness are the hallmarks of legal analysis: perhaps for those audiences a dualist analysis is instinctively attractive. We suggest, however, that our interrogation of the relationship in this article reveals deep flaws in a dualist analysis and that a simple or neat concept that would take dualism's place is not available. The end point of our examination is not, then, an alternative lens or concept that makes everything simple, neat and clear, but a picture of a complex, fragmented and dynamic relationship that can only be seen as such.

II. The "Dualist" Constitution

Regulation of the interplay between internal (domestic) and external (international) norms is a core function of state constitutions, with national constitutional laws setting the primary rules that govern their intersection.[12] The concepts of monism, which regards international laws and domestic laws as one body of norms, and dualism, which treats international law and domestic law as operating in "independent spheres",[13] are at opposite ends of a spectrum of approaches governing the relationship between internally- and externally-generated rules.[14] The UK constitution has traditionally been viewed as tending towards the "dualist" end of this spectrum.[15]

Dualism provides an indicator of constitutional identity,[16] and sets the methodology for introducing international legal norms into the domestic

[12] V.C. Jackson, "Constitutional Comparisons: Convergence, Resistance, Engagement" (2005) 119 Harvard Law Review 109, 111–15; and see generally J. Bomhoff, D. Dyzenhaus and T. Poole (eds.), *The Double-Facing Constitution* (Cambridge 2020).

[13] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [55]; *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, at [78] (Lord Reed).

[14] See generally D. Feldman, "The Internationalization of Public Law and Its Impact on the UK" in J. Jowell and C. O'Cinneide (eds.), *The Changing Constitution*, 9th ed. (Oxford 2019); R. Masterman, "Multi-Layered Constitutions" in R. Masterman and R. Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge 2019).

[15] See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed. (Indianapolis, IN 1982) 19–20; *Mortensen v Peters* (1906) 14 S.L.T. 227; and for a critical introduction to the orthodox approach of English courts see M. Hunt, *Using Human Rights Law in English Courts* (Oxford 1998), ch.1.

[16] *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 W.L.R. 1591, at [80] (Lord Mance): "unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed."

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legal order.[17] Recognised as a necessary derivative of the concept of parliamentary sovereignty,[18] the idea of dualism suggests that "a state's domestic legal order is separate from the international legal order because the two are distinct in form, purpose and sphere of validity".[19] Interaction between these spheres is formally contingent, it is argued, on domestic incorporation. On the orthodox account, a particular treaty entered into by the UK Government can become part of the UK legal order only by Parliament legislating to give it effect in domestic law. David Feldman argues that dualism provides a "filter" that regulates the extent to which external legal norms infiltrate the jurisdiction. This "filter" provides insulation to the domestic constitution and, in turn, to its institutions:

> there are sound reasons for having filters at national level to control the way in which the obligations affect national law- and policy-making. The principled reason is the desire to uphold constitutional guarantees, including the rule of law, and keep in the hands of the nations the democratic control of and accountability for national law and policy, in order to maintain the legitimacy of politics and public law in the state. The pragmatic reason is that international obligations may be contrary to the national interest and may derail important national objectives.[20]

Recognition that dualism is a "necessary corollary" of parliamentary sovereignty has clear implications for the domestic separation of powers.[21] The executive's prerogative power to "make and unmake treaties" is consistent with "the rule that ministers cannot alter UK domestic law"[22] on the basis that while treaties bind the UK internationally, without incorporating legislation they will not "give rise to … legal rights or obligations in domestic law".[23] From this perspective dualism "exists to protect Parliament",[24] guarding against the extra-legislative expansion of executive power.[25]

[17] *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26.
[18] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [57]; Dicey, *Introduction*, 19–20 (cf. 310: "it is even open to question whether the treaty-making power of the executive might in some cases override the law of the land").
[19] B. Malkani, "Human Rights Treaties in the English Legal System" [2011] P.L. 554, 554–55.
[20] Feldman, "Internationalization of Public Law", 128.
[21] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [57].
[22] Ibid., at [56]; see also *The Zamora (No. 1)* [1916] 2 A.C. 77, 90 (P.C.) (Lord Parker): "The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution."
[23] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [55] (Lord Neuberger).
[24] Ibid., at [57].
[25] *Re McKerr* [2004] UKHL 12, [2004] 1 W.L.R. 807, at [52] (Lord Steyn): "[t]he rationale of the dualist theory … is that any inroad on it would risk abuses by the executive to the detriment of citizens." The belief that this justification for dualism is less compelling in the context of human rights treaties – the judicial "incorporation" of which are less obviously likely disadvantage citizens to the benefit of the state – has given rise to significant judicial disagreement (see in particular *R. (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 W.L.R. 1449 and *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26).

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Dualism similarly limits the judiciary's capacity to introduce rights and obligations into domestic law without incorporating legislation.[26] The "constitutional orthodoxy" on this point has been outlined by Lord Kerr:

> Two dominant principles have traditionally restricted the use of international treaties in British domestic law. The first is that domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law; that they are effectively non-justiciable. The second is that such treaties, unless incorporated into domestic law, are not a part of that law and therefore cannot be given direct effect to create rights and obligations under national or municipal law.[27]

Dualism, so the argument goes, protects the domestic constitutional order by safeguarding Parliament's legislative autonomy from interference by the executive in its conduct of foreign affairs under the royal prerogative and by limiting judicial efforts to domesticate norms in "unincorporated" treaties. In short, "[i]f treaties have no effect in domestic law, Parliament's legislative supremacy within its own polity is secure".[28]

III. A Fragmented Relationship

Whilst the examples above suggest that the dualist view of a relatively simple, coherent and stable relationship is resilient, a half-century long period of integration between the UK and European legal orders has placed "the binary logic of strict dualism" under considerable pressure.[29]

The UK constitutional landscape – particularly in its accommodation of the supremacy of EU law, its ECHR-informed approach to rights protection and, more generally, the growing prominence of international legal influences in the domestic legal order[30] – underwent significant change in this period.[31] The latter half of the twentieth century also saw a broader reconfiguration of international law, with the state-centric core of international obligations increasingly accompanied by international agreements conferring rights on individuals.[32] The UK's acceptance, since 1966, of the right of individual petition to the European Court of

[26] *R. v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 (H.L.).
[27] *R. (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [235].
[28] C. McLachlan, *Foreign Relations Law* (Cambridge 2014), [5.20].
[29] T. Poole, "Devotion to Legalism: On the Brexit Case" (2017) 80 M.L.R. 696, 701.
[30] For commentary on the latter, see e.g. Lord Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge 2010); Lord Mance, "International Law in the UK Supreme Court" (London 2017), available at https://supremecourt.uk/uploads/speech_170213_1d3b2802ba.pdf (last accessed 23 April 2025); R. Singh, *The Unity of Law* (Oxford 2022), 261–76.
[31] Malkani, "Human Rights Treaties".
[32] As to this shift, Lord Sumption has said the following: "Since the Second World War there has been a considerable expansion of the range of matters with which international law is concerned, which now extends to many aspects of the relations between states on the one hand and their subjects or residents on the other. The growing importance of the international protection of human rights is one aspect of this change, but not the only one. International law increasingly places limits on the permissible content of municipal law and on the means available to states for achieving even their legitimate policy objectives" (*Belhaj v Straw* [2017] UKSC 3, [2017] A.C. 964, at [251]).

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Human Rights demonstrates the potential for an international agreement to influence the domestic legal order even in the absence of incorporating legislation.[33]

In 2008, Sales and Clement recognised this growing tension, opening an assessment of "the developing framework" surrounding the treatment of international law in domestic courts with the suggestion that "[i]ncreasing reference to international law in the English courts has put pressure on established doctrines of English constitutional law".[34] The relevant doctrines were parliamentary sovereignty, the primary vehicle through which democratic lawmaking is delivered within the state, and the separation of powers, which recognises that judges may be "ill equipped" or "ill suited" to determine questions concerning "foreign affairs", "social policy" or "administrative feasibility".[35] Both principles, Sales and Clement argued, "are deeply rooted in the modern polity in notions of democratic legitimacy, that it is for those representing the people in Parliament, and not the executive or the unelected judiciary, to make the law".[36] The concern articulated by Sales and Clement was that a dilution of dualism – evidenced in increasing reliance on international law (particularly in relation to unincorporated treaties) in domestic litigation – was producing a destabilising effect on domestic constitutional arrangements.

By contrast, our argument is that the complexity of the relationship between the UK domestic and international legal orders is better understood as a feature of domestic constitutional law, rather than as a bug to be fixed by reversion to or insistence on dualist orthodoxy. Dualism, we suggest, overlooks the complexities of the relationship between domestic and international law and offers an at best rudimentary explanation of international law's place in the UK constitutional order. The better view, we contend, is that the relationship is fragmented and dynamic: that is, it comprises multiple moving parts that do not cohere or fit into a neat, explanatory concept. In the three subsections to follow we outline dualism's severely limited capacity as an explanatory notion.

[33] The UK declared its acceptance of the right of individual petition to the European Commission on Human Rights (under former Article 25 of the Convention) and the compulsory jurisdiction of the Strasbourg Court (under former Article 46), on 14 January 1966, renewing is declarations periodically (the last UK declarations were made on 14th January 1996), available at https://rm.coe.int/168048d4e8 (last accessed 23 April 2025). The European Commission on Human Rights was abolished and the court's jurisdiction made compulsory for states parties, by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 155) (entry into force 1 November 1998).

[34] Sales and Clement, "International Law in Domestic Courts", 388.

[35] Ibid., at 390.

[36] Ibid.

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A. *Partiality*

Dualism is traditionally presented as establishing a coherent link between the domestic and the international.[37] A number of considerations, however, suggest a qualified understanding of "absolutist" dualism[38] and that the concept provides only a partial account of relationships between rules of domestic and international origin.

The core of the dualist principle has recently been endorsed by the UK's highest court. In *SC* the Supreme Court addressed whether provisions of the UN Convention on the Rights of the Child might be effective in domestic law via the jurisprudence of the European Court of Human Rights (considered pursuant to the Human Rights Act 1998).[39] Adopting a "strict" dualist view,[40] a unanimous Supreme Court was uncompromising: "[t]he only treaty to which the Human Rights Act gives domestic legal effect is … the Convention."[41] The decision purportedly "corrected" a significant set of earlier Supreme Court judgments on the extent to which courts can have regard to unincorporated treaties when applying and interpreting domestic law,[42] effectively reinstating principles of non-justiciability and "no direct effect".[43] In one sense and as Lord Sales has confirmed extrajudicially,[44] this "correction" can be viewed as a restatement of dualist orthodoxy. The fact that the Supreme Court deemed corrective action to be necessary, however, suggests instability in the domestic/international law relationship.

Beyond this core of dualism, a fragmentation of the principle is evident. While the direct effect of unincorporated treaty norms is precluded on an orthodox dualist approach, the domestic system appears to remain open to the "softer" influences of unincorporated treaties. So while unincorporated treaty norms may be non-justiciable and lack direct effects, they may, nonetheless, exert influence on domestic judicial reasoning.[45] In the

[37] Ibid.

[38] The term is used by Lord Kerr in *R. (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [250], in relation to the position advanced in Sales and Clement, "International Law in Domestic Courts".

[39] On which see R. Masterman, "Reasserting/Reappraising Dualism", available at https://ukconstitutionallaw.org/2021/12/07/roger-masterman-reasserting-reappraising-dualism/ (last accessed 23 April 2025); R. Ekins, "Convention Rights, Child Tax Credits and the Constitution" (2022) 138 L.Q.R. 551.

[40] *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, at [74]–[96] (Lord Reed).

[41] Ibid., at [79] (Lord Reed).

[42] See e.g. *R. (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [247]–[257] (Lord Kerr).

[43] On those principles, see ibid. at [235]–[236] (Lord Kerr). For an approach at odds with *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, see Cotter J.'s judgment in *ST v Chief Constable of Nottinghamshire Police* [2022] EWHC 1280 (Q.B.), at [96]: "In this country the treatment of children in detention is governed not only be domestic legislation but also by the UN Convention on the Rights of the Child (UNCRC), which the UK has signed and ratified."

[44] Lord Sales, "The Developing Jurisprudence of the Supreme Court on Convention Rights" [2024] P.L. 444, 460.

[45] See Lord Oliver in *JH Rayner v Department of Trade and Industry* [1990] 2 A.C. 418, 499 (H.L.) (on "[t]he principle of non-justiciability") and 500 ("[A]s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they

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application of domestic law, for instance, "there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation".[46] This "well established" presumption,[47] in favour of domestic law's consonance with the UK's international obligations, is complemented at common law by the more specific principle that "[d]evelopments of the common law should ordinarily be in harmony with the United Kingdom's international obligations and not antithetical to them".[48] The case law also recognises that a court may refer to international legal obligations as a means of "resolv[ing] ambiguities in the common law".[49]

The Supreme Court's position on these softer influences is unclear. The decision in *SC*, for instance, made no reference to these principles when rejecting earlier suggestions that the traditional approach to unincorporated treaties should admit of a UNCRC exception.[50] The more recent Supreme Court decision concerning the competence of the Scottish Parliament in relation to the Scottish Government's proposed independence referendum bill, however, contained the following passage concerning self-determination in international law:

> The strong presumption in favour of interpreting our domestic law in a way which does not place the United Kingdom in breach of its obligations in international law is well established. [...] If there is ambiguity in a statutory provision operating in a field where the United Kingdom is bound by a treaty obligation, the presumption of conformity with international law will apply to the interpretation of that statutory provision [...]. This presumption of compatibility extends to international treaty obligations whether or not they have been implemented into domestic law within the United Kingdom.[51]

enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation"; "These propositions do not, however, involve as a corollary that the court must never look at or construe a treaty").

[46] *R. v Lyons (Isidore Jack) (No. 3)* [2002] UKHL 44, [2003] 1 A.C. 976, at [27] (Lord Hoffmann); *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 A.C. 471, at [122] (Lord Dyson); *R. (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [239] (Lord Kerr). See also *R. (on the application of Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] Q.B. 1075, at [125] (Arden L.J.): "[T]he usual assumption when interpreting legislation is that, absent some indication to the contrary, Parliament intends to legislate in a manner which conforms with the United Kingdom's obligations under international law."

[47] *R. (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [239] (Lord Kerr).

[48] *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 A.C. 221, at [27] (Lord Bingham).

[49] *R. (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [241] (Lord Kerr) (citing *Derbyshire CC. v Times Newspapers Ltd.* [1993] A.C. 534 (H.L.)).

[50] *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, at [94]–[96] (Lord Reed).

[51] *Reference by the Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31, [2022] 1 W.L.R. 5435, at [87] (Lord Reed) (citations omitted); see also *N3 v Secretary of State for the Home Department* [2025] UKSC 6, [2025] 2 W.L.R. 386, at [86] (Lord Sales and Lord Stephens).

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While unincorporated treaty provisions are not directly effective in domestic law, they may, as Lord Sumption outlined in *Belhaj v Straw*, be put to a range of uses:

> English law has always held to the dualist theory of international law. In principle, judges applying the common law are not at liberty to create, abrogate or modify municipal law rights or obligations in accordance with unincorporated norms derived from international law, whether customary or treaty-based. But, as Lord Bingham pointed out in *R. v Lyons* … international law may … affect the interpretation of ambiguous statutory provisions, guide the exercise of judicial or executive discretions and influence the development of the common law. Although courts are not bound, even in these contexts, to take account of international law, they are entitled to do so if it is appropriate and relevant.[52]

Whilst not directly effective or justiciable unincorporated treaty provisions can, on this basis, safely be regarded as at least potentially influential.

Beyond these treaty-related questions, dualism provides an incomplete account of the relationship between the UK domestic constitutional order and the sources of international law. As already suggested, the UK's dualism variant most clearly opposes the direct effect (absent statutory incorporation) of treaty norms. Customary international law (CIL), by contrast, may not require explicit statutory incorporation in order to enjoy domestic legal effect. Blackstone's view – that the "law of nations" should be regarded as being "adopted in its full extent by the common law"[53] – has found some support in the courts.[54] In *Trendtex* – a 1977 case on the domestic status of contemporary CIL on state immunity – Lord Denning recognised "the doctrine of incorporation … [which] says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament".[55] The idea that CIL norms are automatically incorporated into domestic law absent conflict with primary legislation contrasts with the argument that treaties remain outside the domestic legal order absent positive parliamentary incorporation. The common law position that CIL norms are part of domestic law may be an exception to a "strict" dualist analysis, because of an underpinning presumption that CIL has domestic legal effect. It is

[52] *Belhaj v Straw* [2017] UKSC 3, [2017] A.C. 964, at [252] (Lord Sumption). See, as an apparent example of the approach advocated by Lord Sumption, *R. (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 W.L.R. 4433, at [19]–[33] (Lord Reed and Lord Lloyd-Jones).

[53] W. Blackstone, *Commentaries on the Laws of England*, 1st ed., vol. IV (originally published: Oxford 1765–69), 67.

[54] *Triquet v Bath* (1764) 97 E.R. 936, 936 (Lord Mansfield).

[55] *Trendtex v Central Bank of Nigeria* [1977] 1 Q.B. 529, 553 (C.A.) (Lord Denning M.R.); see also Shaw L.J. at 579, expressing basic agreement with Lord Denning on this point (with Stephenson L.J. dissenting). For a thorough analysis, see R. O'Keefe, "The Doctrine of Incorporation Revisited" (2009) B.Y.I.L. 7.

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simultaneously the case, however, that Lord Denning's recognition of parliamentary supremacy through the language of "conflict" allows for the maintenance of an essentially dualist position in which contrary statutory direction will displace that underpinning presumption. Everything depends on the degree of "automaticity" in the *Trendtex* position and recent cases – *Keyu* foremost amongst them – are at best opaque on that point.

Lord Mance's analysis in *Keyu* suggests that the incorporation of CIL may not be as automatic as it might previously have seemed to be.[56] Commenting that "[t]he position is … somewhat more nuanced than Lord Denning MR's statement [in *Trendtex*] might suggest",[57] Lord Mance, "speaking generally", expressed the view that "the presumption when considering any such policy issue is that CIL, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration".[58]

"Shap[ing] the common law" is not the same thing as being automatically incorporated into it and framing the issue as one of "policy" suggests a move away from doctrine. This move is broadly consistent with Lord Bingham's view – expressed in the earlier decision of *R. v Jones* – that "[customary] international law is not a part, but is *one of the sources*, of English law".[59]

In *Freedom and Justice*, however, the Court of Appeal took pains to maintain something close to the *Trendtex* position,[60] noting the "*obiter*" character of Lord Mance's observations on the "presumption".[61] The Court of Appeal concluded that "[t]he presumption is that a rule of customary international law will be adopted into the common law without the need for legislative intervention unless there is some positive constitutional principle which would prevent this".[62]

The Court of Appeal also seemed keen to avoid a "policy issue" approach, quoting Lord Mance's observations on the "presumption" and reformulating them in these terms:

[56] *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] A.C. 1355, at [150].
[57] Ibid., at [146].
[58] Ibid., at [150].
[59] *R. v Jones (Margaret)* [2006] UKHL 16, [2007] 1 A.C. 136, at [11] (emphasis added).
[60] In *R. (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, at [114] (Arden L.J.), the Court of Appeal observed that in the "older authorities", such as *Trendtex*, "the view … was that customary international law was simply part of the common law", yet "more recently it has been recognised that the better view is that customary international law is a source of common law rules, but will only be received into the common law if such reception is compatible with general principles of domestic constitutional law", citing *R. v Jones* [2006] UKHL 16 in support.
[61] *R. (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, at [115] (Arden L.J.).
[62] Ibid., at [123].

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> The presumption is that a rule of customary international law will be taken to shape the common law unless there is some positive reason based on constitutional principle, statute law or common law that it should not … The presumption reflects the policy of the common law that it should be in alignment with the common customary law applicable between nations. The position is different from that in relation to unincorporated treaty obligations, which do not in general alter domestic law.[63]

The Court of Appeal's suggestion that there is a "policy" of "alignment" between the common law and CIL is at odds with the "policy" logic of Lord Mance's "presumption". Lord Mance's "presumption" operates to inform judicial decision-making on the "policy issue" of any particular CIL rule's domestic legal effect. On that approach, any CIL rule can only be said to be part of the common law with confidence once a court has decided so. Further, when making a decision on that issue, Lord Mance's "presumption" only operates where consistency with the existing domestic law position can be established ("whenever it can do so"): that is, there is no free-standing presumption of consistency or "alignment" (and the absence of that presumption from Lord Mance's dicta explains the Court of Appeal's decision to add its observations on the "policy of the common law"). The Court of Appeal, by contrast, presumes "alignment" on the basis of what it deems to be "the policy of the common law".

The uncertain relationship between *Trendtex*, *Keyu* and *Freedom and Justice* reflects a fragmented, complex and dynamic relationship between UK domestic and international legal orders. On one view – the Court of Appeal's dualist view in *Freedom and Justice* – the position is simple, coherent and stable. For all practical purposes CIL norms are automatically incorporated into domestic law apart from in the rare case where such incorporation presents a constitutional difficulty and that was, in any event, always the case on a proper reading of *Trendtex*. On another view – that suggested by Lord Mance in *Keyu* – CIL incorporation is now a complex "policy issue", *Trendtex* incorporation is not necessarily the doctrinal position and *Trendtex*'s apparent clarity has fragmented into an uncertain, dynamic and unstable position which can only be resolved on a case-by-case basis as the courts work their way through the CIL norms that come before them.

The majority judgment in the Supreme Court's March 2023 *Law Debenture* decision reviewed *Keyu* and *Freedom and Justice*.[64] Glossing Lord Mance's "presumption" it noted that "given the generally beneficent character of customary international law, the presumption should be in

[63] Ibid., at [117].

[64] *The Law Debenture Trust Corporation plc v Ukraine* [2023] UKSC 11, [2024] A.C. 411 (Lord Reed, Lord Lloyd-Jones and Lord Kitchin, with Lord Hodge expressing agreement, formed the majority; Lord Carnwath dissented in part).

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favour of [CIL's] application".[65] *Freedom and Justice* was described as "highlight[ing] the complexity of the relationship of international law and municipal law within the United Kingdom".[66]

The case concerned Ukraine-Russia relations from late 2013 to November 2021 (so, pre-dating Russia's 2022 full-scale invasion of Ukraine), with a specific focus on a 2013 arrangement through which Russia effectively loaned money to Ukraine.[67] Ukraine argued that the application of English contract law (the law governing the loan) should be informed by CIL on countermeasures.[68] The Supreme Court decided that the issue was not justiciable because, if it were, "national courts would become the arbiter of inter-state disputes governed by international law which is not their function".[69] On this basis, and despite vague, *obiter* comments on *Keyu* and *Freedom and Justice* (as noted above), the Supreme Court made no actual decision on the domestic legal effect of CIL. It will, it seems, have to return to the uncertain inter-relationship between *Keyu* and *Freedom and Justice* at a later date.

Beyond dualism's core concern with incorporation, decisions in relation to the "softer" influences of treaty norms and the domestic relevance of CIL norms suggest that international law's place and effect in domestic law may be a question of context rather than doctrine. Mance L.J., as he then was, made this point in *Ecuador v Occidental*: "English courts are not … wholly precluded from interpreting or having regard to the provisions of unincorporated treaties. Context is always important."[70]

B. Hybridity

Recent experience suggests that dualism's binary distinction between the domestic and the international may be misleading, and that international and domestic laws are often "enmeshed in ways that are sometimes elided by a rigid focus on formal doctrines".[71] Some qualification of dualism's seemingly strict insistence that a treaty provision only enjoys domestic legal effect if Parliament has provided for it in legislation seems necessary.

The effects of the UK's membership of the EU and, to a lesser degree, the influence of Convention rights under the Human Rights Act 1998, suggest a form of legislative incorporation that creates a dynamic relationship between international and domestic laws. Within this dynamic relationship

[65] Ibid., at [204] (Lord Reed, Lord Lloyd-Jones and Lord Kitchen).
[66] Ibid., at [205].
[67] Ibid., at [2].
[68] Ibid., at [198]–[200].
[69] Ibid., at [207].
[70] *Republic of Ecuador v Occidental Exploration and Production Co.* [2005] EWCA Civ 1116, [2006] Q.B. 432 at [31].
[71] A. Sanger and A. Young, "Deference and Dualism Are Not Friends of the Earth" [2023] C.L.J. 195, 198.

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post-incorporation changes at the international level can translate into the domestic legal order without further legislative action. Section 2(1) of the European Communities Act 1972 initially facilitated this in relation to EC laws (as they then were), providing that the rights and remedies available "from time to time" by virtue of the EC treaties would be "without further enactment … given legal effect or used in the United Kingdom". The characterisation – by the Supreme Court in *Miller 1* – of this feature of the European Communities Act 1972 as providing the "'conduit pipe' through which EU law [was] introduced into UK domestic law"[72] can be seen as a modification of dualist orthodoxy. As Gavin Phillipson has summarised, the European Communities Act 1972 allowed "a foreign source of law to pour directly into UK law and take effect *as* domestic law".[73] The consequences of this domestic accommodation of EU law principles, via the European Communities Act 1972, were – as the majority in the Supreme Court decision in *Miller 1* recognised – "unprecedented": "[the European Communities Act] authorises a dynamic process by which, without further primary legislation (and in some cases, even without *any* domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes."[74]

If dualism is to operate as a safeguard for domestic institutions then this marginalisation of Parliament's incorporating role challenges the orthodox, Parliament-centred account.[75] Within the European Communities Act model, once the relevant treaties were incorporated, the domestic oversight or filtering role associated with an orthodox dualist account was significantly curtailed. This point is reinforced by the suggestion – also by the majority in *Miller 1* – that during EU membership "the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice" effectively operated as "*direct* sources of UK law".[76]

This model of "dynamic" incorporation partially persists following the UK's exit from the EU. Section 7A of the European Union (Withdrawal) Act 2018 adopts the same "without further enactment" formula as section 2(1) of the 1972 Act in order to give effect to the terms of the European Union Withdrawal Agreement. This residual alignment between domestic and EU laws is perhaps most visible in the post-Brexit arrangements for Northern Ireland, which preserve a connection (detailed in the Northern Ireland Protocol and Windsor Framework) in respect of EU laws integral

[72] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [65].
[73] G. Phillipson, "EU Law as an Agent of National Constitutional Change: *Miller v Secretary of State for Exiting the European Union*" (2017) 36 *Yearbook of European Law* 46, 72 (emphasis in the original).
[74] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [60] (emphasis added).
[75] A point implicitly acknowledged in *R. (on the application of HS2 Action Alliance Ltd.) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 W.L.R. 324, at [207] (Lord Carnwath).
[76] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [61] (emphasis added).

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to upholding the Belfast/Good Friday Agreement.[77] While Brexit itself may be a political act or process, designed to reverse some of the integration between domestic and international legal orders, the legislative mechanisms employed to achieve this reversal – as section 7A illustrates – do not revert to dualist orthodoxy. As much was implicitly acknowledged by the Supreme Court in *Allister*: "whilst ordinarily under our dualist system international law and domestic law operate in independent spheres, this treaty between the UK and the EU [the Withdrawal Agreement] was to form part of UK law and give rise to legal rights and obligations in domestic law."[78] The Withdrawal Agreement is therefore the prompt for a continued, albeit limited,[79] form of dynamic alignment with the EU.

In terms of method if not effect,[80] a similar interaction between the domestic and international legal order is envisaged by the Human Rights Act 1998. This is clear on the face of the Act, which requires that decisions of the European Court of Human Rights – "whenever made or given" – must be "taken into account" in domestic adjudication concerning a Convention right.[81] This stipulation envisages post-Human Rights Act judgments of the Strasbourg Court enjoying the same status as those decided prior to the Act's implementation. It follows that domestic human rights law following the Human Rights Act 1998 develops in symbiosis with the Convention and its attendant case law. A fluid element to the Human Rights Act's domestication of the Convention rights is the indirect consequence of section 2(1), which – to a potentially variable degree – ties the rights protected in municipal law to the "dynamic and evolutive"[82] jurisprudence of the European Court of Human Rights.[83] The "incorporation" of the Convention rights on the Human Rights Act model clearly envisaged a mutability in the development of the Convention jurisprudence, handing domestic courts the task of "keep[ing] pace" with the Strasbourg Court.[84]

[77] The relevant rules include elements of the EU's customs and single market for goods provisions, certain equality laws and provisions on energy trading (for an overview, see J. Curtis, "The Northern Ireland Protocol and Windsor Framework", available at https://commonslibrary.parliament.uk/research-briefings/cbp-9548/ (last accessed 30 April 2025)).

[78] *Re Allister's Application for Judicial Review* [2023] UKSC 5, [2023] 2 W.L.R. 457, at [28] (Lord Stephens).

[79] See now the "Stormont Brake" procedure (Prime Minister and Minister for the Union, *The Windsor Framework: A New Way Forward*, CP 806 (London 2023). See also the (now repealed) European Union Act 2011, part I, for an earlier partial attempt to reinstate domestic oversight (via a combination of legislative approval and endorsement by referendum) in relation to amendments of the Treaty of European Union and Treaty on the Functioning of the European Union.

[80] R. Masterman, "A Tale of Competing Supremacies", available at https://ukconstitutionallaw.org/2013/09/30/roger-masterman-a-tale-of-competing-supremacies/ (last accessed 30 April 2025).

[81] Human Rights Act 1998, s. 2(1).

[82] *Christine Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18, at [74].

[83] For a summary, see J. Gerrards, *General Principles of the European Convention on Human Rights* (Cambridge 2019), ch. 3.

[84] *R. (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 A.C. 323, at [20] (Lord Bingham).

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The senior courts have acknowledged this interdependence and further recognised that the purpose of the Human Rights Act is to give "effect in domestic law to an international instrument … which [can] only be authoritatively interpreted by the Strasbourg court".[85] This approach in turn views the substantive rights,[86] and remedial extent,[87] of the Act as developing in tandem with developments in the jurisprudence of the European Court of Human Rights. In the Human Rights Act context the domestic filter is managed by the courts, who – via their section 2(1) obligation – have the means to regulate the domestic law impact of the Strasbourg case law. This filter, as is well known, however, is conditioned by the courts' position under the Act as "public authorities" charged with acting consistently with the Convention rights,[88] and vis-à-vis the "authoritative" interpretative function of the European Court of Human Rights. As such, the operation of the section 2(1) "filter" has tended towards an approach to the Convention rights in domestic law which is generally led by, and responsive to, development of those rights by the Strasbourg Court.[89] Attempts to explain the Human Rights Act via an orthodox dualist account – as a municipal statute giving rise to "*domestic* rights" which fall to be interpreted by "*domestic* courts"[90] – fail to capture the necessary (ongoing) linkage between the rights given effect by the Act and the developing jurisprudence of the European Court of Human Rights. As with the European Communities Act before it, the Human Rights Act operates as a "conduit" through which the potentially variable requirements of the Convention rights are translated into domestic law.

It is clear from the above illustrations that, while Parliament may have stipulated that certain external norms should permeate the domestic constitution, the UK's membership of the EU and the domestic application of Convention rights effectively abridged Parliament's filtering role in relation to post-"incorporation" norms originating in EU institutions and the European Court of Human Rights. A dilution of the dualist principle is, therefore, apparent in this dynamic, "conduit"

[85] *R. (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28 [2022], A.C. 487, at [54] (Lord Reed); see also *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 A.C. 1312, at [37] (Lord Bingham) and [53] (Baroness Hale).

[86] *R. (Ullah) v Special Adjudicator* [2004] UKHL 26, at [20] (Lord Bingham).

[87] *R. v Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing* [2005] UKHL 57, [2006] 1 A.C. 529, at [34] (Lord Bingham).

[88] Human Rights Act 1998, s. 6(3)(a).

[89] For discussion, see R. Masterman, "The United Kingdom's Human Rights Act as a Catalyst of Constitutional Migration: Patterns and Limitations of Rights Importation by Design" (2023) 19 *European Constitutional Law Review* 88, 98–100.

[90] In *re McKerr* [2004] UKHL 12, at [65] (Lord Hoffmann) (emphasis added): "What the [Human Rights] Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention … their meaning and application is a matter for domestic courts, not the court in Strasbourg."

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method. If these EU and ECHR examples evidence a modified dualist methodology – a "conduit" rather than binary approach – then the hybrid nature of the law that results from this dynamic mode of "incorporation" must be recognised.

This hybrid body of law amalgamates elements drawn from the domestic and international legal orders. The intersection of the domestic and the international is illustrated by the fact that the impact of EU norms in UK law owe(d) much to EU law doctrines of supremacy and direct effect. Those doctrines formed the backbone of a "legal order … separate from that of each of the Member States but which substitutes itself partially for those in accordance with the rules precisely laid down in the Treaty itself and which consist in a transfer of jurisdiction to Community institutions".[91] Despite suggestions that "[a]ny attempt to interfere with primary legislation would be wholly unconstitutional",[92] the supremacy of directly effective EU law was, ultimately, recognised as requiring the disapplication of inconsistent domestic statute.[93] In this way EU law operated outside or beyond the limits of dualism's parliamentary filter.

Although Brexit formally ended the supremacy of EU law in the UK legal order,[94] the residual influences of EU laws applicable in the UK during membership of the EU – particularly, for instance, across policy fields within the remits of the Department of Environment, Food and Rural Affairs and the Department for Transport – remain considerable.[95] Again, while at first glance the UK's departure from the EU might appear to mark an undoing of the post-1972 integration of legal orders, the legal remnants of that integration – whether labelled "retained EU law" or "assimilated law" – are domestic only in the sense that statute directs that they should be regarded as such.[96] Divergence from what remains of EU laws' influence is certainly visible and – as a result of the Retained EU Law (Revocation and Reform Act) 2023[97] – has recently reached a turning point.[98] But the dualist lens does not allow us to see the complex, post-Brexit legal landscape of "assimilated" law and the

[91] *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] C.M.L.R. 425, 439.
[92] *R. v Secretary of State for Transport, ex parte Factortame Ltd. (No.1)* [1989] 2 C.M.L.R. 353, 397 (C.A.) (Lord Donaldson M.R.).
[93] *R. v Secretary of State for Transport, ex parte Factortame Ltd. (No.2)* [1991] 1 A.C. 603 (H.L.). The disapplication of statute for breach of the directly effective provisions of the Northern Ireland Protocol/Windsor Framework remains a possibility (see *In Re Dillon and Others* [2024] NIKB 11, [2024] 3 C.M.L.R. 34 (concerning the disapplication of provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023)).
[94] EU (Withdrawal) Act 2018, s. 5(1); Retained EU Law (Revocation and Reform) Act 2023, s. 3. Cf. European Union (Withdrawal Agreement) Act 2020, s. 7A.
[95] See Department for Business and Trade, "Retained EU Law Dashboard", available at https://www.gov.uk/government/publications/retained-eu-law-dashboard (last accessed 30 April 2025).
[96] EU (Withdrawal) Act 2018; Retained EU Law (Revocation and Reform) Act 2023.
[97] Retained EU Law (Revocation and Reform) Act 2023, ss. 1, 2, and sched. 1.
[98] See also Financial Services and Markets Act 2023; Procurement Act 2023.

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ongoing supremacy and direct effects of the Withdrawal Agreement clearly.[99]

It is equally difficult to see the legal order created by the Human Rights Act 1998 in strict dualist terms. The Act underpins an alternative mode of "constitutional review",[100] based, to a considerable degree, on the external influence of the European Convention on Human Rights and Strasbourg jurisprudence. Human Rights Act adjudication concerning the Convention rights is of a kind with adjudication for compliance with EU law in the sense that it permits primary legislation and public authority acts to be scrutinised for compliance with a set of constitutional standards that have non-domestic origins.[101] The Convention rights applicable by virtue of the Human Rights Act were not intended to simply function as an overlay to domestic law, nor – in the words of Laws L.J. – should the Strasbourg case law be treated "as if it were a compulsory adjunct taken from an alien source".[102] Instead, those rights were to be "woven into" domestic law.[103] The Human Right Act's effect in breaking down dualist division and initiating the domestic development of a body of cogenerated law is apparent in fields such as the protection of personal privacy where the pre-existing common law has become intertwined with the requirements of the Convention and its case law.[104] Quoting Lord Justice General Rodger's comment that Convention rights "soak through and permeate the areas of law in which they apply",[105] the Supreme Court has recognised this merging of the domestic and the international: "The [Human Rights] … Act does not … supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate."[106]

The simplistic conclusion here is that decades of UK engagement with EU and ECHR norms broke down the dualist divide between the

[99] The liminal constitutional space occupied by Northern Ireland – in which certain EU laws remain effective post-Brexit – provides further evidence of the multilayered nature of the UK's relationships with international laws by showing that the state itself adopts a hybrid approach to the incorporation of international norms. The fact that devolved governments may depart from the Westminster approach to incorporation/non-incorporation of certain treaties also raises questions about dualism's subnational influence (see *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 W.L.R. 5106).

[100] A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge 2008).

[101] F. Klug, "The Human Rights Act: A 'Third Way' or 'Third Wave' Bill of Rights" [2001] E.H.R.L.R. 361, 370.

[102] *Begum v Tower Hamlets LBC* [2002] EWCA Civ 239, [2002] 1 W.L.R. 2491, at [17].

[103] Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill*, Cm. 3782 (London 1997), at [1.14].

[104] See e.g. *Campbell v Mirror Group Newspapers Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457.

[105] *Osborn v The Parole Board* [2013] UKSC 61, [2014] A.C. 1115, at [63] (Lord Reed) (quoting Lord Justice General Rodger in *HM Advocate v Montgomery (David Shields)* 2000 J.C. 111, 117).

[106] *Osborn v Parole Board* [2013] UKSC 61, at [57] (Lord Reed).

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domestic and the international by bringing those spheres closer together. The more sophisticated take is that in both instances (EU and ECHR) statutory "incorporating" provisions only partially account for the domestic influence of norms with non-domestic origins and that the law produced out of the interaction between the domestic and the international must be understood as a cogenerated or hybrid product of that interaction. That product cannot, as the post-Brexit, EU law experience shows, easily be converted into something purely domestic.

C. Domestication

Dualism is claimed to provide stability and clarity. The dualist segregation of the municipal and international legal orders provides, it is suggested, vital insulation from the unpredicatible influences of rules which have not been incorporated, or filtered, by domestic institutions.[107] The previous section highlighted the modification of the approach taken by domestic law to this "filtering" process in the European Communities Act and the Human Rights Act. A related point, and the final ground on which to doubt the orthodox account of dualism, flows from this. Dualism encourages a view of incorporation as an event, the end point in a process of integration (the point at which the hitherto external norm is given domestic "justiciability" and "direct effect") rather than the first step in a process of domestication.

"Incorporation" may resolve base-line questions about the potential applicability of a non-domestic norm in the domestic legal order, but it does not necessarily address deeper issues of what we might call constitutional habilitation. A pattern of post-incorporation uncertainty (and occasionally) resistance to the importation of the decisions or adjudicative techniques of international courts and international institutions runs through the discourse. Dualism does not express the receptiveness of the domestic constitution to international legal influences or capture the various processes by which international and domestic laws are linked and applied. Brief discussion of some examples illustrates the point.

In an EU law context UK courts were initially sceptical about domestic law's ability to provide remedies capable of addressing inconsistencies between statute and directly effective European law. In the Court of Appeal's *Factortame (No.1)* decision Lord Donaldson noted that there was "no juridical basis" in domestic law for the courts to suspend the operation of statute.[108] Lord Bridge echoed the point in the Appellate Committee of the House of Lords, suggesting that granting such a

[107] See *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, at [78], referring to *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [55].
[108] *R. v Secretary of State for Transport, ex parte Factortame (No.1)* [1989] 2 C.M.L.R. 353, at [19], [20].

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remedy would be "directly contrary to Parliament's sovereign will".[109] It took a reference to the European Court of Justice for these domestic concerns to yield to the (then) overrding imperative that in the event of irreconcilable conflict domestic law must give way to European law, given its superior status within the European Community framework.[110] Latterly, the Supreme Court's *HS2* decision saw Lords Neuberger and Mance hypothesising that the reach of EU law into domestic constitutional arrangements might not be limitless. The two justices, with whom the remaining five members of the Supreme Court agreed, noted that it was "certainly arguable … 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".[111]

Comparable discussions have taken place in the context of rights adjudication. Domestic judges have, for example, suggested that the section 2 Human Rights Act presumption, or *Ullah* principle,[112] that Strasbourg Court jurisprudence should be reflected in the decision-making of domestic courts, ought not to apply if following that jurisprudence would "compel … a conclusion fundamentally at odds with the distribution of powers under the British constitution".[113] The Supreme Court has declined to follow Strasbourg case law where doing so would produce damaging domestic law consequences.[114] The Supreme Court has also suggested that unpersuasive reasoning by the Strasbourg Court may diminish the likelihood of its staightforward domestic application.[115] A series of Supreme Court decisions on common law rights sought to limit the applicability or relevance of Strasbourg case law where domestic law provides a rights-compliant response.[116] Each of these instances illustrates the post-incorporation uncertainties that fall to be resolved when domestic courts apply and interpret norms with non-domestic origins.

Application of the Convention's legal standards via the Human Rights Act has also provoked some judicial concern. The potential "powerlessness" of domestic courts faced with a clear and applicable

[109] *R. v Secretary of State for Transport, ex parte Factortame (No.1)* [1990] 2 A.C. 85, 143 (H.L.) (Lord Bridge).
[110] *R. v Secretary of State for Transport, ex parte Factortame (No.2)* [1991] 1 A.C. 603.
[111] *R. (HS2 Action Alliance) v Secretary of State for Transport* [2014] UKSC 3, at [207].
[112] *R. (Ullah) v Special Adjudicator* [2004] UKHL 26.
[113] *R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 A.C. 295, at [76] (Lord Hoffmann).
[114] *R. (on the application of Kaiyam) v Secretary of State for Justice* [2014] UKSC 66, [2015] A.C. 1344, at [36]–[40] (Lord Mance and Lord Hughes).
[115] *R. (on the application of Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] A.C. 279, at [85], [90] (Lord Wilson).
[116] E.g. *Osborn v Parole Board* [2013] UKSC 61; *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] A.C. 455.

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decision of the Grand Chamber of the European Court of Human Rights is apparent in Lord Rodger's observation, in *Secretary of State for the Home Department v AF*, that "*[e]ven though we are dealing with rights under a United Kingdom statute*, in reality, we have no choice: Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed".[117] The Supreme Court has occasionally expressed its frustration at perceived deficiencies in Strasbourg decision-making – suggesting occasionally unprincipled[118] and "incoherent"[119] reasoning – as well as in relation to the court's "expansionist"[120] reading of the Convention.[121]

Working within the framework of the Act, ECHR influences have led to increased use of proportionality analysis in judicial review cases. The influence of proportionality has prompted concern that courts are moving away from the procedural focus of judicial review towards merits-based review.[122] This, in turn, has led to debate over whether the domestic *Wednesbury* standard should give way to the "more precise and more sophisticated" requirements of proportionality analysis.[123] For some the proportionality test is nothing more than a disruptive "continental" interloper: "[t]here is no doubt that in the world of judicial review proportionality has advanced like a cuckoo, occupying the common law nest of traditional assessment, laying its continental eggs in it, and ejecting its home-incubated *Wednesbury* hatchlings."[124]

These examples suggest that the dualist worldview – the separated spheres account of domestic and international law – conditions the national reception of "incorporated" norms, such that a sense of separation (or otherness) persists even after "incorporation". Lord Neuberger characterised this concern in the pre-Brexit era as rooted in tension between legal traditions and in a sense that "that UK law, and in particular the common law, is being subjected to undesirable mainland

[117] *Secretary of State for the Home Department v AF* [2009] UKHL 28, [2010] 2 A.C. 269, at [98] (emphasis added).

[118] *R. (on the application of Stott) v Secretary of State for Justice* [2018] UKSC 59, [2020] A.C. 51, at [175] (Lord Carnwath).

[119] *R. (on the application of Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] A.C. 279, at [85], [90] (Lord Wilson).

[120] *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36, [2017] A.C. 624, at [36] (Lord Carnwath); *R. (Stott) v Secretary of State for Justice* [2018] UKSC 59, at [179] (Lord Carnwath).

[121] The extra-judicial commentary of two senior judges is worthy of note: Lord Hoffmann, "The Universality of Human Rights" (2009) 125 L.Q.R. 416; Lord Sumption, "The Limits of Law" (Kuala Lumpur 2013), available at https://www.sultanazlanshah.com/pdf/2021/SAS_Lecture_27.pdf (last accessed 30 April 2025); J. Sumption, "Judicial and Political Decision-Making: The F.A. Mann Lecture 2011" (2011) 16 Judicial Review 301.

[122] E.g. *R. (on the application of Kanja Sandy) v Secretary of State for the Home Department* [2023] EWHC 640 (Admin), [2023] A.C.D. 63, at [48] (Mostyn J.).

[123] *R. v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 A.C. 532, at [27] (Lord Steyn); and see *R. (on the application of Association of British Civilian Internees (Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] Q.B. 1397, at [34]–[35]; R (*Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, at [131]–[134] (Lord Neuberger).

[124] *R. (Kanja Sandy) v Secretary of State for the Home Department* [2023] EWHC 640 (Admin), at [47] (Mostyn J.).

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European civilian law influences, from the jurisdiction of the Court of Justice of the European Union, the CJEU in Luxembourg and of the European Court of Human Rights, the ECtHR in Strasbourg".[125] The resulting instability caused by this tension is perhaps most obviously apparent in political objections to extra-jurisdictional influences. As a case in point, resistance to the domestic effects of decisions by EU institutions (e.g. the Court of Justice of the EU) was fundamental to pro-Brexit efforts to "take back control" of lawmaking powers.[126]

The Human Rights Act, as discussed above, amplifies the significance of Strasbourg decision-making for domestic adjudication. That has led to complaints, similar to those made in relation to EU influences, that domestic institutions are somehow subjugated to non-domestic influences.[127] In both instances (EU and ECHR) Parliament directed that the relevant norms were domestically applicable. That did not, however, prevent debate or controversy about the domestic reception of international legal norms and decision-making. The domestication of international law is, as the above decisions illustrate, an iterative process. Whilst incorporation is a vital point in an international norm's transition into the domestic legal order it clearly does not put a definite end to debate about a non-domestic norm's domestic effect or its relationship with other domestic laws and principles.

IV. Imposing Dualist Coherence/Recognising Fragmented Complexity

One possible response to these tensions is to recognise that constitutions are not hermetically sealed,[128] and that dualism is a variable rather than an absolute concept. Feldman, for one, acknowledges that dualism operates as a "semi-permeable membrane, which allows rules to pass through it in different directions for different purposes".[129] Similarly, Poole draws a distinction between the orthodoxy of "strict dualism" and the practical realities of the fluid interplay between domestic and EU laws to which the UK's EU membership gave rise, arguing that "[s]trict dualism miss[ed] what [wa]s distinctive about the ECA",[130] namely, that "a dynamic, international source of law was grafted onto, and above, the

[125] Lord Neuberger, "Cambridge Freshfields Annual Lecture 2014: The British and Europe" (Cambridge 2014), available at https://supremecourt.uk/uploads/speech_140212_a13d061a1c.pdf (last accessed 30 April 2025), at [5].
[126] HM Government, *The United Kingdom's Exit From and a New Partnership With the European Union*, Cm. 9417 (February 2017), 13–15.
[127] E.g. M. Pinto-Duschinsky, "Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK", available at https://www.policyexchange.org.uk/wp-content/uploads/2016/09/bringing-rights-back-home-feb-11.pdf (last accessed 2 May 2025).
[128] Bomhoff et al., *Double-Facing Constitution*, ch. 1.
[129] Feldman, "Internationalization of Public Law", 134.
[130] Poole, "Devotion to Legalism", 702.

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well-established existing sources of domestic law: Parliament and the courts".[131] Some uncertainty about how domestic law relates to international law seems inevitable. Yet the degree of fragmentation mapped in the previous sections suggests, we argue, that dualism's binary opposition of the domestic to the international is becoming redundant.

We noted above that the relationship between domestic and international laws provides an indicator of constitutional identity. This final section reflects on the fragmentation of dualism as a reflection of broader constitutional patterns. Cheryl Saunders has observed that:

> By its very nature, as the law that binds the organs of state, public law is closely tied to the politics and political culture of the state in which it is embedded. Public law claims to derive its legitimacy from the people of a state, at least as a matter of theory and rhetoric. In practice, public law undeniably depends in some degree of acceptance by political elites.[132]

In the UK's (in)famously political constitution,[133] it stands to reason that the tides of political opinion will impact upon the shape and tone of public or constitutional law. As such, it is in a sense elementary that political tensions concerning the extent to which non-domestic norms permeate the domestic constitution will influence perceptions of the legal position.

Doubts about the domestic influence of norms generated outside the national legal order are a leitmotif in a number of recent, constitutionally significant political initiatives. Foremost among them, the Brexit process is a textbook example of a politico-legal project centred on the dismantling of linkages between the domestic legal order and international legal influences. Recurrent efforts to reform the UK's human rights framework – or alternatively for the UK to withdraw from the Convention system – are heavily influenced by concerns about the extent to which the European Court of Human Rights and its jurisprudence influences and constrains domestic law and domestic decision-making.[134]

While Brexit and possible Human Rights Act reforms exemplify the tensions, they are not the only symptoms of this "exceptionalism". Efforts to redefine and diminish international law's place in the domestic legal order range from the relatively subtle – such as the removal (between 2015 and 2024) from the *Ministerial Code* of explicit reference to ministers' obligations to act consistently with "international law and

[131] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [90].
[132] C. Saunders, "Transplants in Public Law" in M. Elliott, J.N.E. Varuhas and S. Wilson Stark (eds.), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford 2018), 260.
[133] J.A.G. Griffith, "The Political Constitution" (1979) 42 M.L.R. 1.
[134] *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), available at https://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document (last accessed 30 April 2025); Ministry of Justice, *Human Rights Act Reform*; Bill of Rights Bill 2022–23.

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treaty obligations"[135] – to the harder-edged. The United Kingdom Internal Market Bill was (notoriously) intended, in its original form, to "break international law in a specific and limited way".[136] While the bill was not enacted in its original form the message was that the UK's international legal obligations – even those contained in a recently-agreed treaty – were open to avoidance under cover of Parliament's (domestic) legislative sovereignty.

Conventional dualist debate centres on *how* international norms are domesticated and includes recognition of a possible "dissonance" between the UK's obligations in international law and the requirements of domestic law.[137] More recent developments highlight a growing debate about *whether* international norms should be domesticated at all and whether the effects of any past domestication should be curtailed. This creates a particular dissonance, *within* the domestic legal order, between those who take the view that domestic law has a necessary if dynamic connection with international law and those who take the view that domestic law *is* and must be domestic.

The most striking legislative examples of this dissonance – and these are by no means the only relevant examples[138] – relate to legal disputes arising out of conflict situations and control of the UK's borders. Legislation limiting legal actions against UK military personnel in relation to actions outside the UK,[139] and limiting criminal prosecutions and civil proceedings relating to the conflict in Northern Ireland,[140] attempt to restrict the domestic influence of ECHR norms applicable under the Human Rights Act, arguably in violation of the UK's obligations under the Convention.[141] The enactment of the latter statute – the Northern

[135] Cabinet Office, *Ministerial Code* (London 2015), available at https://www.civilservant.org.uk/library/2015_Ministerial_Code.pdf (last accessed 30 April 2025), at [1.2]. The 2024 reissue of the Code saw the omitted text effectively reinstated (HM Government, *Ministerial Code* (London 2024), available at https://assets.publishing.service.gov.uk/media/672b46f5f03408fa7966d1d4/November_2024_-_Ministerial_Code.pdf (last accessed 30 April 2025), at [1.6].

[136] HC Deb. vol. 679, col. 509 (8 September 2020).

[137] Sales and Clement, "International Law in Domestic Courts", 390, 420–21.

[138] See also Victims and Prisoners Act 2024, s. 69.

[139] Overseas Operations (Service Personnel and Veterans) Act 2021.

[140] Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, in particular ss. 19–24 and ss. 38–45, which, with the exception of s. 19(17) (which entered into force on 1 December 2023, pursuant to The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (Commencement No.1) Regulations 2023) and s. 43 (which entered into force pursuant to s. 63(2)(a)), are not yet in force. See *In Re Dillon and Others* [2024] NIKB 11.

[141] In relation to the Overseas Operations (Service Personnel and Veterans) Act 2021, see e.g. Joint Committee on Human Rights, "Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill" (London 2020), available at https://committees.parliament.uk/publications/3191/documents/39059/default/ (last accessed 2 May 2025). In relation to potential ECHR compliance issues with the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, see e.g. J. Dawson, G. Cowie, D. Torrance and C. Mills, "Research Briefing: Northern Ireland Troubles (Legacy and Reconciliation) Bill 2022-2023 (London 2022), available at https://researchbriefings.files.parliament.uk/documents/CBP-9553/CBP-9553.pdf (last accessed 2 May 2025), 49–52; Northern Ireland Human Rights Commission, "Legislative Scrutiny: NI Troubles (Legacy and Reconciliation) Bill" (Belfast 2022), available at https://nihrc.org/assets/uploads/publications/JCHR-Legacy-Briefing-NIHRC.pdf (last accessed 2 May 2025), at [1.2]: "The NIHRC is clear that the Bill is incompatible with Articles 2

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Ireland Troubles (Legacy and Reconciliation) Act 2023[142] – prompted the Government of Ireland, in January 2024, to make an interstate application to the European Court of Human Rights on the basis that that the Act breaches a number of Convention articles.[143] In *Dillon* the Northern Ireland High Court made declarations of incompatibility in relation to the Act's immunity from prosecution provisions (on the basis that they conflict with the requirements of Article 2 and 3 ECHR) and in relation to the Act's limitations on civil procedings arising out of the troubles (in light of their incompatibility with Article 6 ECHR).[144]

In the context of border controls, efforts to "stop the boats" via the Illegal Migration Act 2023 and initiatives relating to the Rwanda deportations policy,[145] employ a range of devices designed to avoid the effects of the UK's domestically applicable, international human rights obligations. The Illegal Migration Act 2023 (IMA) has been argued to run contrary to a "sizeable proportion of the UK's obligations under international human rights law" including those that are domestically applicable by virtue of the Human Rights Act.[146] The IMA insulates itself from potential judicial interpretation designed to achieve compatibility with Convention rights by declaring that section 3 of the Human Rights Act "does not apply" to its provisions or any provisions made "by or by virtue of" the IMA.[147] The Safety of Rwanda (Asylum and Immigration) Act 2024 – enacting the legislative fiction that Rwanda is a safe country for deportation purposes – similarly purports to exclude the application of the Human Rights Act to its terms and prospective operation, specifically disapplying *almost all* of the Human Rights Act's operative provisions, including section 2 (the duty on domestic courts to "take into account" Convention case law in domestic human rights litigation), section 3 (the

(right to life) and 3 (freedom from torture) of the European Convention on Human Rights (ECHR)" – in footnote 1, the NIHRC also concludes that the Bill is incompatible with the UK's obligations under a number of other international human rights treaties.

[142] The King's Speech 2024 indicated that the incoming Labour Government would work to replace and repeal the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023; see Prime Minister's Office, "The King's Speech 2024", available at https://www.gov.uk/government/speeches/the-kings-speech-2024 (last accessed 2 May 2025).

[143] "New Inter-State Application Brought by Ireland against the United Kingdom" (2024), available at https://hudoc.echr.coe.int/fre-press#{%22itemid%22:[%22003-7854820-10910604%22]} (last accessed 2 May 2025).

[144] *In Re Dillon and Others* [2024] NIKB 11 (on which, see A. Deb and C. Murray, "Dillon and Others' Applications for Judicial Review: A Radically Unradical Analysis of the Legacy Act", available at https://ukhumanrightsblog.com/2024/03/18/dillon-and-others-applications-for-judicial-review-a-radically-unradical-analysis-of-the-legacy-act/ (last accessed 2 May 2025); see also *Re Dillon and Others* [2024] NICA 59.

[145] On which, see *R. (AAA) v Secretary of State for the Home Department* [2023] UKSC 42.

[146] Public Law Project et al., "The Illegal Migration Bill: Constitutional Implications", available at https://publiclawproject.org.uk/content/uploads/2023/05/The-Illegal-Migration-Bill-Constitutional-Implications.pdf (last accessed 1 April 2025).

[147] Illegal Migration Act 2023, s. 1(5).

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Act's interpretative provision) and section 6 (the obligation on public authorities to act consistently with the Convention rights).[148]

In short, the UK Government and Parliament has proposed and, in some cases, adopted a series of international law avoidance mechanisms which either reduce or destroy the domestic effect of domestically applicable norms or exclude the potential domestic influence of the UK's broader international obligations. The culmulative effect of these legislative measures is twofold. In a straightforward sense legislative disapplication of the Convention rights partially reinforces dualist orthodoxy by illustrating that international obligations remain contingent on statute for their domestic effects; statute can take away, as well as grant, domestic legal effect. More pertinently however, the legislative disapplication of otherwise "incorporated" international norms demonstrates dualism's growing redundancy as a concept that explains the UK domestic/international law relationship. Legislative differentiation of contexts or circumstances in which "incorporated" norms will and will not apply further undermines the binary distinction on which dualist orthodoxy rests. Such differentiation fragments the dualist concept and – given the extent of recent political contestation over connections between international and domestic laws – shows the potential for what remains of that idea to collapse into, rather than bring shape and order to, fluctuations in the domestic political climate.

The "messiness" and "disagreement" that characterises recent aspects of the relationship between the UK and international legal orders reviewed in this section can, perhaps, be explained away as by-products of the UK's political constitution.[149] Dualism's (supposed) requirement for legislative incorporation might, equally, be said to reflect a political constitutional preference for democratic lawmaking primarily delivered by statute. This emphasis on political explanation does, however, risk reaching for "the political" because of its perceived capacity to simplify the complexities of "the legal". If the object of inquiry is the *relationship* between the UK domestic and international legal orders then the focus needs to remain on the specifics and particulars of that relationship, as they play out in specific judgments, statutes and other legal materials.

Our broad point is that no simple, neat explanatory concept can account for the complex, fragmented and dynamic nature of the actual relationship between the UK domestic and international legal orders that plays out in particular cases, situations and documents. A political constitutional analysis might suggest that the power to determine the domestic legal

[148] Both the Illegal Migration Act 2023 and the Safety of Rwanda Act 2024 further diminish the effects of international laws in the domestic constitution by declaring that compliance with interim measures of the European Court of Human Rights is a matter for ministerial discretion (see Illegal Migration Act 2023, s. 55; Safety of Rwanda (Asylum and Immigration) Act 2024, s. 5(2)).

[149] G. Gee and G. Webber, "What Is a Political Constitution?" (2010) 30 O.J.L.S. 273, 277.

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effect of a treaty norms rests with Parliament. The case law, however, shows that Parliament is often not as clear about its intentions as a judge faced with a relevant question might like.[150] Broad propositions about the allocation of constitutional power have little practical impact if the judge finds it difficult to discern Parliament's will on the relevant point. If we are, then, concerned with the actuality of the relationship between domestic and international law our focus has to be on its granularity, its specifics, rather than on structural abstractions that offer palatable simplicity at the expense of addressing real and persistent complexities.

Alternative concepts which have been advanced as offering some explanation for the relationship between international and national legal orders also appear inapt in this context. Global constitutionalism, for instance, suggests that the boundaries between national and international legal orders have been weakened by the emergence of a transnational body of rules, with a particular focus on the protection of human rights.[151] Allusions to that idea may occasionally be visible in UK constitutional discourse,[152] but global constitutionalism *per se* is at odds with recent UK constitutional practice. The Supreme Court's decision in *SC* is an outright rejection of any suggestion that treaty-based human rights obligations – beyond those explicitly incorporated by statute – have any particular domestic status or effect.[153] The Safety of Rwanda (Immigration and Asylum) Act 2024 is a strident assertion of Parliament's capacity to insulate domestic decision-making from scrutiny on the basis of "any … international law, or convention or rule of international law, whatsoever".[154] International human rights law and a broad sense of global interconnection are the very foundations of any global constitutional analysis. Any suggestion that the UK domestic legal order is built on *that* kind of constitutionalism is defeated by the clear evidence in *SC* and the 2024 Act.

[150] See e.g. *Zoernsch v Waldock* [1964] 1 W.L.R. 675, 687 (C.A.) (Danckwerts L.J.), 690 (Diplock L.J.); *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657, [2008] 1 W.L.R. 254, at [35]–[40] (Lloyd L.J.), [66] (Moses L.J.).

[151] See e.g. T. Suami, A. Peters, D. Vanoverbeke and M. Kumm (eds.), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge 2018); M. Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State" in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge 2009), 259; E. de Wet, "The International Constitutional Order" (2006) 55 I.C.L.Q. 51, 75 ("[i]n the increasingly integrated international legal order there is a co-existence of national, regional and sectoral (functional) constitutional orders that complement one another in order to constitute an embryonic international constitutional order. This constitutional co-existence (*Verfassungskonglomerat*) has consequences for the relationship between international and national law. To a certain extent, the development of an international community with an international value system leads to the replacement of the traditional, dualist system with a more integrated system. In this system, individuals and state organs simultaneously function both within the national and post-national communities and legal orders").

[152] See e.g. *R. (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16.

[153] *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26.

[154] Safety of Rwanda (Immigration and Asylum) Act 2024, s. 1(6); see also s.1(4)(b): "the validity of an Act is unaffected by international law."

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Constitutional pluralism, meanwhile, maintains that hierarchies in national constitutional law have given way to a more heterarchical understanding of interlocking legal systems.[155] Again, we can see some affinity between this idea and the suggestion that the precise impact of an international norm in the domestic legal order is a matter of context rather a function of doctrine. Equally, the UK's period of EU membership produced illustrations of pluralist thinking from domestic judges attempting to grapple with laws originating from competing sites of constitutional authority.[156] As with the notion of global constitutionalism, however, recent domestic developments are inconsistent with constitutional pluralism *as* a means of explaining the relationship between the UK domestic and international legal orders. The UK's departure from the EU indicates a partial retreat towards a "classic dualist" position in which "alien norms … are valid only through the recognition of, and to the extent permitted by, the state legal order".[157] As such, the UK's legal order – though able to accommodate alternative sources of law and authority – displays a clear preference for doing so without conceding that the hierarchies resulting from parliamentary sovereignty are diminished; as legislation has recently emphasised, "the Parliament of the United Kingdom *is* sovereign".[158]

As lenses, global constitutionalism and constitutional pluralism make something of the relationship between the UK domestic and international legal orders visible. Yet neither concept offers a complete account of the relationship and, in our view, no single lens or explanation can do so. We suggest that the fragmented, complex, dynamic nature of the relationship confounds attempts to find a "catch-all" explanation.

V. Conclusion

With the creation of a statutory framework that facilitates the UK diverging from the residue of EU legal influences that remain after Brexit,[159] the idea that the post-Brexit constitution is reverting or might revert to earlier, simplistic and binary orthodoxies is, perhaps, instinctively appealing. Our analysis, however, highlights the complexities of the so-called "dualist" constitution and points towards an increasingly fragmented, complex and dynamic relationship between the domestic and international legal orders

[155] See e.g. N. MacCormick, "Beyond the Sovereign State" (1993) 56 M.L.R. 1; N. Walker, "The Idea of Constitutional Pluralism" (2002) 65 M.L.R. 317.

[156] *R. (HS2 Action Alliance) v Secretary of State for Transport* [2014] UKSC 3 (on which, see A. Young, "Wilkommen zum Constitutional Pluralism", available at https://ukconstitutionallaw.org/2014/02/17/alison-young-on-hs2-wilkommen-zum-constitutional-pluralism/ (last accessed 2 May 2025).

[157] C. Mac Amhlaigh, "Back to a Sovereign Future? Constitutional Pluralism after Brexit" (2019) 21 *Cambridge Yearbook of European Legal Studies* 41, 42.

[158] European Union (Withdrawal Agreement) Act 2020, s. 38(1); Safety of Rwanda (Immigration and Asylum) Act 2024, s. 1(4) (emphasis added).

[159] Retained EU Law (Revocation and Repeal) Act 2023.

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that does not accord with, and cannot fully be explained by, the orthodox dualist account. Cases concerning CIL and unincorporated treaties suggest a dualism more dynamic than stable. The hybrid products of the UK's interactions with European legal orders defy dualist categorisation, owing their content to a combination of domestic and international sources. The binary distinction on which dualism rests is complicated by the intricacies of post-"incorporation" processes of domestication. The straightforward appeal of a reversion to dualist orthodoxy – of precisely the kind endorsed by the Supreme Court in *SC* – fades in the face of such difficulties, precisely because the picture is not simple or binary but complex and multi-dimensional.

These illustrations of a fragmented relationship are components of (or, at least, run parallel to) a seam of resistance to or scepticism about the place of international legal norms, institutions and processes in the UK's domestic legal order. The emerging picture is of a UK legal order less integrated with, and potentially more opposed to, the international legal order than had previously seemed to be the case. Collectively, these pressures highlight dualism's inability to account for the realities of the UK's relationship with international law. What comes next is, of course, a primarily political question and it seems the UK's new (2024) Government intends to take a less oppositional approach to international legal obligations than has been apparent in legislation, reviewed in the previous section, passed under recent governments.[160] If it does so the lesson to be taken from our analysis in this article may be that dualism, if not *wholly* redundant, is, at best, a flawed and incomplete guide to the intricacies of the relationship between UK domestic law and international law.

In closing, then, our analysis distils into three key points. First, dualism does not and cannot account for the entire relationship between the UK domestic and international legal orders. Second, the complex picture of the relationship emerging from our analysis should be accepted on its own terms, without any attempt to simplify or compress it into some "new" explanatory concept. Third, and notwithstanding any practical utility that a "new" explanatory concept might be thought to have, the picture of the relationship offered in this article provides a more realistic and comprehensive appraisal of the complex, fragmented and dynamic constitutional landscape than any such explanatory concept can offer.

[160] It should be noted that – following the May 2024 general election – indications from the new UK Government suggest a less oppositional approach to obligations arising in international law (e.g. Attorney General's Office, "Attorney General Swearing-In Speech: Rt. Hon. Richard Herner KC", available at https://www.gov.uk/government/speeches/attorney-general-swearing-in-speech-rt-hon-richard-hermer-kc (last accessed 2 May 2025); Attorney General's Office, "Attorney General's 2024 Bingham Lecture on the Rule of Law", available at https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law (last accessed 2 May 2025)) and the repeal of a number of the measures discussed above (see Border Security, Asylum and Immigration Bill 2024–25, part II, which would repeal in full the Safety of Rwanda (Asylum and Immigration) Act 2024 and in part the Illegal Migration Act 2023).

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