The ghost in the statute book

Catherine Barnard on why leaving the EU has not freed Britain from the gravitational pull of EU law.

The EU is a creature of the law. It is built through treaties, governed by rules interpreted through sometimes expansive decisions of the Court of Justice. Although the British people made their decision in what David Cameron called a "simple yes/no referendum", translating their decision into international agreements, and then into domestic law, has proved anything but simple.

Britain joined the EU by treaty and left by treaty. When it joined the European Economic Community, the UK did so through the 1972 Accession Treaty. The European Communities Act of the same year gave effect to what became European Union law at home, including two of its defining principles: supremacy, under which EU law takes precedence over conflicting domestic legislation, and direct effect, which allowed individuals to enforce certain European rights in British courts.

Leaving the EU required another dense body of law. The Withdrawal Agreement, negotiated over three years by two British prime ministers, set the terms of departure and made special provision for Northern Ireland, which would stay in the EU customs union. The Trade and Co-operation Agreement, negotiated over nine months during the Covid pandemic, established the basis for the UK's post-Brexit relationship with the EU. Because the UK treats international and domestic law as separate legal systems, both agreements had to be given effect in domestic law (via an Act of Parliament) before they could operate at home. Both agreements are also premised on UK membership of the European Convention on Human Rights, itself now under threat by commitments from the Conservatives and Reform to withdraw should they win the next general election.

Brexit generated some of the most important constitutional litigation in recent British history. This began when campaigner Gina Miller challenged the government's attempt to exercise its prerogative powers to trigger 'Article 50', the EU treaty provision governing withdrawal from the union. The Supreme Court ruled that ministers could not act alone and that Parliament had to legislate first. The result was a short act authorising the government of Theresa May to notify the EU of Britain's intention to leave.

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In the second Miller case, the court ruled that Boris Johnson's advice to the Queen to suspend Parliament in the autumn of 2019 was unlawful because it frustrated parliament's ability to perform its constitutional duties without reasonable justification. Together, the two cases exposed the strain that Brexit placed on the UK's uncodified constitution – a system built as much on convention and restraint as on formal rules.

For the day-to-day operation of the law, however, the most important piece of Brexit legislation was the European Union (Withdrawal Act) 2018. Its aim was continuity. Rather than allow large parts of the statute book to fall away overnight, it took what was, in effect, a screenshot of all EU-derived law and kept it

functioning so that airline safety, food safety, and workers' rights would be protected after Brexit. Some EU rules were turned off, most notably those governing the free movement of persons. But a large body of EU-derived law remained and continues to this day, with the courts in the UK applying it very much as they did when Britain was a member-state.

That continuity caused significant chagrin to supporters of Brexit. Championed by the Johnson government, the Retained EU Law (Revocation and Reform) Bill sought to turn off all remaining EU law on the statute book unless ministers expressly decided to preserve it. But the more officials looked, the more rules they found, with numbers going up from 2,417 items to nearly 7,000 by January 2026.

The practical risks became clear. Sweeping away thousands of rules in one stroke would have created serious uncertainty and potentially opened a huge chasm in the statute book. As British prime ministers changed and the bill finally became law under Rishi Sunak, the approach had changed. All 'retained' EU law would stay, except a few hundred statutory instruments, and the surviving body of rules was renamed 'assimilated law'.

The political mood has shifted since then. Since Sunak's premiership, the desire for legislative pull away from the EU has waned, and the argument today is no longer principally about how quickly Britain can diverge from EU law. It is increasingly about when continued 'alignment' with EU rules makes economic sense. Things came almost full circle when the Labour chancellor Rachel Reeves announced in March that, where alignment with EU rules served the national interest, Britain should be prepared to accept it. Regulatory autonomy might still be necessary in some sectors, she said, but it should be "the exception, not the norm".

That shift is already visible in the 'reset' pursued by the Labour government, which is now negotiating new agreements with Brussels on agrifood trade, the linking of emissions-trading systems and UK participation in the EU's internal electricity market. These arrangements will require the UK to engage in 'dynamic alignment', meaning that Britain will need to keep its rules up to date with relevant EU legislation, but it will have a limited role in shaping EU decisions. Unlike member-states, it will not have a vote.

Dynamic alignment will need new legislation, the European Partnership Bill, announced in the 2026 King's Speech. It will provide the powers needed to implement this EU legislation via 'statutory instrument'. This will take us back to the situation in 1972 when the legislation that brought the UK into the EU gave wide so-called Henry VIII powers to the government to implement EU law.

More than half a century later, Parliament is again being asked to consider how EU rules should enter the British statute book. The difference this time is that the UK is no longer a member-state. It may have a role in 'shaping' new EU rules, but it will have no say in making them. Apart from refuelling old political divisions, it raises difficult questions over how to consult and involve the devolved administrations, and how MPs can scrutinise EU rules once they apply in the UK again. Brexit was supposed to settle the question of legal sovereignty. A decade on, the argument has changed rather than disappeared.

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