

**THE NUANCED CONSTITUTION:  
AN ESSAY ON COMMON LAW CONSTITUTIONAL RIGHTS**

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## **DECLARATION OF AUTHENTICITY**

'I, Eva Christina Lienen, confirm that the work presented in this thesis is my own.  
Where information has been derived from other sources, I confirm that this has  
been indicated in the thesis.'

Signed: \_\_\_\_\_

Dated: \_\_\_\_\_

## ABSTRACT

This thesis argues that the examination of judicial reasoning in public law cases shows that the UK constitution is best described as 'nuanced', rather than by reference to either political or common law constitutionalism. One manifestation of the nuanced constitution is the concept of common law constitutional rights, i.e. human rights under the English common law, which have recently been revived by the UK Supreme Court in cases such as *UNISON v Lord Chancellor*. I examine these rights with a view to portraying the inner workings of the nuanced constitution as well as its shortcomings.

Drawing on the historical development and the contemporary characteristics of common law constitutional rights, I contend that the latter have been negatively impacted by the ambiguities underlying the wider constitutional framework. As the *Privacy International* litigation shows, the senior Judiciary is in significant disagreement about some of the core aspects of the UK constitution. Indeed, we cannot detect a principled constitutional philosophy guiding decision-making; the nuanced constitution is torn between the irreconcilable tenets of political and legal constitutionalism. Due to this tension the range and scope of common law constitutional rights remains unclear, and their legitimacy contested. Furthermore, given the continued role of Parliamentary Sovereignty, common law constitutional rights are at constant risk of being abrogated by clear statutory language.

Having found that the nuanced constitution - despite the resurgence and increased weight of common law constitutional rights - is unable to adequately protect essential constitutional values, I advance an alternative approach to constitutional rights protection. Abandoning Parliamentary Sovereignty, which is riddled with conceptual and normative shortcomings, I propose a more principled framework that effectively protects those rights that are constitutive of a liberal democracy, properly understood.

## IMPACT STATEMENT

This thesis calls for a more explicitly theoretically grounded analysis of UK public law. It highlights the current low levels of engagement with substantive constitutional values both in the academic literature and in judicial reasoning. Greater coherence in common law constitutional rights jurisprudence could be achieved if scholars and judges were to adopt a less institutional legitimacy-centric approach, focusing instead on the core values of a liberal democracy.

In the course of writing this thesis I have sought to contribute to the debate on judicial reasoning in public law adjudication by publishing some of my work in two highly regarded law journals ('Common law constitutional rights jurisprudence: public law at a crossroads?' [2018] Public Law 649 and 'Judicial Constitutional Comparativism at the UK Supreme Court' (2019) 39(1) Legal Studies 166). Additionally, I have highlighted the significance of this line of jurisprudence by regularly contributing to widely read law blogs, such as the UK Constitutional Law Association Blog (2017), the UCL Constitution Unit Blog (2017) and the IACL-AIDC Blog (2019).

I also spoke at numerous conferences about the opportunity the current resurgence of common law constitutional rights jurisprudence offers to re-examine our constitutional arrangements more broadly. In particular, I highlighted the significance of the UK Supreme Court judgment in *UNISON* at the Public Law Conference co-organised by the University of Cambridge and the University of Melbourne (2018). I was able to further contribute to comparative legal analysis by presenting my research to an audience of academics and practitioners from Canada and other common law jurisdictions at the Unwritten Constitutional Norms and Principles: Contemporary Perspectives Symposium hosted by the University of Ottawa (2019).

Going forward, this thesis' critique of the current lack of a principled approach towards autochthonous case law based human rights protection is likely to influence future legal debate and scholarship. While this research is likely to have the clearest impact within academia, there is a strong potential for it to also benefit judges and politicians. To that end, apart from my ambition to convert this thesis into a monograph, I will explore other disseminating outputs to make my findings and proposals available to a wider audience. For instance, the political ambition to abolish the Human Rights Act 1998 has been unhelpfully bolstered by the mistaken assumption that the English common law offers the same or a highly similar level of human rights protection. This thesis challenges that assumption, and its findings could potentially benefit NGOs that raise awareness about the importance and indispensability of the Act.

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## INTRODUCTION

The United Kingdom's ('UK') constitutional set up is predominantly known for what it does not have - a codified constitution. In the absence of a single constitutional document, various theories have emerged about the nature of the UK's constitution, the various principles thereunder, and the roles and powers of the three branches of state.

### 1. The Nuanced Constitution

This thesis proposes a departure from well-rehearsed academic arguments according to which the UK constitution is a manifestation of political or legal constitutionalism. It argues that the constitution's defining feature is that it is 'nuanced', being characterised by "subtle shades of meaning"<sup>1</sup> and "often appealingly complex qualities, aspects, or distinctions".<sup>2</sup>

The complex character of the UK constitution mainly stems from the fact that there is, in the absence of a single constitutional document, no agreement as to the justification of public power. Relatedly, there is no single overriding constitutional principle. Neither Parliamentary Sovereignty nor the substantive notion of the rule of law command absolute respect. Indeed, both judicial reasoning and legal scholarship often attempt the impossible by trying to reconcile the orthodox starting point of unlimited legislative law-making powers with the meaningful protection of fundamental constitutional values, such as the separation of powers, substantive and procedural fairness, and human rights. Institutional legitimacy concerns continue to play a central role in public law cases while at the same time

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<sup>1</sup> *Oxford English Dictionary* (3<sup>rd</sup> edn, Oxford University Press 2010).

<sup>2</sup> Merriam-Webster Online Dictionary, 'Nuanced' <https://www.merriam-webster.com/dictionary/nuanced> accessed 22 August 2019.

attention is increasingly paid to substantive values. These values increase or decrease in importance depending on the context.

This thesis proposes that we can conceptualise the workings of the nuanced constitution by viewing public law adjudication as operating on a spectrum. We can picture Parliamentary Sovereignty at one end of the spectrum, and legal constitutionalism at the other, with judicial reasoning relying more or less on one of these principled positions. In some cases, elements of the political constitution will be more prominent. In others, aspects of the legal constitution - predominantly the common law component of the constitution - will dominate. Indeed, the courts typically view public law cases through the prism of Parliamentary Sovereignty until the point where such an approach would result in an infringement of one or more fundamental values. When we reach that point, a case is pulled closer towards the legal constitutionalism side of the spectrum, and the courts consider if any applicable legislative wording is general enough to allow for a 'value-compatible' interpretation. On the other hand, if said wording limits or abrogates a fundamental value expressly, the courts generally consider themselves - in light of the overarching traditional framework - as having no choice but to enforce it. Thus, under the nuanced constitution, public law is context-specific in its application. Apart from the statutory context, a judge's individual conception of constitutional theory, the persuasiveness of the justifications put forward by public bodies, and the availability of precedent all shape the determination of individual public law cases.

One may interject at this point and suggest that constitutions are by their very nature nuanced. Does not every democratic legal order comparable to the UK contain broad principles, and does not every constitutional adjudication necessarily entail normative reasoning, so creating room for nuance? However, this comparative observation does not impact on the value of the contribution this thesis makes. Indeed, one of the main contributions here is the suggestion - based

on critical engagement with the case law - that the two leading characterisations of the UK constitution are flawed. Thus, while the claim that the UK constitution is best characterised as nuanced may appear to be unsurprising, it is in fact a significant finding in light of what legal scholarship ordinarily suggests.

## **2. Common Law Constitutional Rights**

As recent case law shows, there is, contrary to what is stipulated by Hart's rule of recognition, no "single supreme criterion of what constitutes law",<sup>3</sup> and equally there is no clear, definite ranking of the sources of law. This is where the link between the nuanced constitution and common law constitutional rights jurisprudence becomes clear. It is the absence of a single supreme criterion, taken together with the growing presence of more substantive values within the UK's nuanced constitution that has created space for the phenomenon of common law constitutional rights.

Common law constitutional rights can loosely be characterised as human rights that are protected through the English common law rather than through a codified constitution or Bill of Rights. Indeed, in the absence of a codified constitution and without a comprehensive Bill of Rights<sup>4</sup> prior to the passing of the Human Rights

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<sup>3</sup> NW Barber, 'Sovereignty re-examined: the Courts, parliament & statutes' (2000) 20(1) Oxford Journal of Legal Studies 131, 136.

<sup>4</sup> I do not consider the Magna Carta, the Petition of Right 1627, the Act of Settlement 1700 or the Bill of Rights 1688 as bills of rights in the modern sense of the word. None of these ever form the basis for a determinative legal argument, and they are generally regarded as having no appreciative value by the courts, see *R (Henderson) v Secretary of State for Justice* [2015] EWHC 130 (Admin), [2015] 1 WLUK 573; their function is one of inspiration rather than foundation.

Act 1998 ('HRA'), the English common law, the oldest national law in Europe,<sup>5</sup> fulfilled this role in part. Under the influence of a legion of judges, it has developed towards the recognition and protection of constitutional rights that are increasingly conceptualised as a freestanding source of law. For instance, the right to open justice and the right of access to justice are enforced directly rather than through, for example, defamation law.

I use the term common law constitutional rights, as have others before me.<sup>6</sup> An alternative term commentators employ is common law 'fundamental' rights.<sup>7</sup> One may ask whether the term 'fundamental' adds much. A right, properly understood, is inevitably highly important. I suspect that one reason for this term to have emerged is likely to be the (judicial) motivation to ring-fence certain values from statutory interference. The term 'fundamental' suggests that an interest is of exceptional importance, justifying judicial protection in the face of statutory law through the mechanism of interpretation, or by quashing secondary legislation. Meanwhile, the term 'constitutional' may be more ambiguous, in particular in the UK, where there is no single authoritative document providing guidance, and where there is substantial academic disagreement as to how the term should be

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<sup>5</sup> For an excellent analysis of its origins, see H Patrick Glenn, *Legal Traditions of the World: Sustainable diversity in law* (Oxford University Press 2014) ch 7.

<sup>6</sup> Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68(1) *Current Legal Problems* 85; Lady Hale, 'UK Constitutionalism on the March?' (Constitutional and Administrative Law Bar Association Conference, 12 July 2014) <https://www.supremecourt.uk/docs/speech-140712.pdf> accessed 17 August 2019.

<sup>7</sup> Sir Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75(1) *Cambridge Law Journal* 86; TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press 2013). Note that Allan used the term 'constitutional rights' in 'Constitutional Rights and Common Law' in *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1994) ch 6.



understood. However, it is also more fitting as it openly acknowledges the constitutional dimension of these rights, notably their judicial enforcement against the state.<sup>8</sup> Their constitutional dimension further springs from the fact that these rights impact on the relationship and hierarchy of different legal sources and their respective interpretation in this jurisdiction. Thus, while the two terms are arguably interchangeable,<sup>9</sup> common law constitutional rights is the one this thesis adopts.

Common law constitutional rights are utilised by the courts to protect values which judges consider having significant constitutional importance. By definition, they are not formulated by the elected branches of state. Nonetheless, they have been characterised by senior UK judges as “principles of constitutionality little different from those that exist in countries where the power of the legislature is expressly limited by a constitutional document”.<sup>10</sup> They are “not mere canons of statutory interpretation”,<sup>11</sup> and they cannot be described realistically as being implicit in legislative intent. In other words, they are “not a consequence of the democratic process but logically prior to it”.<sup>12</sup>

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<sup>8</sup> This is not to say the English common law does not enforce rights with constitutional dimensions in horizontal relationships. For example, in *O (A Child) v Rhodes* [2015] UKSC 32, [2016] AC 219 the Supreme Court reinforced the Appellant’s right to freedom of speech against another individual. Specifically, the Court held that he could publish a book, which the Respondent had argued would cause him severe emotional harm. As this decision did not affect any branch of government, it would not feature in this thesis as part of the main argument.

<sup>9</sup> Jack Beatson and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell 2008) 8 citing *Watkins v Home Office* [2006] UKHL 17, [2006] 2 AC 395.

<sup>10</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) 131 (Lord Hoffmann).

<sup>11</sup> Jeffrey Jowell, ‘Parliamentary Sovereignty under the new constitutional hypothesis’ [2006] Public Law 562, 576.

<sup>12</sup> *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB) 581.

The narrative accompanying the recognition of these rights is not one of novelty. Rather, common law constitutional rights judgments emphasise the longevity of rights protection in this jurisdiction. In other words, rights are perceived as an indigenous and natural facet of the English common law. In particular, any dependence or inferiority to European human rights protection is rejected. Thus, recent case law proclaims that “the protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but permeates our legal system”.<sup>13</sup>

Common law constitutional rights remain heavily undertheorised. Prior to 2000, the year the HRA entered into force, there was no body of literature that dealt with a free-standing notion of common law constitutional rights,<sup>14</sup> and indeed most scholarly works today still focus almost exclusively on the HRA,<sup>15</sup> the notable exceptions being a handful of leading practitioner-oriented books.<sup>16</sup> However, given their focus, these do not discuss the nature and the rationale of these rights in a comprehensive manner; neither do they explain domestic constitutional rights jurisprudence in the context of wider constitutional law debates. Accordingly, this

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<sup>13</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [55].

<sup>14</sup> Instead, works focused on international and European human rights protection. See Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing 1997) and Richard John Francis Gordon and Richard Wilmot-Smith, *Human Rights in the United Kingdom* (Oxford University Press 1996).

<sup>15</sup> See David Hoffmann, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (4<sup>th</sup> edn, Pearson Education 2013) and Rosalind English and Philip Havers (eds), *An Introduction to Human Rights and the Common Law* (Hart Publishing 2000).

<sup>16</sup> The leading contributions are Jack Beatson and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell 2008); Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2<sup>nd</sup> edn, Oxford University Press 2009); Michael Fordham, *Judicial Review Handbook* (6<sup>th</sup> edn, Hart Publishing 2012). See also Michael Fordham, ‘Common Law Rights’ (2011) 16(1) *Judicial Review* 14 and David Feldman, *English Public Law* (2<sup>nd</sup> edn, Oxford University Press 2009).

thesis provides the first comprehensive account of the phenomenon of common law constitutional rights, with a particular focus on what the latter reveal about the nature and the shortcomings of the UK constitution.

### **3. Exploring the Nuanced Constitution Through the Lens of Common Law Constitutional Rights**

This thesis provides an in-depth study of common law constitutional rights with a view to make some more general statements about important aspects of the UK constitution. The jurisprudence surrounding these rights lends itself particularly well to an in-depth exploration of public law adjudication under the nuanced constitution. First, axiomatically, common law constitutional rights are a product of the English common law. Accordingly, they reveal how the latter works to protect rights, what aspects of the English common law are conducive towards basic democratic rights adjudication, and which ones are not. Secondly, common law constitutional rights operate in a public law context. They inhabit a sphere defined by other constitutional principles. Accordingly, they offer a unique opportunity for scholars to explore the broader nature of the constitution, as well as offering the chance to analyse these principles through a rights-based lens. Third, common law constitutional rights, by virtue of what they seek to protect and by virtue of the mechanisms they employ, are among the most legislation-resilient concepts the English common law possesses. Accordingly, the study of these rights allows us to explore the boundaries of the principle of Parliamentary Sovereignty, which continues to play an important role, despite - as I argue - having been partially abrogated.

Bringing these two notions - the nuanced constitution and common law constitutional rights - together, this thesis argues that while the word 'nuanced' has positive connotations, suggesting a certain level of care and thoughtfulness, nuance can be problematic in constitutional rights cases. Indeed, as part of the

complexity in the UK constitution arises from the continued adherence to Parliamentary Sovereignty in many cases, the principled and effective protection of what I call liberal democracy-constitutive rights is hampered.

#### **4. The Core of this Model: Five Significant Common Law Constitutional Rights Cases**

The relatively young UK Supreme Court ('the Supreme Court') has produced powerful jurisprudence that recognises the ability and desirability of the common law to be a source for constitutional rights protection. In fact, it was the reasoning in *R (Osborn) v Parole Board* ('*Osborn*')<sup>17</sup> that initially triggered my motivation to write this thesis. The decision captured my attention mainly because of Lord Reed's dictum on the relationship between domestic rights protection and European rights protection. *Osborn* concerned a determinate sentence prisoner who was released on licence but then recalled to custody on the same day due to his failure to arrive at his designated place of residence on time. His solicitor's explanatory representations in support of his release to the Parole Board were not considered. A 'paper panel', an anonymous member of the Board, decided to make no recommendation that he should be released without taking Mr Osborn's representations into account. It was held that the board breached its *common law duty of procedural fairness* to Mr Osborn by failing to offer him an oral hearing, and that the board was accordingly also in breach of article 5(4) of the European Convention on Human Rights ('ECHR/the Convention').

*Osborn* was preceded by the Court of Appeal judgment in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* ('*Guardian News*').<sup>18</sup> This case concerned the prominent UK newspaper's application for access to documents which had been placed before a district judge and referred to in the

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<sup>17</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>18</sup> [2012] EWCA Civ 420, [2013] QB 618.

course of the extradition hearings of two British citizens who were requested by the United States under the Extradition Act 2003. During the proceedings certain documents, including skeleton arguments, affidavits and witness statements had been referred to by counsel, but not read out in detail. Based on *the principle of open justice*, which was considered to be “at the heart of our system of justice and vital to the rule of law”,<sup>19</sup> Toulson LJ ordered for the documents to be released as there was no risk of harm to any other party, or a great burden on the court.<sup>20</sup>

Then, in *Kennedy v The Charity Commission* (*‘Kennedy’*),<sup>21</sup> a journalist had requested the disclosure of documentation on the investigations into the Mariam Appeal by the Charity Commission under the Freedom of Information Act 2000 (*‘FOIA’*). The Charity Commission sought to rely on the absolute exemption contained in section 32(2) of FOIA. The Appellant had claimed that the section must be read down to comply with article 10 ECHR. The Supreme Court, in the lead judgments given by Lord Mance and Lord Toulson, held that this was not an article 10 question and that the relevant legislation, including the Charities Act 1993, should be interpreted in light of “*the common law presumption in favour of openness*”<sup>22</sup> as “the common law is fully capable of protecting sufficiently whatever rights under article 10 Mr Kennedy may have”.<sup>23</sup>

Next came *A v British Broadcasting Corporation* (*‘A v BBC’*),<sup>24</sup> which relied to a large extent on *Guardian News*. The Applicant for judicial review of his deportation order had been allowed to secure his anonymity, due to potential safety risks in

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<sup>19</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420, [2013] QB 618 [1].

<sup>20</sup> *ibid* [87].

<sup>21</sup> [2014] UKSC 20, [2015] AC 455.

<sup>22</sup> *ibid* [47] (emphasis added).

<sup>23</sup> *ibid* [131].

<sup>24</sup> [2014] UKSC 25, [2015] AC 588.

connection with his conviction of sexual offences in his home country, by amending his application by replacing his name and address. Furthermore, the Court had under section 11 of the Contempt of Court Act 1981 prohibited the publication of his name or other identifying details as well as directing that no picture of him should be published or broadcast. The BBC argued that any common law power, which might previously have been exercised in such circumstances, had been superseded by the Convention. Lord Reed, with whom Lady Hale, Lord Wilson, Lord Hughes and Lord Hodge agreed, went down a different path, reasoning that *the common law principle of open justice* could be departed from so as to protect the Applicant's article 3 rights under the Convention. This would also avoid the frustration of the judicial review proceedings, which otherwise would have been "rendered largely pointless".<sup>25</sup>

These four cases initially formed the core of my common law constitutional rights analysis. While this 'quartet' of cases had prompted some academic interest,<sup>26</sup> there was - and to this day is - no comprehensive analysis of common law constitutional rights beyond their relationship with the ECHR. However, this jurisprudence offers insights into the UK constitution that reach far beyond the European/comparative dimension. The following questions therefore ensue: what exactly are common law constitutional rights? What do these rights tell us about

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<sup>25</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588 [73].

<sup>26</sup> Sir Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75(1) *Cambridge Law Journal* 86; Eirik Bjorge, 'Common Law Rights: Balancing Domestic and International Exigencies' (2016) 75(2) *Cambridge Law Journal* 220; Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68(1) *Current Legal Problems* 85; Scott Stephenson, 'The Supreme Court's Renewed Interest in Autochthonous Constitutionalism' [2015] *Public Law* 394; Roger Masterman and Seshana Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] *European Human Rights Law Review* 57; Brian Pillans, 'Another serving of alphabet soup: *A v British Broadcasting Corporation (Scotland)*' (2014) 19(4) *Communications Law* 130.

the nature of the constitution? Are common law constitutional rights a positive development, or do they under deliver? What is the source of the power of judges to enforce these rights? Given the lack of codification, is there a legitimacy issue? Can common law constitutional rights be reconciled with the philosophy traditionally associated with the UK constitution, i.e. political constitutionalism?

My initial sense that this jurisprudence represented something more profound than a mere reconsideration of the relationship between the English common law and the ECHR was borne out by the 2017 Supreme Court judgment in *R (UNISON) v Lord Chancellor* ('UNISON').<sup>27</sup> Contrary to the quartet, *UNISON* attracted wider academic attention, while concomitantly gaining extensive media coverage. This was undoubtedly due - even if only in part - to the unequivocal remedy granted: the Supreme Court unanimously declared the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893 to be void ab initio. The Fees Order had been adopted by the Lord Chancellor in the exercise of his statutory powers under section 42 (1) of the Tribunals, Courts and Enforcement Act 2007. Its stated aims were to partially shift the financial burden from the taxpayer to the actual "users of the service",<sup>28</sup> to deter unmeritorious claims and to promote settlements. Under this regime, court fees totalled between £390 and £1600 per individual claim. *UNISON*'s claim throughout the litigation had been based on effectiveness and discrimination, relying predominantly on European Union law ('EU law') with limited reference to domestic law and judgments by the European Court of Human Rights ('ECtHR'). The Supreme Court found the fees to be unlawful as they violated the constitutional right of access to the courts/justice as well as the rule of law.

*UNISON* is the strongest example of the enforcement of a common law constitutional right not only in terms of the strength and ramifications of its remedy,

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<sup>27</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>28</sup> *ibid* [11].

but also in terms of the terminology used. It is one of the few instances in which the Supreme Court explicitly uses language referring to a 'constitutional right'. Indeed, common law constitutional rights judgments demonstrate a clear lack of linguistic unity, signalling perhaps an uncomfortableness with calling something a right. Rights are interchangeably referred to as principles,<sup>29</sup> privileges,<sup>30</sup> duties,<sup>31</sup> or simply as 'the common law'. The linguistic advancement is but one element that connects *UNISON* to the decision in *R v Lord Chancellor, ex p Witham* ('*Witham*')<sup>32</sup> - a judgment that forms part of the first wave of common law constitutional rights - in which a new understanding of the UK constitution and the role of rights thereunder was alluded to.<sup>33</sup> The reasoning in *Witham* relied heavily on powerful constitutional principles, value driven statutory interpretation and a very prominent role of the English common law in the development of public law.

The final case to be mentioned briefly at this stage is *R (Privacy International) v Investigatory Powers Tribunal and others* ('*Privacy International*').<sup>34</sup> I discuss the Supreme Court judgment, and the judgments of the Divisional Court<sup>35</sup> and the Court of Appeal,<sup>36</sup> extensively in Chapter 4, which is why, at this stage, I only refer

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<sup>29</sup> This is the dominant term in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618). Overall, the term 'principle' is the one most often referred to across all cases.

<sup>30</sup> See for example *Beghal v DPP* [2015] UKSC 49, [2016] AC 88.

<sup>31</sup> As is the case in *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>32</sup> [1998] QB 575 (QB).

<sup>33</sup> *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB) (Sir John Laws) 581C-F, articulating a position subsequently approved of by the Court of Appeal in *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, [2000] 2 WLR 318.

<sup>34</sup> [2019] UKSC 22, [2019] 2 WLR 1219.

<sup>35</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), [2017] 3 All ER 1127.

<sup>36</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868, [2018] 1 WLR 2572.



to the key question put to the courts. This was whether section 67(8) of the Regulation of Investigatory Powers Act 2000 prevents judicial review of a decision of the Investigatory Powers Tribunal. Albeit not strictly speaking a common law constitutional rights case (it concerned the availability of judicial review rather than a substantive right), it is nonetheless an important authority for this thesis for two main reasons. First, it displays the richness and complexity of contemporary constitutional jurisprudence, both in terms of its diversity of judicial opinion and in terms of substance. Accordingly, it is a helpful source for the analysis of the character of the UK constitution. Second, and relatedly, some of the reasoning in *Privacy International* is groundbreaking as it challenges the constitutional status quo by suggesting that the rule of law may require the Judiciary to reject Acts of Parliament.

## **5. Methodology and Structure**

At its core, this research is a close analysis of legal text in the light of an examination and evaluation of different theoretical accounts of the UK constitution. I adopt a combination of doctrinal, conceptual and normative analyses. Extensive case law analysis focusing predominantly on recent Supreme Court jurisprudence provides the foundation upon which concepts are explored and normative claims are developed.

The initial analysis of the 'quartet' and other common law constitutional rights cases indicated that despite a significant amount of shared characteristics no coherent model for common law constitutional rights had been established. This finding and the wider incongruence of this jurisprudence prompted a closer, and broader, study of the workings of the UK constitution. Realising that the leading theoretical accounts - mainly Hart's explanation of the political constitution and

Allan's theory of common law constitutionalism<sup>37</sup> - do not accurately capture judicial practice, an alternative characterisation had to be proposed. This alternative - the nuanced constitution - enabled a more neutral analysis of public law jurisprudence, leading to a more realistic critique.

Chapter 1 introduces the idea of the nuanced constitution by critically engaging with the case law. Next, Chapters 2 to 4 provide an in-depth, primary sources-based exploration of the workings of the nuanced constitution. The chief focus is the phenomenon of common law constitutional rights, together with the judicial treatment of ouster clauses. Read as a whole, these chapters thus provide (i) a description of what constitutes a nuanced constitution through a review of the current state of the jurisprudence, and (ii) an analysis of two key manifestations of the nuanced constitution. Chapter 5 evaluates the ramifications of the findings in Chapters 1-4, elaborating major shortcomings of the nuanced constitution. In particular, it provides a case law-based exploration of (i) the significance of the nuanced constitution's lack of a principled constitutional philosophy, (ii) the principle of legality's ability to simultaneously strengthen and weaken rights protection, and (iii) the English common law's role in the stagnating development of a comprehensive constitutional rights regime. In response to the shortcomings of the nuanced constitution, Chapter 6 offers a more robust framework for constitutional rights protection in the UK. It engages critically with the legal scholarship, suggesting that there are - parallel to the case law - deficiencies in academic public law discourse. It then engages critically with the arguments put forward in defence of Parliamentary Sovereignty, predominantly by reference to the distorting effect of the electoral system and the state of civic political

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<sup>37</sup> HLA Hart, *The Concept of Law* (3<sup>rd</sup> edn, Oxford University Press 2012); TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press 2013). See also Ronald Dworkin, *Law's Empire* (Fontana Press 1986); John Finnis, *Natural Law and Natural Rights* (2<sup>nd</sup> edn, Oxford University Press 2011).

engagement. Finally, to resolve some of the deficiencies articulated throughout this thesis, it develops a template for a more systematic and effective way to protect constitutional rights.

In sum, this thesis (i) highlights and conceptualises the constitutional dynamics of public law reasoning, (ii) challenges commonly held perceptions about what such reasoning represents, (iii) criticises the incoherence and normative deficiencies of recent public law jurisprudence, and (iv) proposes an alternative model for constitutional rights adjudication.

## **6. My Argument Summarised**

### **Chapter 1: The Nuanced Constitution**

In Chapter 1, I argue that it is time to recognise that our constitution cannot be explained by reference to political or common law constitutionalism. Concerning political constitutionalism, the case law shows that judges do not endorse Parliamentary Sovereignty uniformly as the UK's apex constitutional principle. It is indeed *among* the most fundamental constitutional principles, however no recent public law decision endorses it definitively as the *supreme* one. Furthermore, there is ample evidence of value-driven, nuanced interpretation of statutes, which is often - in essence if not in words - independent of Parliamentary intention. Additionally, the judicial entrenchment of constitutional values through the judicial concepts of constitutional statutes and common law constitutional rights signifies that there is some *degree* when it comes to constitutional importance.

Having shown that the case law signals a departure from the idea that Parliament is not subject to legal constraints on its power, I suggest that there are two main factors that have contributed to this development. One is the influence of European legal sources. The enforcement of the latter has led to an accustomisation with

human rights thinking, which has made it more natural for lawyers and judges to look at a legal problem from a rights-based angle. This in turn invites more nuanced judicial reasoning. After considering the potential impact of Brexit on the development of UK public law, I argue that the second factor facilitating the nuanced constitution is the English common law.

In the final section of this chapter, I argue that the nuanced constitution is not the common law constitution. This is evident from the fact that (i) the Supreme Court has abstained from quashing an Act of Parliament, (ii) there is no explicit judicial endorsement of the common law constitution, and (iii) there are many cases in which legislation takes centre-stage and common law legal principles play a minor role, if any role at all. This being the case, the picture emerging is one of significant nuance rather than absolute adherence to one or the other constitutional theory. A public law case will have a combination of elements stemming from political constitutionalism and common law constitutionalism. This observation lays the groundwork for the remainder of this thesis, which critically analyses the consequences of this ambiguous constitutional framework.

## **Chapter 2: A Short History of Common Law Constitutional Rights**

Having argued that the UK constitution is best described as a nuanced constitution, this second chapter is the first of two in which I focus on one manifestation thereof, common law constitutional rights. Specifically, this chapter focuses on the historical development of common law constitutional rights, with an emphasis on famous antecedents and three main contemporary phases, which I refer to as waves. I place these waves into the wider legal and political context of their time, showing that common law constitutional rights have generally been driven by external factors.

First, I show that common law constitutional rights are not an entirely new development. There are several famous cases dating back centuries, whose judicial reasoning relied heavily on the concept of common law principles and rights protecting individuals from interference by the state. These have echoed down the centuries as a source of pride and inspiration. Their legacy is the widely held belief that the English common law is a source of justice and reason, a notion that was revived in the two decades prior to the entering into force of the HRA. This first contemporary wave was reactive and almost defiant, exposing an uncertainty surrounding the doctrine of dualism and an unresolved tension between claims as to the sufficiency of the common law and the apparent lack thereof. The ‘trough’ that followed is roughly represented by the first decade the HRA was in force. During that time, human rights protection under the English common law developed in the shadow of the Convention. Finally, the second - and current - wave, relates to the resurgence of common law constitutional rights, which commenced a few years after the Supreme Court was established. This wave, I suggest, has produced powerful judgments with significant implications for the UK constitution.

### **Chapter 3: The Nature and Characteristics of Common Law Constitutional Rights**

Chapter 2 traced the occurrence of common law constitutional rights throughout English legal history, starting with famous antecedents and culminating in the 2017 Supreme Court judgment in *UNISON*.<sup>38</sup> Having provided the historical overview of this phenomenon, in this third chapter I determine the nature of these rights and their six main characteristics.

I first conceptualise common law constitutional rights by distinguishing them from the concept of civil liberties, also known as residual freedoms. Next, after I

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<sup>38</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

highlight how common law constitutional rights can be both negative and positive in nature, I attempt to devise a model that encapsulates their shared features. I do so by establishing and contrasting the characteristics discernible in *Guardian News*,<sup>39</sup> *Osborn*,<sup>40</sup> *Kennedy*<sup>41</sup> and *A v BBC*<sup>42</sup> and *UNISON*.<sup>43</sup> The six key characteristics emerging are:

- (1) the absence of a clearly discernible foundational or philosophical source of power;
- (2) a wide-ranging understanding of the principle of legality;
- (3) an attempted redefinition of the relationship between the common law and the ECHR, in which the former is accorded primacy;
- (4) a broad conceptualisation of domestic precedent;
- (5) extensive reliance on judicial reasoning from other common law jurisdictions; and
- (6) the use of proportionality review.

First, there is discrepancy as to the enabling power of common law constitutional rights. Some judgments rely on the principle of inherent jurisdiction while others are based on the rule of law. Others still do not mention any foundational source of power at all. Second, while the principle of legality enables - and in many ways strengthens - the protection of common law constitutional rights, it is equally apparent that it does not guarantee their enforcement. Third, I argue that it would be mistaken to view common law constitutional rights as purely domestic - and sufficient - alternatives to the rights protected by the ECHR. Fourth, I show that in

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<sup>39</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618.

<sup>40</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>41</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455.

<sup>42</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588.

<sup>43</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

many of the cases analysed there is no strong precedential basis for the right in question. This, I say, raises important questions as to the nature of common law constitutional rights and their ultimate origin. Fifth, I reason that in the absence of an established constitutional rights framework in this jurisdiction, the courts look to external sources to shape domestic rights as well as to validate their enforcement, while difficult underlying jurisprudential questions are skirted. Finally, out of the six characteristics identified, the most consistent one is the use of proportionality review.

#### **Chapter 4: A Case Study of *Privacy International v Investigatory Powers Tribunal***

This chapter highlights some of the key aspects of the nuanced constitution by taking a closer look at the various stages and outcomes of the *Privacy International* proceedings in which the courts grappled with the question of whether an ouster clause prevented judicial review of a decision of the Investigatory Powers Tribunal. After examining the relevance for public law adjudication of ouster clauses more broadly, I consider the wide range of judicial opinions in these proceedings, arguing that they exemplify the nuanced constitution. Specifically, I argue that the judicial reasoning in this case (i) demonstrates both the political and the legal constitutionalist school of thought, (ii) shows significant disagreement as to which of these two philosophies deserves primary consideration, and (iii) attempts the impossible by trying to reconcile what is in essence common law constitutionalist reasoning with an orthodox framework that is based on the notion of unlimited legislative law-making authority.

#### **Chapter 5: The Shortcomings of the Nuanced Constitution**

This chapter critiques the shortcomings of the UK's nuanced constitution based on an examination of the findings in previous chapters. It argues that the judicial

protection of domestic constitutional rights - despite increasing in strength - remains unsatisfactory. In particular, three characteristics of the nuanced constitution have led to an underdeveloped rights philosophy and practice. First, the nuanced constitution's lack of a paramount constitutional philosophy hampers the development of a strong justificatory basis for common law constitutional rights. Second, the continued role and relevance of Parliamentary Sovereignty - which frames the nuanced constitution - means that while the courts rely increasingly on legal constitutionalist notions in their analysis, ultimately there is an apparently insurmountable barrier. Express statutory wording is still widely regarded as trumping constitutional rights - even those of the most cherished kind. Third, the principled development of a comprehensive rights regime has been hampered by the workings of the English common law, specifically by its affiliation with the past, its historical focus on process rights, and its inclination towards incremental rather than principled reasoning.

Therefore, I argue, while there is a wide range of rights touching upon various aspects of an individual's interest, some rights are more firmly established than others, and some rights typically recognised as being essential in a liberal democracy are either non-existent or there is uncertainty regarding their scope and strength. Furthermore, no matter how deeply engrained a right is, it remains at constant risk of being undermined by clear statutory language. Therefore, it is far from certain that an appropriate remedy will vindicate the breach of a constitutional right.

## **Chapter 6: Striving Towards a More Coherent Framework: A Template for Rights Protection in a Liberal Democracy**

The previous chapters of this thesis portrayed and criticised aspects of the way in which public law adjudication - in particular in constitutional rights cases - works. I highlighted the tension inherent in the nuanced constitution, which is caused by its



adherence to both legal and political constitutionalist notions, and I exposed the fragility and jurisprudential incoherence surrounding common law constitutional rights due to the continued role of Parliamentary Sovereignty. In response to the shortcomings I identified, this final chapter proposes an alternative model for constitutional rights adjudication.

In particular, I argue that scholars ought to engage more critically with questions of political morality. These lie beneath every constitutional principle, and our analyses of the case law are incomplete and disconnected if we do not engage with this dimension. Specifically, we ought to consider whether the claims put forward by constitutional theory are logically sound and realistic. Engaging with these dimensions in relation to political constitutionalism, I argue that we cannot normatively defend Parliamentary Sovereignty; it is based on logically fallible as well as on unrealistic assumptions. Furthermore, as it imposes no legal limits on Parliament's authority, it also endangers some of the values it claims to safeguard, such as equality.

Having rejected institutional legitimacy as a sole justificatory basis for public power, I begin to develop an alternative foundation. Indeed, besides equality, there are other constitutional rights indispensable in a liberal democracy, and that therefore must be protected. I propose an approach to define these, and conclude by defending my alternative model against potential criticism.

## CHAPTER 1

### The Nuanced Constitution

In *R (Miller) v Secretary of State for Exiting the European Union* ('*Miller*'), no less than eight Justices of the Supreme Court reiterated that,

“The United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions”.<sup>44</sup>

Most legal commentators, practitioners and judges would endorse this description, however some of the most fundamental aspects of this characterisation are heavily debated. Indeed, “contestability” has been suggested to be inherent in the nature of the UK constitution.<sup>45</sup>

#### 1. The Need for a Fresh Assessment

Slowly but surely, constitutional lawyers are making the case for modifying or abandoning the dichotomous debate featuring the descriptively inaccurate and normatively undesirable competing schools of thought of common law constitutionalism (a domestic variant of legal constitutionalism)<sup>46</sup> and political constitutionalism. Put briefly, legal constitutionalism advocates a system of limited

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<sup>44</sup> [2017] UKSC 5, [2018] AC 61 [40] (judgment for the majority by Lord Neuberger, then President of the Supreme Court).

<sup>45</sup> Robert B Taylor, 'The contested constitution: an analysis of the competing models of British constitutionalism' [2018] Public Law 500.

<sup>46</sup> I will use these terms synonymously.

government, in which the Judiciary upholds the rule of law by imposing certain standards, such as human rights, on the elected branches of state. Political constitutionalism on the other hand ascribes unlimited legal authority to the Legislature, and views judge-made law and in particular human rights adjudication with suspicion.

Taylor argues that neither “of the competing models provide a complete and accurate picture of the contemporary British constitution”, and that we should instead recognise a model of “complementary constitutionalism”.<sup>47</sup> His observation that “the common law and the political models of constitutionalism seek to reinterpret the existing constitution, and do so by adopting both principled as well as historical perspectives”<sup>48</sup> is an important insight. However, some of his claims are incomplete and, more importantly, Taylor does not offer any normative explanation as to the legitimacy of the constitutional model he puts forward. Murkens offers a more intellectually satisfying account, arguing that the theories of the political as well as the common law constitution focus too heavily on procedure, and that,

“the democratic legitimacy of laws stems from a complex constellation of requirements and conditions that no longer involves popular sovereignty alone, but also basic rights and liberties; not an overriding concern with public order, but an overriding concern with freedom; not just formal participatory rights, but an inclusive process of opinion and will-formation; and not just the negative, individualist and liberal view of freedom as non-interference guaranteed by the

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<sup>47</sup> Robert B Taylor, ‘The contested constitution: an analysis of the competing models of British constitutionalism’ [2018] Public Law 500, 501.

<sup>48</sup> *ibid* 518.

rule of law, but the social and public conception of non-domination in a free, civic and democratic society”.<sup>49</sup>

A fresh assessment of the UK constitution is long overdue. Rather than shoehorning the rich variety of constitutional cases into the narrow frameworks of either of the aforementioned schools of thought, i.e. trying to reconcile judicial practice with the established parameters of common law constitutionalism or political constitutionalism, it is time to recognise that our legal system is irreconcilable with either of these normative positions. Put succinctly, in this first chapter I develop the idea of an alternative reading of the UK’s constitutional dynamics. I term this the nuanced constitution.

More specifically, first, I provide case law based evidence to show that Parliamentary Sovereignty can no longer be viewed - if it ever could - as the overarching, supreme principle in the UK constitution. Second, I outline the key factors that have enabled and facilitated the increasingly nuanced nature of the UK constitution. Finally, I show why the nuanced constitution is not to be equated with the common law constitution.

## **2. The Traditional Description of the UK Constitution**

Parliamentary Sovereignty is the core principle underpinning political constitutionalism.<sup>50</sup> Traditionally, the concept of Parliamentary Sovereignty dominated UK constitutional theory, legitimising public power by ascribing primacy and theoretically unlimited authority to its main representative institution - the

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<sup>49</sup> Jo Eric Khushal Murkens, ‘Democracy as the legitimating condition in the UK Constitution’ (2018) 38(1) *Legal Studies* 42, 58.

<sup>50</sup> KD Ewing, ‘The Resilience of the Political Constitution’ (2013) 14(12) *German Law Journal* 2111, 2118. I will use the two terms synonymously.

Westminster Parliament.<sup>51</sup> The doctrine establishes a hierarchy under which primary legislation is the superior source of legal authority, rendering the validity and effect of all other sources of law conditional upon there being no conflicting Parliamentary intention. The notion of Parliamentary Sovereignty is, as Elliott has put it, “as extravagant as it is simple”.<sup>52</sup> Under the political constitution, Parliament has the unlimited authority to enact, amend and repeal any law save binding their successors (positive dimension) and no other institution or person can override or set aside such law (negative dimension).<sup>53</sup> This is “Dicey’s brilliant evocation of legislative supremacy of, by, and for, the English gentleman”.<sup>54</sup> The only serious limit to political power is that posed by “the possibility of popular resistance”.<sup>55</sup>

Once largely unchallenged, doubt has begun to grow as to whether Parliamentary Sovereignty can indeed accurately describe the workings of the UK constitution in practice, particularly in light of the UK’s membership of the European Union, the UK’s obligations under the ECtHR, devolution, and other domestic

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<sup>51</sup> Hence the synonymous term ‘legislative supremacy’.

<sup>52</sup> Mark Elliot, ‘1000 words, Parliamentary Sovereignty’ (*Public Law For Everyone*, 15 October 2014) <https://publiclawforeveryone.com/2014/10/15/1000-words-parliamentary-sovereignty/> accessed 22 August 2019.

<sup>53</sup> For some, this extends to the international sphere as well; see for example Richard Bellamy who has said that ‘it is the business of the government and Parliament, not the courts, to decide whether or not Britain should abide by its treaty commitments’ in Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010) 287.

<sup>54</sup> Richard Rawlings, ‘Introduction: Sovereignty in Question’ in Richard Rawlings, Peter Layland and Alison L Young, *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 2.

<sup>55</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, MacMillan 1915) 76.

developments.<sup>56</sup> The ‘European pressures’ on the concept of Parliamentary Sovereignty were highlighted when, in 1990, the House of Lords disapplied the Merchant Shipping Act 1995. Applying the latter would have frustrated the exercise of EU law rights - in this case the rights of Spanish fishermen to trawl in UK waters - which, the Court confirmed, enjoyed supremacy over national law.<sup>57</sup> Then, the well-established narrative that Parliament’s power is legally unlimited was questioned directly in a purely domestic context in 2004. In *R (Jackson) v Attorney General* (*‘Jackson’*),<sup>58</sup> several of the Law Lords pondered what were to happen if Parliament legislated the unthinkable: the abolition of judicial review or the ending of the ordinary role of the courts. Stating that this would be unacceptable, Lord Hope suggested - in obiter - that “step, by step, gradually but surely, the English principle of the absolute sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified”.<sup>59</sup>

Both Coke and Blackstone have in their influential writings expressed views that contradict the notion of absolute Parliamentary Sovereignty, which is why the accuracy of the second part of the sentence is questionable. However, I will argue that the first part of Lord Hope’s statement holds true: Parliamentary Sovereignty has been qualified. It is a concept too simple and exclusive to capture the rich

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<sup>56</sup> For an overview of the individual pressures on Parliamentary Sovereignty, see Mark Elliott, ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional and Political Perspective’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019).

<sup>57</sup> A selection of the vast commentary on this decision includes John McEldowney, ‘The *Factortame* Litigation: Sovereignty in Question’ in Satvinder Juss and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Hart Publishing 2017); William Wade, ‘Sovereignty: Revolution or Evolution’ (1996) 112 *Law Quarterly Review* 568; NW Barber, ‘The afterlife of Parliamentary sovereignty’ (2011) 9(1) *International Journal of Constitutional Law* 144.

<sup>58</sup> [2005] UKHL 56, [2006] 1 AC 262.

<sup>59</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [104].

character of the UK constitution. Taking a close look at the constitutional dynamics in this jurisdiction, predominantly by reference to Supreme Court decisions, it can be shown that the UK constitution cannot convincingly be described as one that is entirely political in nature.

### **3. Why the UK Constitution is not Political in Nature**

First, Parliamentary Sovereignty has not been endorsed expressly as the most important and overarching constitutional principle. Second, even if this was the case, in practice there is ample evidence of value-driven judicial interpretation of statutes that results in Parliamentary intention not being the primary - if even a dominant - factor. Third, the recognition of constitutional statutes and common law constitutional rights acknowledges that there is some *nuance* when it comes to constitutional importance, which cannot be explained by reference to the political constitution.

I recognise that much has been said about the potential of the HRA limiting or indeed abolishing the concept of Parliamentary Sovereignty.<sup>60</sup> The Act was deliberately designed to maintain a certain version of the latter,<sup>61</sup> though I would tentatively argue that the mechanisms and resulting dynamics thereunder support my claim that the UK constitution is nuanced in nature.<sup>62</sup> However, while referring

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<sup>60</sup> For a comprehensive overview of this topic see Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009); see also Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009); Adam Tucker, 'Parliamentary Sovereignty and the Ingenuity of the Human Rights Act' (2012) 3(1) *Jurisprudence* 307.

<sup>61</sup> Rights Brought Home: The Human Rights Bill (Cm 3782, 1997) 10.

<sup>62</sup> Particularly under HRA 1998, s 3; see also Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26(1) *Oxford Journal of Legal Studies* 179.

to the HRA intermittently in this chapter, I do not raise it as a freestanding argument in this section. Thus, my overall argument retains its force even if the Government decides to abolish and/or replace the HRA, as has been contemplated by successive governments.<sup>63</sup>

### **Parliamentary Sovereignty is not Uniformly Endorsed as the Supreme Constitutional Principle**

Forsyth recently repeated his long-held view that “Parliament is sovereign”, saying that “this does not flow from an attachment to the doctrine of sovereignty on [his] part” or from “any particular fondness for the doctrine; it flows, in the first place, from the pronouncements of the courts”.<sup>64</sup> In this section, I show that this opinion is in fact not supported by recent case law. Whilst there is ample evidence that Parliamentary Sovereignty is *among* the most fundamental constitutional principles, in none of the leading constitutional cases decided by the Supreme Court do the Justices endorse it as the supreme or ultimate one. I start with the first case Forsyth relies on to make his point. In *Miller*,<sup>65</sup> the case that famously determined that an Act of Parliamentary was needed to trigger Article 50 in the

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<sup>63</sup> The latest development in this context is the Government’s announcement that any legislative changes to the UK’s human rights regime would be put on hold until after Brexit, a statement supported by the Conservatives’ Manifesto for the 2017 General Election <https://s3.eu-west-2.amazonaws.com/conservative-party-manifestos/Forward+Together+-+Our+Plan+for+a+Stronger+Britain+and+a+More+Prosperous....pdf> accessed 12 June 2019.

<sup>64</sup> Christopher Forsyth, ‘Privacy International Symposium – Ouster Clauses and Sovereignty’ (*Administrative Law in the Common Law World Blog*, 21 November 2018) <https://adminlawblog.org/2018/11/21/christopher-forsyth-privacy-international-symposium-ouster-clauses-and-sovereignty/> accessed 17 August 2019.

<sup>65</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.



Brexit process, it was said that Parliamentary Sovereignty is “a fundamental principle of the UK constitution”,<sup>66</sup> and that it is “fundamental to the United Kingdom’s constitutional arrangements”.<sup>67</sup> Similar terminology is employed in other Supreme Court judgments.<sup>68</sup>

I accept that Lord Wilson, twice, calls it “*the* fundamental principle” of the legal framework.<sup>69</sup> I also accept that one can always find individual judgments in which Parliamentary Sovereignty is viewed as the pinnacle of the constitutional order. For example, in the Divisional Court’s judgment in *Miller*, Sales LJ said that,

“the most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme [...] Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen”.<sup>70</sup>

However, this does not undermine my argument, which is that leading constitutional law cases such as *Miller* do not boast unequivocal obiter dicta in support of Parliamentary Sovereignty being the supreme constitutional principle. Indeed, the fact that not all judges, let alone Justices of the Supreme Court, ascribe to it overarching, unmatched legal status, is sufficient to show that there is no

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<sup>66</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 [43] (emphasis added).

<sup>67</sup> *ibid* [67]; see also [274].

<sup>68</sup> See for instance *Belhaj and another v Straw and others* [2017] UKSC 3, [2017] AC 964.

<sup>69</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 [163] (emphasis added).

<sup>70</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2017] 1 All ER 158.

uniform consistent express judicial endorsement of absolute Parliamentary Sovereignty. Furthermore - a point that is often overlooked - we must not underestimate the significance of the context in which remarks such as Lord Wilson's were made. *Miller* concerned the relationship and allocation of power between the Legislature and the Executive. Failing to endorse Parliamentary Sovereignty in this instance would have resulted in a judicial endorsement of the loss of significant rights by individuals at the hands of the Executive. Thus, the case did not in any notable way touch upon the relationship between the Judiciary and Parliament. When academics like Forsyth and Goldsworthy write about Parliamentary Sovereignty, they rely on the principle to argue against what they consider democratic debilitation, i.e. 'judicial activism'. However, *Miller* is not concerned with this dimension. It merely addresses the separation of powers as far as the Legislature and the Executive are concerned. Therefore, even if the judgment *did* entail a unanimous unequivocal commitment to ultimate legislative power, *Miller* would have to be viewed in that light. In other words, context is key. If the courts were to declare that Parliamentary Sovereignty is the supreme principle of the UK constitution in a case like *Miller*, which focuses on the relationship between the political branches of state, this would not allow us to reach conclusions on the constitution more broadly. It would tell us rather little, for example, about the power the courts consider themselves to have to scrutinise primary legislation that is detrimental to human rights.

Indeed, the case law seems to suggest that context plays a bigger role than an individual judge's 'go to' constitutional philosophy. This is evident from the contrast between two of Lords Reed's recent judgments. His judgment in *Miller* focused on the rule of recognition and the absence of legal constraints on the Executive's power. Meanwhile, in his single majority judgment in *UNISON*<sup>71</sup> he quashed the employment tribunal fees, reasoning that the extent of the power conferred on the Executive must be determined by the enabling statutory provision as well as by

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<sup>71</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

“the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles”.<sup>72</sup> It is equally striking that Lord Reed, who gave the single majority judgments in *Osborn*<sup>73</sup> and *A v BBC*,<sup>74</sup> and whom I consider the judicial driving force behind common law rights protection,<sup>75</sup> took a much more Parliament-centric view in *R (Moseley (in substitution of Stirling Deceased)) v London Borough of Haringey* (*‘Moseley’*).<sup>76</sup> In *Moseley*, the Supreme Court found that Haringey Council’s statutory consultation procedure had been unlawful as one of the consultation documents had provided insufficient information on the alternatives available to its preferred policy on council tax. The Court reached the decision unanimously albeit with significant differences in the Justices’ approaches. In sharp contrast to Lord Wilson, Lord Reed reasoned that the Council’s statutory duty to consult was determined by the language of the statute itself, not by individual rights at common law (here the common law right to procedural fairness). This is another example pointing to the nuances inherent in judicial reasoning, the importance of context, and the flexibility and adaptability of constitutional principles.

In light of the development of UK constitutional law, in which the rule of law plays an increasingly central role, it would indeed be very difficult for a judge to accord Parliamentary Sovereignty *complete dominance* over and above all other constitutional principles. *R (Evans) v Her Majesty’s Attorney General*<sup>77</sup> serves as a good example to demonstrate the fundamental importance of other, partially

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<sup>72</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [65].

<sup>73</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>74</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588.

<sup>75</sup> Lord Reed has recently been appointed President of the Supreme Court. Given his strengthened influence, there is no indication that common law constitutional rights jurisprudence is going to recede.

<sup>76</sup> [2014] UKSC 56, [2014] 1 WLR 3947.

<sup>77</sup> [2015] UKSC 21, [2015] AC 1787.

conflicting, constitutional principles. Lord Neuberger (with whom Lord Kerr and Lord Reed agreed) held that the Attorney General did not have a veto power to prevent the publication of Prince Charles' memos to government ministers after a court had ordered their release as this would be contrary to the separation of powers and the rule of law.

### **Value-driven Interpretation of Primary and Secondary Legislation**

The popular conceptual absolutist starting point, which places Parliament at the helm of the constitutional system and renders courts its subordinates, is not reflected in judicial practice. While institutional legitimacy concerns continue to play a central role in public law cases, attention is also increasingly paid to substantive values. UK courts employ reasoning which - sometimes directly, and other times indirectly - recognises that democracy includes the protection of certain individual rights, which are enforced by the courts.

*UNISON*,<sup>78</sup> the strongest example of common law constitutional rights to date, is a good starting point to explore the constitutional richness of statutory interpretation in the 21<sup>st</sup> century. As stated above, Lord Reed reasoned that “the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles”<sup>79</sup> were crucial to determine whether the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013<sup>80</sup> was unlawful. By saying that “the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law”,<sup>81</sup> *UNISON* echoes the jurisprudence on common law constitutional rights that had previously been shaped powerfully by

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<sup>78</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>79</sup> *ibid* [65].

<sup>80</sup> SI 2013/1893.

<sup>81</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [64].

other Supreme Court judgements, notably *Osborn*,<sup>82</sup> *A v BBC*<sup>83</sup> and *Kennedy*.<sup>84</sup> Similarly to those cases, *UNISON* displays an emphasis on the historical foundation of the constitutional right in question. It referenced Magna Carta, influential historical writings such as Sir Coke's seminal *Institutes of the Laws of England*, as well as case law from the first peak of common law constitutional rights in the 1980s and 1990s, which I discuss more extensively in Chapter 2.

As I argue in more detail in Chapters 3 and 6, in many regards *UNISON* represents a "new high-water mark".<sup>85</sup> For example, Lord Reed seems to expand the notion of the concept of legality, the guiding principle for statutory interpretation in public law cases. The principle of legality was defined authoritatively by the House of Lords in *R v Secretary of State for the Home Department, ex p Simms* ('*Simms*'),<sup>86</sup> in which it was held that the prohibition for journalists to visit serving prisoners (with a view to investigate and report whether there had been any miscarriages of justice) was unlawful. The principle of legality avails to the courts the following interpretative mechanism. Fundamental rights cannot be overridden by general or ambiguous words. Accordingly, where express language is lacking, the courts presume that even the most general statutory words were intended to be subject to the basic rights of the individual, and uphold these by interpreting the statute in question accordingly.

*UNISON* goes further than this in that it explores a dimension of the principle of legality the courts do not typically entertain. Citing *R v Secretary of State for the*

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<sup>82</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>83</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588.

<sup>84</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455.

<sup>85</sup> Richard Rawlings, 'The *UNISON* Case: A New High-Water Mark (2018) 29(3) Public Law Review 190.

<sup>86</sup> [2000] 2 AC 115 (HL).

*Home Department, ex p Leech (No.2) ('Leech')*<sup>87</sup> and *R (Daly) v Secretary of State for the Home Department ('Daly')*,<sup>88</sup> Lord Reed said that “even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation”.<sup>89</sup> This could be read to suggest that even in the face of *explicit* statutory constitutional rights curtailment,<sup>90</sup> i.e. even if a primary statute were to acknowledge openly its abrogating effect on a particular right, such a statute would still be read down to secure the right in question. This is only one step away from suggesting that no statute could ever oust judicial review, a notion I explore in later chapters.

Two other Supreme Court cases that point towards (some would say *creative*) independent value-driven statutory interpretation are worth mentioning at this stage. Neither of them would typically be categorised as a constitutional law case. However, it would be incomplete to analyse the faithfulness in judicial practice to Parliamentary intent - and, by extension, the nature of the UK constitution - solely by reference to cases such as *Miller* and *UNISON*. Other, more subtle cases have contributed to the shaping of the contemporary relationship between the different branches of government and the relationship between individuals and the state.

One such case is *Armes v Nottinghamshire CC ('Armes')*,<sup>91</sup> in which the Supreme Court held that local authorities are vicariously liable for torts committed by foster parents against a child whom the authority has placed in their care. The Appellant, Natasha Armes, had been committed into the care of Nottinghamshire County

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<sup>87</sup> [1994] QB 198, [1993] 3 WLR 1125.

<sup>88</sup> [2001] UKHL 26, [2001] 2 AC 532.

<sup>89</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [88].

<sup>90</sup> Compare Jason Varuhas who distinguishes between what he calls the “augmented principle of legality” and the “proactive principle of legality” in ‘Conceptualising the Principle(s) of Legality’ (2018) 29(3) Public Law Review 196.

<sup>91</sup> [2017] UKSC 60, [2018] AC 355.

Council at the age of 7 by a care order made under section 1 of the Children and Young Persons Act 1969. She was subsequently put into two foster families and suffered emotional, physical and sexual abuse at the hands of both families. Applying the requirements of the doctrine of vicarious liability established in *Cox v Ministry of Justice*,<sup>92</sup> Lord Reed reasoned that vicarious liability can be imposed beyond traditional employer/employee relationships. This was the case where the tortfeasor was acting as an “integral part” of somebody else’s business, and for the latter’s benefit.

Lord Reed disagreed with the Court of Appeal, which had dismissed the claim on the basis that the relevant activity the foster parents were engaged in was providing daily family life. As the council did not at any stage provide daily family life, the Court of Appeal had reasoned, the activity could not be characterised as an integral part of the business of the council for the operation of its benefit. Adopting the wider alternative, Lord Reed interpreted the statutory framework in a way that imposed liability on a public body, and allowed Ms Armes to successfully sue the council, which was in a financial position to satisfy an award of damages. Thus, in *Armes*, the notions of justice, fairness and reasonableness, inherent in the common law concept of vicarious liability, influenced statutory interpretation in such a way that it led to the recognition of positive duties vested in the state for the protection of those within its jurisdiction. Accordingly, the case demonstrates how public power and obligations can be (re)defined in a field populated by both statute and the common law.

Meanwhile, in *Dover DC v Campaign to Protect Rural England Kent* (*‘Dover’*)<sup>93</sup> the Supreme Court said that if the case had not been determined under the Town and County Planning (Environmental Impact Assessment) Regulations 2011, the imposition of a common law duty to provide reasons for the grant of the planning

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<sup>92</sup> [2016] UKSC 10, [2016] AC 660.

<sup>93</sup> [2017] UKSC 79, [2018] 1 WLR 108.

permission in question would have been justified. Campaign to Protect Rural England Kent had sought judicial review of Dover District Council's grant of a planning permission that did not include a statement of the main reasons and considerations on which the decision had been based. The fact that planning law was "a creature of statute" was no barrier to this imposition as "the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law".<sup>94</sup> The common law, in turn, was said to entail the concept of fairness, which requires giving reasons to allow effective supervision by the courts. Specifically, Lord Carnwath said that fairness was double-edged: it imposes a duty on public authorities to give reasons for an administrative decision and enables individuals affected to bring proceedings to challenge the legality of such decisions. Lord Carnwath made these obiter dicta in acknowledgment of the fact that primary legislation was silent on the issue *and* that there had in fact been an abrogation of the specific duty to give reasons for the grant of permission in 2013. Thus, *Dover* joins the other cases highlighted in this section that point to judicial practice which enforces constitutional rights and principles through value-driven reasoning. Beneath the surface of these cases, we can detect notions of substantive fairness, which may play a bigger role than the statutory wording.

### **The Recognition of Constitutional Statutes and Common Law Constitutional Rights**

The political constitution presumes the legitimacy of majoritarian decision-making.<sup>95</sup> All primary legislation is passed by a simple majority, and all laws can be abolished through the same mechanism. Thus, every Act of Parliament is of

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<sup>94</sup> *Dover DC v Campaign to Protect Rural England Kent* [2017] UKSC 79, [2018] 1 WLR 108 [54].

<sup>95</sup> Jo Eric Khushal Murkens, 'Democracy as the legitimating condition in the UK Constitution' (2018) 38(1) Legal Studies 42.



equal value, meaning there can be no entrenchment. The abandonment of this long-standing assumption, which is implicit in the recognition of the concept of constitutional statutes, is further evidence of a more gradual, nuanced constitution.<sup>96</sup>

A constitutional statute is defined as “a statute at least a part of which (1) creates or regulates a state institution and (2) is among the most important elements of our government arrangements, in terms of (a) the influence it has on what state institutions can and may do, given our other governing norms, and (b) the influence it has on what state institutions can and may do through the difference it makes to our other norms. Put simply, a constitutional statute is a statute that is about state institutions and which substantially influences, directly or indirectly, what those institutions can and may do”.<sup>97</sup> The concept of constitutional statutes has most recently been confirmed in *Miller*,<sup>98</sup> in which the Supreme Court said that the European Communities Act 1972 had constitutional character, echoing Laws LJ’s analysis in *Thoburn v Sunderland City Council*.<sup>99</sup> Ahmed and Perry show that constitutional statutes are given special treatment - compared to ordinary statutes - in two ways: they are protected from implied repeal, and if they are more general than pre-existing statutes, absent clear words, they should not be circumvented

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<sup>96</sup> In the leading academic paper on the subject, the judicial recognition of constitutional statutes was referred to as “the death of an orthodoxy”: Farrah Ahmed and Adam Perry, ‘Constitutional Statutes’ (2017) 37(2) Oxford Journal of Legal Studies 461, 461.

<sup>97</sup> *ibid* 471.

<sup>98</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

<sup>99</sup> [2002] EWHC 195 (Admin), [2003] QB 151. The latest Supreme Court case dealing with constitutional statutes is *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

by a conflicting specific provision in a non-constitutional statute.<sup>100</sup> This has implications for the constitutional system. Constitutional statutes are “systematically set apart and above the non-constitutional”<sup>101</sup> and, importantly, accorded higher value, thereby breaking with long-accepted ‘constitutional truths’.

As I argue in further detail in later chapters, the judicial recognition and enforcement of common law constitutional rights, also - in theory and practice - qualifies the notion of unlimited law-making power. Like constitutional statutes, they introduce an element of hierarchy into constitutional analyses, focusing on values that are so fundamental that special measures are required for them to be overridden. Indeed, there is even authority to suggest that they could eventually be the basis for the courts not to accept a piece of primary legislation. In *Moohan v Lord Advocate*, (*Moohan*)<sup>102</sup> the Applicants argued that not including prisoners in the franchise for the Scottish independence referendum was contrary to the ECHR or the common law. Having concluded that – at present – neither the ECHR nor domestic law extended the right to vote to referenda, the Supreme Court stated in obiter dicta that it could,

“not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by

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<sup>100</sup> Farrah Ahmed and Adam Perry, ‘Constitutional Statutes’ (2017) 37(2) Oxford Journal of Legal Studies 461, 464 citing *R (Governors of Brynmawr Foundational School) v The Welsh Ministers (Brynmawr)* [2011] EWHC 519 (Admin), [2011] 3 WLUK 306 (Sir Beatson J).

<sup>101</sup> Farrah Ahmed and Adam Perry, ‘Constitutional Statutes’ (2017) 37(2) Oxford Journal of Legal Studies 461, 464; see also Mark Elliott, ‘Constitutional Legislation, European Union Law and the Nature of the United Kingdom’s Contemporary Constitution’ (2014) 10(3) European Constitutional Law Review 379.

<sup>102</sup> [2014] UKSC 67, [2015] AC 901.

principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful”.<sup>103</sup>

As with common law constitutional rights, judges have largely avoided the justificatory question concerning constitutional statutes. In other words, no explanation is given as to why either of them is different from ‘ordinary’ law and legal principles and, perhaps more importantly, why they deserve special treatment. In the context of constitutional statutes, such special treatment is evident in the doctrine of modified implied repeal and their superiority over ordinary statutes. In the context of common law constitutional rights, it is evident in the protection the latter offer against ‘unjust’ secondary legislation as well as through the highly context-sensitive and purposive interpretation of Acts of Parliament. Ahmed and Perry justify the higher value accorded to constitutional statutes by reference to legislative intent. This reasoning, albeit thorough and well put, strikes me as an example of the type of analytical shoehorning we often see in public law scholarship, and which we ought to avoid. It seems more accurate and realistic to suggest that, as with common law constitutional rights, judges are ‘entrenching’ law they deem, for one reason or another, more normatively important than others, irrespective of Parliament’s view on the matter.

#### **4. Enabling Factors**

I conclude from the last three sub-sections of this chapter that judicial adherence to political constitutionalism is not absolute in constitutional practice. This section outlines how the partial departure from Parliamentary Sovereignty is facilitated by

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<sup>103</sup> *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901 [35] (Lord Hodge). For similar reasoning as to the limits of a common law right in the context of the right to a fair trial and the right to trial by jury see the recently decided *In the matter of an application by Hutchings’ Application for Judicial Review* [2019] UKSC 26, [2019] 6 WLUK 29, in particular [55].

what I call *enabling factors*. These factors are not exhaustive. Many other factors, grounded in legal history, legal training, social dynamics and our political system contribute to the way in which the UK's uncodified constitution functions. Indeed, as the next chapter shows, common law constitutional rights, which are a manifestation of the nuanced constitution, have been influenced by different factors at different times. Here, two key facilitators of the nuanced constitution, the influence of European law - which includes EU law and ECHR law - and the properties of the English common law are focused on.

### **The Influence of European Law**

As I show in Chapters 2 and 3, European law has had a strong influence on legal thinking in this jurisdiction.<sup>104</sup> One example is the way in which the principle of proportionality has influenced the development of the standard of review in some public law cases. Specifically, common law constitutional rights are, post-*Kennedy*,<sup>105</sup> enforced by reference to proportionality review. I subscribe to the view supported in *Kennedy* that the two tests are not in their essence very different from each other and that any divergence is one of degree rather than kind. However, one of the differences in the application of these two tests is that proportionality review allows the courts to *openly* balance competing interests, whereas the traditional common law review mechanisms strike this balance more covertly. The way in which proportionality review operates as a methodological tool that requires an open weighing of the constitutional rights and the justification for their limitation has no doubt had an impact on the collective judicial mindset in this jurisdiction.

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<sup>104</sup> Compare Robin Cooke, 'The Road Ahead for the Common Law' (2004) 53(2) *International and Comparative Law Quarterly* 273, who says that the English common law is becoming 'less English'.

<sup>105</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455.

More broadly, although we cannot definitively measure the extent to which it has influenced legal reasoning in domestic adjudication, it does strike me as sensible to suggest that the accustomisation with human rights thinking through the engagement with European human rights jurisprudence has led to a partial change in legal reasoning. It has become more natural for lawyers and judges to look at a legal problem from a rights-based angle to the extent that one could say English administrative law “has undergone a ‘rights’-based ‘expansion’”<sup>106</sup> because of, among other factors, the passing of the HRA. Indeed, under the stimulus of the latter, “the courts have become increasingly conscious of the extent to which the common law reflects fundamental values”.<sup>107</sup>

As I explain further in Chapter 2, this comparing and contrasting between European and domestic legal sources has triggered a judicial reassertion of the virtue and strength of the English common law in some judgments. Thus, as previously stated, in *UNISON*, Lord Reed stressed the point that “the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law”.<sup>108</sup> In *A v BBC*, Lord Reed identified the roots of the constitutional principle of open justice as being old enough to have been covered by “the constitutional legislation enacted following the accession of William and Mary” in the Court of Session Act 1693.<sup>109</sup>

Meanwhile, in other cases the Supreme Court refused to adapt the common law in view of the stronger rights protection offered by the ECHR. *Commissioner of*

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<sup>106</sup> Jason NE Varuhas, ‘The Reformation of English Administrative Law? ‘Rights’, Rhetoric and Reality’ (2013) 72(2) Cambridge Law Journal 369.

<sup>107</sup> *Montgomery v Lankashire Health Board* [2015] UKSC 11, [2015] AC 1430 [80] (Lord Kerr and Lord Reed).

<sup>108</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [64].

<sup>109</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588 [24].

*Police of the Metropolis v DSD and another* ('DSD')<sup>110</sup> saw two victims of sexual offences bring proceedings against the police, alleging failure to conduct effective investigations into these crimes after they had raised them with the authorities. The Supreme Court held that article 3 ECHR imposes a positive obligation on states to investigate effectively reported crimes perpetrated by private individuals, and that this obligation had been breached. Reasoning that the bases of liability - the common law and the ECHR - are different, Lord Kerr said that the two regimes should not be aligned. In other words, in *DSD*,<sup>111</sup> the non-convergence of the two legal sources in question allowed the Supreme Court to impose a positive obligation on the police even though no liability could be established under English tort law. The 'weaknesses' of the common law from a rights perspective presented no hindrance to the ultimate protection of the right in question. Thus, even in cases where the common law is not bolstered through the direct contrast with the European-based regime under the HRA, rights awareness is further shaped, and rights-based thinking is rehearsed. The rights under the Convention being predominantly leveraged against the state,<sup>112</sup> and there being a statutory duty to read legislation as far as possible compatibly with the rights protected by the HRA,<sup>113</sup> the courts are incentivised to take a nuanced approach to interpreting statutes. This has spilled over into common law constitutional rights case law and domestic jurisprudence more broadly.

Further, in the EU law context, one can see how the direct comparison between protection offered by the former might trigger an increasing willingness to enforce rights lingering somewhat undefined in some mysterious layer of the common law.

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<sup>110</sup> [2018] UKSC 11, [2019] AC 196.

<sup>111</sup> *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11, [2019] AC 196.

<sup>112</sup> On horizontal effect see Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) *Modern Law Review* 878.

<sup>113</sup> HRA, s 3.

In *Dover*, the planning case mentioned above, the Supreme Court made it clear that EU law requires a local planning authority to include in certain decisions “(i) the content of the decision and any conditions attached to it, (ii) the main reasons and considerations on which the decision is based including, if relevant, information about the participation of the public, (iii) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development, and (iv) information regarding the right to challenge the validity of the decision and the procedures for doing so”.<sup>114</sup> As the Supreme Court noted, these requirements make sense. Concerns about the supposed burden on a planning authority were rightly considered not persuasive because one cannot reasonably argue that a decision does not have to be *taken* on rational grounds. The duty to *disclose* those grounds is therefore merely a matter of articulation, which is not burdensome. The mirror held up by the significant, and sensible protection offered by EU law provided a strong incentive to develop the common law accordingly.

### *What About Brexit?*

Following what some have referred to as “the Brexit Shock”,<sup>115</sup> at the time of writing the UK is expected to leave the European Union on 31 October 2019. This is against the background of the UK having been part of a higher legal order since the 1970s. During that time, EU law took - and until the UK’s actual departure date continues to take - precedence over domestic law. In doing so, EU law has shaped domestic law considerably, predominantly in the areas where the European Union

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<sup>114</sup> *Dover DC v Campaign to Protect Rural England Kent* [2017] UKSC 79, [2018] 1 WLR 108 [32].

<sup>115</sup> Andrew Blick, *Stretching the Constitution: The Brexit Shock in Historic Perspective* (Hart Publishing 2019).

has exclusive competence,<sup>116</sup> but also beyond these.<sup>117</sup> Apart from the influence this legal system has had on the substantive level, it has also placed a layer of oversight and control over successive UK governments and Parliaments. For, as the 'higher legal order' suggests, it was impossible for the UK to pass legislation or act otherwise in breach of the EU treaties and other legally binding rules without the serious possibility of facing enforcement action accompanied by potential financial sanctions.<sup>118</sup> It is therefore no exaggeration to say that the European Communities Act 1972, the Act by virtue of which the UK became a member of the European Union, then the European Economic Community, "provided for a new constitutional process for making law in the United Kingdom".<sup>119</sup>

Subject to any agreement to the contrary, this supranational oversight will cease to exist once the UK leaves the European Union, thereby naturally vesting more power, predominantly by removing constraints, in the nation state. At present, what the long-term relationship between the European Union and the UK will entail is unclear. The Brexit withdrawal agreement ('the Withdrawal Agreement'),<sup>120</sup> which has the support of the leaders of the 27 remaining member states but has yet to

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<sup>116</sup> These are listed in article 3 of the Treaty on the Functioning of the European Union.

<sup>117</sup> For example, employment law and environmental law have been heavily influenced by EU law.

<sup>118</sup> For a holistic account of the various enforcement mechanisms see András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).

<sup>119</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 [62] (Lord Neuberger, Lady Hale, Lord Mance, Lord Clarke, Lord Wilson, Lord Sumption, Lord Kerr, Lord Hodge).

<sup>120</sup> The Draft Agreement on the Withdrawal of the United Kingdom from the European Union.



be approved by the UK Parliament, which may or may not happen in the near future,<sup>121</sup> merely sets out the terms of leaving the European Union.

Arguably, the most important provisions of the Withdrawal Agreement in the present context are those determining how EU law ceases to apply at the end of the envisaged transition period. Concisely, whereas some political and judicial oversight is envisaged to continue, there are individual cut-off points for such continued jurisdiction. In other words, as per the Withdrawal Agreement, it will eventually end. For example, article 89 of the Withdrawal Agreement states that the European Court of Justice ('CJEU') will have jurisdiction for cases referred from UK courts during the transition period, currently envisaged to be in place for two years. Thereafter, preliminary references can only be sent for a limited number of years and only in relation to certain issues, such as the protocols on Northern Ireland. Similarly, enforcement action by the European Commission can only be commenced up to four years after the end of the transition period provided the alleged failure to comply with EU law occurred within the transition period itself. That being said, given there is currently no end date to the backstop relating to Northern Ireland (a feature which the newly elected Prime Minister Boris Johnson is keen to eradicate) and as the UK lacks the ability to terminate it unilaterally, some European Union laws - predominantly on trade and the regulation of goods, but also on the environment and competition - may theoretically continue to apply for an indefinite time.

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<sup>121</sup> At the time of writing, it had been rejected by Parliament for a third time on 29 March 2019 (by 344 votes to 286). While the UK Parliament appears to be in deadlock over this issue, the EU has consistently stated that any future withdrawal would have to be on the terms of the Withdrawal Agreement, even in case of a new government and in the case of a General Election which is why my arguments are based on the assumption that, if we do leave, the terms negotiated thereunder are likely to be determinative.

Thus, the currently envisaged legal relationship between the UK and the European Union suggests that it may well be the case that within a few years, the UK will no longer be subject to the jurisdiction of the European Court of Justice. Further, and most notably from a rights perspective, the EU Charter of Fundamental Rights ('the Charter') is not incorporated into UK Law under the European Union (Withdrawal) Act 2018.<sup>122</sup> This is significant not merely because of the rights that will be lost, some of which extend beyond the protection offered by the ECHR. The other key loss is the remedial strength of the Charter. Given its EU law character, UK courts have the power to disapply conflicting domestic legislation. In comparison, under the ECHR/HRA regime, the weaker remedy of a declaration of incompatibility is the strongest measure a national court can take.

Considering the above and other factors, it is safe to say that - even in the absence of a definitive framework for withdrawing from the European Union - Brexit is likely to lead to an erosion of existing human rights standards, both in terms of substance and in terms of remedies. Many areas of law will be affected by this. For example, "Brexit creates a risk that important EU legal standards that help to protect rights in areas such as personal privacy, workers' rights and non-discrimination will be diluted, amended or even repealed over time".<sup>123</sup> While some other legal mechanisms and avenues, such as the ECtHR following the European Court of Justice's lead, may partially compensate for the losses anticipated, they cannot

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<sup>122</sup> This Act governs the bringing of the *acquis* of EU Law into UK law. For an overview of the main transposition mechanisms under this Act and its constitutional implications, see Paul Craig, 'Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018' (2019) 82(2) *Modern Law Review* 319.

<sup>123</sup> Colm O'Coinneide, 'Brexit: The International Legal Implications' (Paper No. 16, 2018) [https://www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.16\\_0.pdf](https://www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.16_0.pdf) accessed 17 August 2019, 1.

replace the existing level of protection.<sup>124</sup> Indeed, the gravity of the potential loss lies largely in the combination of the loss of substantive protection and the loss of the system built around it, i.e. “the extra layer of security currently provided by the supremacy and direct effect of EU law”.<sup>125</sup>

In terms of the likely implications for the nuanced constitution, the UK is highly likely to see more power vested in Parliament and, independently as well as by extension, the Executive. While decades of European Union legal influence and the associated effects on domestic substantive law and judicial thinking and reasoning will not be erased overnight, the trajectory is pointing towards lower legal protection in many areas, in particular as far as rights are concerned. Once the UK leaves the EU, a high degree of supranational oversight and agenda-setting will fall away, leading overall to stronger executive power and weaker courts. That being said, the courts are likely to find ways to counter-act the probable erosion of legal standards to some extent. One way of doing this is by extending the use as well as the remedial rigour of common law constitutional rights. Another is to take a more proactive stance under the HRA.

The changes likely to be triggered by Brexit, albeit fundamental, will not change the nature of the nuanced constitution. We will continue to see a context sensitive approach to legal reasoning, particularly at the Supreme Court level. With or without the safeguards provided by the European Union, the courts are likely to continue to designate - and avoid the transgression of - certain boundaries. At the same time, they are unlikely, in the absence of the adoption of a written

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<sup>124</sup> For a holistic analysis on the implications of losing the Charter see Tobias Lock, ‘Human rights law in the UK after Brexit’ [2017] Public Law (Brexit Special Extra Issue) 117.

<sup>125</sup> Colm O’Cinneide, ‘Brexit: The International Legal Implications’ (Paper No. 16, 2018) [https://www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.16\\_0.pdf](https://www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.16_0.pdf) accessed 17 August 2019, 3.

constitution, to move fully towards a legal constitution along the lines of the one advocated for in Chapter 6. Accordingly, my assessment of the shortcomings of the nuanced constitution in Chapter 5 is apt to remain valid even after Brexit. Indeed, some of the criticism I advance will be more potent should the safeguards outlined in this section fall away after the UK's departure.

### **The Properties of the English Common Law**

Partially, the qualification in some cases of the concept of Parliamentary Sovereignty has been enabled by the way in which the English common law works. Indeed, it is the combined effect of the partial 'Europeanisation' of UK law and the common law's inbuilt qualities, which has made the UK constitution increasingly nuanced.

As I repeat in Chapter 5, the English common law<sup>126</sup> approaches statutes in much the same way as it approaches other common law rules: on a case by case basis, guided by long established principles and precedent. Legal principles are explored on the basis of factual patterns, which are compared and contrasted, and previous interpretations pitted against each other in the court room. The result is a constant process of both development and refinement. Most cases balance the two parameters of legal certainty, which is achieved, for example, by interpreting statutory language consistently, and some notion of *justice* or *fairness*, which is achieved through, for example, the application of substantive, value-driven legal principles and mechanisms such as reasonableness review. Summarised by

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<sup>126</sup> Originally, the common law was not - strictly speaking - English but 'a species of continental feudal law developed into an English system by kings and justices of continental extraction', see Raoul Charles Van Caenegem, *The Birth of the English Common Law* (Cambridge University Press 1988) 110.

Pound's "the law must be stable, but it cannot stand still",<sup>127</sup> the hallmark of our legal system is,

"its capacity to allow for change and innovation in an overall process that emphasizes the importance of continuity and stability. Indeed, the legal community insists that a large part of adjudicative activity involves reliance on the legal past, whether by way of substantive results or argumentative consistency, to resolve present problems and to influence future results".<sup>128</sup>

Within this approach to legal reasoning, several specific characteristics can be made out that have cemented legal principles in public law adjudication. First, one traditional aspect of the common law that has helped shape a more nuanced constitution is its *gap-filling character*. *Dover*, which recognised this quality specifically, is a case that allows us an insight into how this *gap-filling* function influences nuanced statutory interpretation. As I stated earlier, the legislation in question was silent on whether the council was under a duty to disclose reasons for the granting of a planning permission. The common law, Lord Carnwath said, can supplement statutory rules. In making this statement, he relied on the fact that the explanatory memorandum accompanying the abrogation of the previous express duty stated that this (abrogation) should not "detract from the general principle of transparency".<sup>129</sup> By filling the gaps, common law principles are developed and reinforced over time.

Second, there is the justice/fairness component, which, for example, influences common law constitutional rights significantly. Considerations of justice and

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<sup>127</sup> Roscoe Pound, *Interpretations of Legal History* (Cambridge University Press 1967) 1.

<sup>128</sup> Allan C Hutchinson, *Evolution and the Common Law* (Cambridge University Press 2005) 1.

<sup>129</sup> *Dover DC v Campaign to Protect Rural England Kent* [2017] UKSC 79, [2018] 1 WLR 108 [56].

fairness also shape public law adjudication more widely as is evidenced by Lord Carnwath's opinion in *Dover*, where he said, relying on *R v Secretary of State for the Home Department, ex p Doody* ('Doody'),<sup>130</sup> that the proper interpretation of the statute is underpinned by the principle of fairness, and specifically "fairness as between the state and an individual citizen".<sup>131</sup> He continued to say that a further common law principle was in play, namely the common law principle "that justice should not only be done, but also be seen to be done".<sup>132</sup> This makes *Dover* a primary example of how value-driven common law principles and rights cut across different areas of (public) law to shape the constitutional atmosphere within which individual cases operate.

Meanwhile, *Armes*<sup>133</sup> demonstrates how fairness can - albeit implicitly - influence statutory interpretation through the development of the law on vicarious liability. In this case, Lord Reed moved away from a control-centric definition, traditionally a key element of employer/employee relationships. He suggested that vicarious liability should be imposed where this is "fair, just and reasonable", which will usually be the case where the "five incidents of the relationship between employer and employee which had been identified by Lord Phillips in the *Christian Brothers*"<sup>134</sup> are present.<sup>135</sup> As public bodies who are responsible for decision-making in relation to children may find it "advantageous to place them in foster

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<sup>130</sup> [1994] 1 AC 531 (HL).

<sup>131</sup> *Dover DC v Campaign to Protect Rural England Kent* [2017] UKSC 79, [2018] 1 WLR 108 [54]-[55].

<sup>132</sup> *ibid* [55]. He then referred to *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455, one of the main common law constitutional rights authorities discussed throughout this thesis.

<sup>133</sup> *Armes v Nottinghamshire CC* [2017] UKSC 60, [2018] AC 355.

<sup>134</sup> *Catholic Child Welfare Society & Ors v Various claimants* [2012] UKSC 56, [2013] 2 AC 1.

<sup>135</sup> *Armes v Nottinghamshire CC* [2017] UKSC 60, [2018] AC 355 [55].

care notwithstanding the inherent risk that some children may be abused, it may be considered *fair* that they should compensate the unfortunate children for whom that risk materialises, particularly bearing in mind that the children are under the protection of the local authority and have no control over the decision regarding their placement”.<sup>136</sup> The normative character of the statutory interpretation in *Armes* is further supported by Lord Reed’s powerful dismissal of the argument that holding the council liable would open the floodgates, and that the imposition of vicarious liability would have major financial consequences. If this were the case, Lord Reed reasoned, this would mean that there had been such a widespread problem of child abuse by foster parents that there would indeed be “every reason why the law should expose how this has occurred”.<sup>137</sup>

It is unsurprising that, where a legal system is principally made up of two legal sources, judge-made law and statutory law, the workings and principles of one legal source will influence the other. Under the nuanced constitution, statutory law alters the common law, and the common law shapes the way in which statutory law is interpreted. For example, rights protected by the common law will be enforced through the constitutional principle of legality when interpreting a statute which risks abrogating those rights. Equally, secondary legislation and other statutory instruments can be quashed if they violate aspects of the rule of law.<sup>138</sup> In turn, statutes can restate and replace parts of common law.<sup>139</sup>

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<sup>136</sup> *Armes v Nottinghamshire CC* [2017] UKSC 60, [2018] AC 355 [61] (emphasis added).

<sup>137</sup> *ibid* [69].

<sup>138</sup> As was the case in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>139</sup> For example, the Companies Act 2006 did this for directors’ duties.

## 5. Why is the Nuanced Constitution not the Common Law Constitution?

This chapter has been chiefly concerned with substantiating the argument that the UK constitution cannot be characterised accurately as reflecting political constitutionalism. Indeed, constitutional practice regularly demonstrates a context sensitive, value-driven approach to legal reasoning in which legislative intent is but one factor. Judges interpret and apply principles such as Parliamentary Sovereignty by taking into account the statutory framework, the importance of any right or interest in question, and the extent to which precedent supports and legitimises the proposed outcome of a case.

However, it equally needs to be acknowledged that the Supreme Court has abstained from quashing an Act of Parliament. Furthermore, there is no explicitly judicial endorsement of the common law constitution. Finally, in many cases, law enacted by Parliament takes centre-stage, and common law legal principles play a minor role – if any role at all. Indeed, we must acknowledge that UK judges regularly hand down judgments in which the statutory framework prevails over individual rights despite possible avenues to protect the latter.

One example of this practice is the decision in *R (Nicklinson) v Ministry of Justice* ('*Nicklinson*').<sup>140</sup> The case concerned terminally ill individuals challenging the domestic criminalisation of assisted suicide under the 1961 Suicide Act on the basis of articles 2 and 8 ECHR. The Supreme Court was extremely divided on what the right outcome should be. Among the nine Justices, five said that they had - in principle - authority to issue a declaration under section 4 HRA that section 2 of the Suicide Act 1961 was incompatible with article 8 ECHR, which protects the right to private life. However, Lord Neuberger, Lord Wilson and Lord Mance held that the ban was proportionate; only Lady Hale and Lord Kerr reasoned that a declaration should be issued in this case. By deciding not to issue a declaration of

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<sup>140</sup> [2014] UKSC 38, [2015] AC 657.



incompatibility under the HRA, the majority gave Parliament the opportunity to consider legislating to allow individuals who are not physically able to commit suicide to be assisted in dying.

Thus, the Court limited its own function to be “law-applying and conflict-resolving”.<sup>141</sup> No common law right was enforced despite Lord Neuberger’s acknowledgement that the courts had in the past “been ready both to assume responsibility for developing the law on what are literally life and death issues, and then to shoulder responsibility for implementing the law as so developed”.<sup>142</sup> Indeed, as Murkens points out, it is remarkable that Lord Neuberger first “lays the groundwork for a momentous decision” before then concluding that it would be “institutionally inappropriate” to issue a declaration of incompatibility.<sup>143</sup> Specifically, Lord Neuberger pointed out “the gravity of the interference with the applicant’s Article 8 ECHR rights [...] the hypocrisy of official attitudes towards assisted suicide [...] the court’s similar approach under the common law” and that there was no compelling reason for the Supreme Court ceding its jurisdiction to the legislature.<sup>144</sup> Yet, in the end, institutional legitimacy concerns determined the outcome of this case.<sup>145</sup>

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<sup>141</sup> Jo Eric K Murkens, ‘Judicious Review: The Constitutional Practice of the UK Supreme Court’ (2018) 77(2) Cambridge Law Journal 349, 370.

<sup>142</sup> *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 [98].

<sup>143</sup> Jo Eric K Murkens, ‘Judicious Review: The Constitutional Practice of the UK Supreme Court’ (2018) 77(2) Cambridge Law Journal 349, 372.

<sup>144</sup> *ibid.*

<sup>145</sup> For a case study that criticises the judgment’s effect on domestic human rights protection, see Elizabeth Wicks, ‘The Supreme Court Judgment in Nicklinson: One Step Forward on Assisted Dying; Two Steps Back on Human Rights’ (2015) 23(1) Medical Law Review 144.

Second, in *Beghal*,<sup>146</sup> which is discussed again in later chapters, the Supreme Court had to decide whether the half an hour interrogation of Mrs Beghal at the East Midlands Airport under Schedule 7 of the Terrorism Act 2000 was in breach of her human rights. Specifically, the question was whether her right to liberty, her right to privacy and family life, and the privilege against self-incrimination had been unduly infringed. The statutory purpose of her questioning was to determine whether she appeared to be involved in the commission, preparation or instigation of acts of terrorism. Upon refusing to answer any questions, Mrs Beghal was convicted of the offence created by paragraph 18 of said Schedule. Lord Hughes' opinion is representative of the restrictive interpretative approach taken in *Beghal*. For example, he reasoned that the Appellant could not avail herself of the common law privilege against self-incrimination when questioned under Schedule 7, as the privilege was inapplicable because it was *by necessary inference abrogated by the statute*.<sup>147</sup> Thus, *Beghal* demonstrates that very little weight may be given to common law constitutional rights, other common law concepts or the protection offered by the HRA in certain contexts where the courts consider that Parliament has made itself clear - even if rights have not been abrogated expressly.

Third, in *R (MM (Lebanon)) v Secretary of State for the Home Department* ('*MM*')<sup>148</sup> the Supreme Court took an equally deferential view, however in a different context and against a different branch of state, namely the Executive. Here the question was whether the new entry requirements for non-European Economic Area applicants to join their spouses or civil partners in the UK under the Immigration Rules - which included a minimum income requirement of at least £18,600/year - was incompatible with article 8 ECHR (the right to family life) or unlawful under the common law. The Supreme Court held that the

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<sup>146</sup> *Beghal v DPP* [2015] UKSC 49, [2016] AC 88.

<sup>147</sup> The reasoning was also based on the belief that there would be no sufficient risk that the answers would be used in subsequent criminal proceedings.

<sup>148</sup> [2017] UKSC 10, [2017] 1 WLR 771.

requirement facilitated the legitimate aim of ensuring that couples affected “do not have recourse to welfare benefits and have sufficient resources to be able to play a full part in British life”.<sup>149</sup> The judgment confirmed that under UK immigration law, individuals such as one of the Appellants in this case, a PhD student earning £15,600 per year, are unable to live with their spouses, in this case a Lebanese woman who spoke fluent English and was found to have good job prospects in the UK. The Supreme Court reached its decision despite the fact that family members had covenanted to provide them with £80 per week for five years, which would have crossed the statutory threshold. Given MM’s refugee status, and his fear of persecution in Lebanon, there was no other country in which they had a right to reside. Thus, a significant human right (and arguably also the notions of fairness and equality) gave way to political aspects, namely policy and budget concerns.

Why did the Supreme Court adopt Parliament or Executive-centric stances in these cases? It would be too simple to suggest that *Beghal* is more geared towards recognising the centrality and or/dominance of statutory law as the law in question was an Act of Parliament as opposed to, for example, the fees order at stake in *UNISON. Evans*<sup>150</sup> shows that things are not that black and white. In *Evans*, the Upper Tribunal’s order to disclose Prince Charles’s memos to government ministers was upheld by the Supreme Court even though Parliament had explicitly given the Attorney General the statutory power to veto disclosure on “reasonable grounds”. The “fundamental composite principle” that a decision of a judicial body should be final and binding *and* that it should not be capable of being overturned by a member of the Executive,<sup>151</sup> paved the way for a highly contextual interpretation of what was, on the face of it, clear *primary* statutory language. Thus, the type of legislation in question need not necessarily steer judicial reasoning one

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<sup>149</sup> *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10, [2017] 1 WLR 771 [82].

<sup>150</sup> *R (Evans) v Her Majesty's Attorney General* [2015] UKSC 21, [2015] AC 1787.

<sup>151</sup> *ibid* [115].

way or another. More subtle factors are at play, such as the issue in question and the exact wording of statutory language.

Viewed in their aggregate, the cases presented in this chapter suggest strongly that the UK has neither a political nor a legal - or common law - constitution. Common law constitutionalism is most closely associated with Trevor Allan.<sup>152</sup> His theory can be summarised by reference to three key claims. First, Parliament's power is legitimised by and derived from law. Second, it does (therefore) not have unlimited legal power but is restrained by fundamental legal values which are conceptualised as a higher rule. Third, this higher rule is typically captured by the rule of law in tandem with the principle of legality, both of which are considered creatures of the common law. Taken together, these points mean that in the judicial process,

“authoritative sources are identified, interpreted, and (when necessary) moderated on the basis of reasoned argument. Moral deliberation comes to the fore as the defining characteristic of a system of law grounded on defensible principles of justice or fairness [...]”<sup>153</sup>

I reject the accuracy of the claim that we can see from the case law that the UK has a common law constitution. First, there are numerous examples where moral

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<sup>152</sup> See TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press 2013); *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2003); ‘Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism’ (1985) 44(1) *Cambridge Law Journal* 111. See also Paul Craig, ‘Formal and substantive conceptions of the rule of law: an analytical framework’ [1997] *Public Law* 467; Paul Craig, ‘Competing Models of Judicial Review’ [1999] *Public Law* 428.

<sup>153</sup> TRS Allan, ‘Law, Democracy, and Constitutionalism: Reflections on *Evans v Attorney General*’ (2016) 75(1) *Cambridge Law Journal* 38, 39.

deliberation, or the supposed striving of the common law towards justice and liberty, does not come to the fore as the defining characteristic. Indeed, as *Nicklinson* shows, the law may well be deemed 'necessary' to be judicially moderated, yet the courts may still let institutional legitimacy concerns prevail. Meanwhile, in *Beghal*, the courts chose not to enforce a number of rights - enshrined by statute and protected under the common law - despite rather draconian legislation under which individuals could be detained for a maximum of six hours without reasonable suspicion. Many other cases can be found in which the elements of legal constitutionalism, of which common law constitutionalism is a uniquely British variation, are almost entirely eclipsed. Indeed, typically Parliamentary Sovereignty *does* provide "a presuppositional frame that shapes perception, understanding and, in turn, practical reason".<sup>154</sup> Further, as I have noted above, there are no decisions in UK law in which the courts have actually overturned an Act of Parliament.

The picture emerging is one of significant nuance. This nuance is created by judges engaging with substantive arguments about values and interests - which are given legal status - at the same time as according a fundamental status to legislation. A public law case will have a combination of elements associated with the political constitution as well as legal constitutionalism features. As I explain further in later chapters, the case law can be viewed as falling on a spectrum, and exactly where on the spectrum individual cases fall is determined by a range of factors. A reinterpretation of the above cases as a manifestation of a legal - or common law - constitution would reduce this theory to the claim that judges interpret and make law. The more realistic view is that the common law can, depending on the context, and the other factors creating the UK constitution's nuance, play a fundamental role in public law adjudication, sometimes at the

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<sup>154</sup> Neil Walker, 'Sovereignty Frames and Sovereignty Claims' in Richard Rawlings, Peter Layland and Alison L Young, *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 21.

expense of legislative intent. In those cases, we move closer to the legal constitutionalism end of the spectrum. However, we cannot view the spectrum itself as the common law constitution.

## **6. A Closer Look at Common Law Constitutional Rights**

Having argued that the UK constitution is best described as a nuanced constitution - which is an alternative third model - in the following two chapters I will take a closer look at one concept thereof, common law constitutional rights. This will provide further insights into both the constitution's workings and conceptual foundations.

As noted in the Introduction, the jurisprudence surrounding these rights lends itself particularly well to an in-depth exploration of the nuanced constitution for several reasons. First, axiomatically, common law constitutional rights are a species of the English common law. Accordingly, they reveal how the latter works specifically to protect rights. The analysis will bring out which aspects of the English common law are conducive towards legitimate basic democratic rights adjudication, and which ones are not. Second, common law constitutional rights operate predominantly in a public law context. Therefore, they inevitably inhabit a sphere defined by other constitutional principles. Accordingly, they lend themselves well to explore the nature of the constitution more broadly, but at the same time more tangibly by looking at other principles through a rights-based lens. Third, common law constitutional rights, by virtue of what they seek to protect and by virtue of the mechanisms they employ, such as the principle of legality, are among the most legislation-resilient concepts the English common law possesses.<sup>155</sup> Accordingly, a close analysis of them promises a better understanding of exactly how these two

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<sup>155</sup> This is so even where, as in the Supreme Court decision of *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219, they are not directly emphasised but rather indirectly form part of the interpretative analysis.

sources of the UK legal system - legislation and the common law - interact. This analysis will lay the groundwork for my criticism of the nuanced constitution's shortcomings in Chapters 5 and 6.

## CHAPTER 2

### A Short History of Common Law Constitutional Rights

There is nothing particularly new about judges developing the law and “construing statutes in a way that protects higher notions of justice and rights”.<sup>156</sup> Many of the early rights theories influencing the UK’s common law courts in previous centuries were based on the idea that the supreme authority of the land was subject to limits. Indeed, this notion was also central to early rights charters such as Magna Carta and its successor, the Charter of Henry III (and the Charter of the Forest).<sup>157</sup> In addition, there were numerous homegrown philosophical templates for judges to resort to for inspiration when pondering a case. For example, John Locke’s natural rights theory<sup>158</sup> suggested that one may not “take away, or impair the life, or what tends to the preservation of the life, the liberty,

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<sup>156</sup> Dan Meagher, ‘The Common Law Principle of Legality in an Age of Rights’ (2011) 35(2) Melbourne University Law Review 449, 452.

<sup>157</sup> David Carpenter (trs), *Magna Carta* (Penguin Classics 2015) 407-408. Magna Carta articles 39 to 40 protected the rights liberty, property and access to justice. Magna Carta has been regarded as providing the starting point for the protection of civil liberties: Michael Tugendhat, *Liberty Intact: Human Rights in English Law* (Oxford University Press 2016) 21.

<sup>158</sup> For a critique of the viability of a theory of natural rights, see Loren E Lomansky, *Persons, Rights, and the Moral Community* (Oxford University Press 1990).



health, limb or goods of another”,<sup>159</sup> and a similar emphasis on the existence of rights to life, liberty and property was inherent in Blackstone’s works.<sup>160</sup>

No matter how haphazard and underdeveloped, the gist of the claims made by these influential thinkers and others no doubt contributed to the judicial enforcement of common law rights in earlier centuries. Initially, these were mainly conceptualised and enforced through various areas of private law - most importantly tort law<sup>161</sup> and property law<sup>162</sup> - as well as criminal law.<sup>163</sup> Private law provided a fertile ground for the development of rights as it remained relatively undisturbed by the political branches of the state until well into the 19<sup>th</sup> century.<sup>164</sup> However, as the following section shows, there are also famous historical case law examples within the constitutional sphere.

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<sup>159</sup> John Locke, *Two Treatises of Government* (1690) section 14. This stands in stark contrast to Thomas Hobbes’ account, according to which the only natural right possessed by human beings is the right to self-preservation: Thomas Hobbes, *Leviathan* (Herbert Schneider ed, Bobbs-Merrill 1958) 109.

<sup>160</sup> Although the latter was predominantly geared towards conceptualising municipal law rather than contributing to natural law jurisprudence, see John Finnis, *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press 2011) 192-193.

<sup>161</sup> See for example *Sir W De Crespigny v Wellesley* (1829) 5 Bingham 392, 130 ER 1112 and *Hollins v Fowler* (1874-75) LR 7 HL 757.

<sup>162</sup> See for example *Tapling v Jones* (1865) 11 HLC 290, (1865) 20 Common Bench Reports (New Series) 166 and *Western Counties Railway Co v Windsor and Annapolis Railway Co* (1882) 7 App Cas 178.

<sup>163</sup> The law of battery, for example, indirectly protected personal rights such as the right to be free from physical harmful contact.

<sup>164</sup> John Hasnas, ‘Toward a Theory of Empirical Natural Rights’ (2005) 22(1) *Social Philosophy and Policy* 111, 132, footnote 51.

## 1. Three Famous Antecedents

One cannot with certainty point to the first case reflecting a rights-based focus. Notably, however, there are several famous cases dating back centuries whose judicial reasoning rely heavily on the concept of common law principles protecting individuals from interference with their rights by the state (or others). These have echoed down the centuries as a source of pride and inspiration. Perhaps the most treasured of these is *Entick v Carrington*,<sup>165</sup> which has been described as “one of the canons of English public law”.<sup>166</sup> Among many other things, it stands for the recognition of property rights at common law<sup>167</sup> - the case had been brought as one of trespass for unlawful seizure of personal property.<sup>168</sup> However, *Entick v Carrington* also had another significant dimension as it concerned the question whether general warrants, issued to the senior King's messenger to arrest Mr Entick and Mr Beardmore and seize their papers, could authorise searches of property. The Court of Common Pleas found that they could not as no statutory basis could be located.

This has been interpreted as one of the first recognitions of the rule that express legal authority is necessary for the interference with individual rights. Thus, and in sharp contrast to the more recent *Malone v Commissioner of Police of the*

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<sup>165</sup> *Entick v Carrington* (1765) 2 Wilson, KB 275, 95 ER 807.

<sup>166</sup> Adam Tomkins and Paul Scott, ‘Introduction’ in Adam Tomkins and Paul Scott (eds), *Entick v Carrington 250 Years of the Rule of Law* (Hart Publishing 2015).

<sup>167</sup> For a detailed analysis of the case see Denis Baranger, ‘Law, Liberty and *Entick v Carrington*’ in Adam Tomkins and Paul Scott (eds), *Entick v Carrington 250 Years of the Rule of Law* (Hart Publishing 2015).

<sup>168</sup> For an account on how the development of the law on seditious libel prior to *Entick v Carrington* influenced this decision see Tom Hickman, ‘Revisiting *Entick v Carrington*’ in Adam Tomkins and Paul Scott (eds), *Entick v Carrington 250 Years of the Rule of Law* (Hart Publishing 2015) 71.

*Metropolis (No.2)*,<sup>169</sup> which I discuss in Chapter 3, public action will not be permitted unless such legal authority is established. According to *Entick v Carrington* the state has no ‘residual freedom’ to act within the bounds set by legal prohibitions. A strict notion of residual liberty on behalf of the state is not tenable as there is a very real risk of public authorities encroaching upon the rights held by individuals.

The argument that the same reasoning may hold true in a purely horizontal relationship, i.e. that individuals are not simply left to do as they please in their relationships with one another so long as their behaviour is not expressly prohibited by law, is at the core of the second famous decision: *Somerset v Stewart*,<sup>170</sup> a case from 1772. A man who had been given the name ‘Somerset’ and held captive by a slave-owner in Virginia, had been brought over to England, where he refused to continue in bondage, but was captured and held on a vessel that was about to leave for Jamaica. The case was decided during the golden age of habeas corpus, following the enactment of the Habeas Corpus Act 1679.<sup>171</sup>

*Somerset v Stewart* represents the notion of English exceptionalism. Counsel sought to persuade Lord Mansfield by passionate appeals such as “Ought we not, on our part, to guard and preserve that liberty by which we are distinguished by all

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<sup>169</sup> [1979] Ch 344, [1979] 2 WLR 700.

<sup>170</sup> [1995] 1 All ER 513 (QB); see also William R Cotter, ‘The Somerset Case and the Abolition of Slavery in England’ (1994) 79 History 31.

<sup>171</sup> However, it should be noted that it was not ‘Somerset’ himself that could rely on this piece of legislation, but rather his English godparents who had made an application to the court of king’s bench for a writ of habeas corpus, see Alexander Jackman, ‘Judging a Judge: A Reappraisal of Lord Mansfield and *Somerset’s Case*’ (2018) 39(2) The Journal of Legal History 140.

the earth!”<sup>172</sup> It also presents a formidable example of a case whose subsequent romanticising has created a very sustainable illusion as to the (historic) virtue and strength of the English common law.

There are different accounts as to what it was exactly that Lord Mansfield said. One source suggests that he held,

“The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged”.<sup>173</sup>

This statement has been much celebrated, however the actual impact of the case is heavily disputed. In particular, it is highly doubtful to what extent this case had any implications beyond its individual application. In fact, instead of outlawing slavery, it merely settled a narrow legal point, namely that a slave master could not seize a slave and remove him from the jurisdiction against his will.<sup>174</sup> The flip

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<sup>172</sup> He is also reported to have said “I am now, in full conviction how opposite to natural justice Mr. Stewart's claim is, in firm persuasion of its inconsistency with the laws of England”.

<sup>173</sup> *Somerset v Stewart* (1772) Lofft 1, 98 ER 499, 510.

<sup>174</sup> William M Wiecek, ‘Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World’ (1974) 42 *University of Chicago Law Review* 86, 87. Note that Wiecek says that the second legal point that was determined by this case was that slaves could bring habeas corpus applications, however this may have to be qualified, see

side of his reasoning is that it was legal to keep fellow human beings in bondage in this jurisdiction. Accordingly, one cannot sensibly conclude that Lord Mansfield's judgment signified - in any meaningful way - that the English common law "provided certain minimum levels of substantive protection to anyone who came to England".<sup>175</sup> It is equally wrong to suggest that the judgment implies that "the master-slave relationship rested on a dubious legal foundation because of slavery's contrariness both to natural law and to the substantive principles of the English Constitution".<sup>176</sup> If either of these statements were true, slavery could certainly not have continued in the UK for more than six decades after *Somerset v Stewart* was decided, and beyond that in parts of the British Empire.<sup>177</sup>

The third case is *Dr. Bonham's Case*,<sup>178</sup> which stands predominantly not for constitutional rights protection, but rather for the supposed capacity of the common law or natural law to invalidate Acts of Parliament.<sup>179</sup> Having studied medicine at

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Alexander Jackman, 'Judging a Judge: A Reappraisal of Lord Mansfield and *Somerset's Case*' (2018) 39(2) *The Journal of Legal History* 140.

<sup>175</sup> George Van Cleve, "'Somerset's Case' and Its Antecedents in Imperial Perspective' (2006) 24(3) *Law and History Review* 601, 636.

<sup>176</sup> Justin Buckley Dyer, 'After the Revolution: *Somerset* and the Antislavery Tradition in Anglo-American Constitutional Development' (2009) 71(4) *The Journal of Politics* 1422, 1422. Indeed, given Lord Mansfield's statements in the later *Zong* case, in which he equated slaves with livestock, the portrayal of him being morally opposed to slavery must be called into question, see Jeremy Krikler, 'The *Zong* and the Lord Chief Justice' (2007) 64(1) *History Workshop Journal* 29.

<sup>177</sup> Indeed, slavery at the hands of the British continued well into the 20<sup>th</sup> century in various parts of the Empire, and enforcement of the Emancipation Act in 1833 at home for a long time remained, if one was to be generous, largely ineffective.

<sup>178</sup> 77 ER 638, (1608) 8 Co Rep 107.

<sup>179</sup> JW Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Johns Hopkins University Press 2000) 158-159; Raoul Berger, 'Doctor Bonham's Case:

Cambridge, Dr Bonham was fined and imprisoned by the College of Physicians for practising in London without becoming a member of the College first, although not for lack of trying.<sup>180</sup> The College had been authorised by statute to fine and imprison individuals. The key question was as to the legality of the College's decision in light of its statutory powers. Sir Edward Coke CJ, who was very aware of the medieval rights debate,<sup>181</sup> and who is often cited as an authoritative source of support for common law constitutional rights today, found in favour of Dr Bonham. He famously said,

“it appears in our Books, that in many Cases, the Common Law does control Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void”.<sup>182</sup>

This must be read in its historical context. At the relevant time, the branches of state were not clearly established and both Parliament and the courts were attempting to seize control from the king, which is why the above quote may best be interpreted as representing attempts to secure a plural government.<sup>183</sup> This view is reinforced by the fact that Coke cited Henry of Bratton, a key contributor to

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Statutory Construction or Constitutional Theory?’ (1969) 117(4) University of Pennsylvania Law Review 521.

<sup>180</sup> For a detailed summary of the facts see Harold J Cook, ‘Against Common Right and Reason: The College of Physicians versus Dr. Thomas Bonham’ (1985) 29(4) The American Journal of Legal History 301.

<sup>181</sup> Claire Palley, ‘The United Kingdom and Human Rights’ (42<sup>nd</sup> series, The Hamlyn Lectures, Sweet & Maxwell 1991) 20.

<sup>182</sup> *Dr Bonham’s Case* 77 ER 638, (1608) 8 Co Rep 107, 652.

<sup>183</sup> Douglas E Edlin: *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* (University of Michigan Press 2008) 55.

Medieval English constitutionalism,<sup>184</sup> who had written that the king is subject to God and the law. Further, the subsequent qualifications by Coke, focusing on statutory construction in cases of uncertain or general words, need to be appreciated as they give a holistic view of what he was trying to say.<sup>185</sup> Finally, there was at the time a lack of a consistent or technical meaning of the word ‘void’ and the supposed force of the statement needs to be qualified to the extent that controlling a statute may have simply meant to “prevent the application of the full rigour of a statute in a single case, and certainly does not support claims for judicial review of statutes”.<sup>186</sup> Scholars have, sometimes in light of these qualifications and sometimes regardless of them, debated whether the case merely stands for common law rules on statutory interpretation<sup>187</sup> or whether it insinuates the superiority and supremacy of the common law.<sup>188</sup>

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<sup>184</sup> Mark E Brandon, ‘Constitutionalism’ in Mark Tushnet, Mark A Graber and Sanford Levinson (eds), *The Oxford Handbook of the U.S. Constitution* (Oxford University Press 2015).

<sup>185</sup> JWF Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press 2007) 5.

<sup>186</sup> Ian Williams, ‘Dr Bonham’s Case and ‘void’ statutes’ (2006) 27(2) *The Journal of Legal History* 111, 126.

<sup>187</sup> SE Thorne, ‘Dr Bonham’s Case’ (1938) 54 *Law Quarterly Review* 543.

<sup>188</sup> For an overview see Richard H Helmholz, ‘Bonham’s Case, Judicial Review, and the Law of Nature’ (2009) 1(1) *Journal of Legal Analysis* 325 and RA Edwards, ‘Bonham’s Case: The Ghost in the Constitutional Machine’ (1996) 11(1) *The Denning Law Journal* 74. Paul Craig, for example, regards Coke’s remarks about the controlling power of the common law as the underpinning of the judiciary to interpret statutes in ‘Ultra Vires and the Foundations of Judicial Review’ (1998) *Cambridge Law Journal* 63, 88. To compare, see the decision in *Omychund v Barker* (1744) *Willes* 538, 125 ER 1310 in which Lord Mansfield said that ‘a statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament’.

These early rights cases expose the close connection between rights, institutional considerations and statutory construction. Further, as *Somerset v Stewart* and *Entick v Carrington* in particular make abundantly clear, there have been references to notions of justice scattered throughout time. Today these would be perceived as aspects of the rule of law. Finally, they all reveal a special affinity with powerful language and imagery. Their combined legacy is the notion of the common law as a source of justice and reason, a narrative that has largely survived till this day. They provide, albeit superficially, templates for nuanced reasoning for those seeking to secure individual rights against the state. In what follows, I outline the more contemporary judicial recognition of common law constitutional rights, which has indirectly benefitted from the articulation of constitutional principles in these famous antecedents.

## 2. The First Modern Wave

Notably, the first modern wave of common law constitutional rights developed against the background of the UK's obligations under the ECHR. The UK was one of the first countries to ratify the ECHR in 1951, having previously played a role in drafting it.<sup>189</sup> However, it was only from 1966 onwards that individuals had the right to petition to the ECtHR,<sup>190</sup> and the first case was brought before, what was then, the Commission (and settled) in 1967.<sup>191</sup> By the time the HRA was passed, the UK had been the respondent state before the ECtHR more than 100 times.<sup>192</sup>

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<sup>189</sup> Geoffrey Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993) 42(4) *International and Comparative Law Quarterly* 796.

<sup>190</sup> See Lord Lester, 'U.K. acceptance of the Strasbourg jurisdiction: what really went on in Whitehall in 1965' [1998] *Public Law* 237.

<sup>191</sup> *Alam and Khan v United Kingdom* (Application 2991/66) (1967) 24 CD 116.

<sup>192</sup> Council of Europe, *European Court of Human Rights, Forty Years of Activity* (1998) 26.



However, this did not make up for the fact that individuals could not seek redress before domestic courts, a situation which stood in sharp contrast to what individuals in the civil law based signatory states could do.<sup>193</sup> The UK was the only member state apart from Ireland that had not incorporated provisions of the Convention into domestic law. The UK feared such a step would,

“compromise the doctrine of the sovereignty of parliament and [it] flattered itself that there was no need, assuming that the rights and freedoms guaranteed by the Convention could be delivered under the common law. Aggrieved parties would have to exhaust domestic remedies before they could resort to Strasbourg. It was a typical British muddle”.<sup>194</sup>

Politically, we can detect a serious will to incorporate the ECHR into domestic law from the late 1990s,<sup>195</sup> however at several points in time before there had been judicial<sup>196</sup> and political<sup>197</sup> voices campaigning for its incorporation. It was through the Labour Party’s initiative that the rights guaranteed under the ECHR were eventually transposed into national law. The thinking behind it was simple and sensible: “legally enforceable rights and duties underpin a democratic society, and

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<sup>193</sup> Luke Clements and James Young, ‘Human Rights: Changing the Culture’ (1999) 26 *Journal of Law and Society* 1.

<sup>194</sup> Harry Potter, *Law, Liberty and the Constitution: A Brief History of the Common Law* (Boydell Press 2015) 286.

<sup>195</sup> For an overview of this development, see Rabinder Singh, *The Future of Human Rights in the United Kingdom: Essays on Law and Practice* (Hart Publishing 1997) chapter 2.

<sup>196</sup> See particularly Lord Scarman, ‘*English Law - The New Dimension*’ (26<sup>th</sup> series, The Hamlyn Lectures, Stevens & Sons Ltd, 1974).

<sup>197</sup> See for example the Lords Select Committee, *Report of the Select Committee on a Bill of Rights* (HL 176, 1978) and the two bills introduced into Parliament by Lord Lester of Herne Hill in the 1990s.

access to justice is essential in order to make these rights and duties real".<sup>198</sup> In early 1993, incorporation of the Convention was officially endorsed by John Smith, the Labour leader at the time, confirmed by his successor Tony Blair in 1995, strengthened by a 1996 consultation paper,<sup>199</sup> and finally announced in the Queen's speech following Labour's landslide victory in the 1997 General Election.<sup>200</sup> The transposition formed part of the most comprehensive constitutional overhaul up to this date.<sup>201</sup> It is in this political and legal context that the initial rise of common law constitutional rights has to be analysed.

### **Examples of Common Law Constitutional Rights and Their Claim to Sufficiency**

Perhaps the most unequivocal commitment to common law constitutional rights in the run-up to the incorporation of the HRA was shown in *Witham*.<sup>202</sup> The Applicant had applied for judicial review of a decision by the Lord Chancellor to introduce an order which had the effect of reversing the prior rule according to which litigants in persons receiving income support did not have to pay a fee to initiate proceedings in the High Court. He argued that this would deny him his constitutional right of access to the courts.<sup>203</sup> Laws J in his speech went into some detail in answering

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<sup>198</sup> David Bean (ed), *Law Reform for All* (Blackstone Press 1996) Foreword.

<sup>199</sup> *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997).

<sup>200</sup> Steven Greer, 'A guide to the Human Rights Act 1998' (1999) 24(1) *European Law Review* 3.

<sup>201</sup> See Lord Irvine, 'Constitutional reform and a Bill of Rights' (1997) 5 *European Human Rights Law Review* 483 for a comprehensive overview of other key developments.

<sup>202</sup> *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB).

<sup>203</sup> The right of access to the courts is centuries old, see for example *R and W Paul Ltd v Wheat Commission* [1937] AC 139, [1936] 2 All ER 1243. Some have considered this to be the most developed and powerful common law right: see Jack Beatson and others,

the preliminary question of whether such a right existed in the first place. His conclusion can be seen as the prelude to the principle of legality-based approach in *Simms*,<sup>204</sup> which was decided two years after *Witham* (which provides part of the foundation for *UNISON*).<sup>205</sup> To Laws J, what makes a common law right *constitutional* is the intrinsic mechanism that it cannot be abrogated unless abrogation is specifically permitted by Parliament.<sup>206</sup> Substantively, determining the content of the right he identified at common law, he could draw on the authoritative pair of cases that is *Leech*<sup>207</sup> and *Raymond v Honey*,<sup>208</sup> both prisoners' rights cases. These cases and others, he argued, provide the basis for arriving at his legal conclusion. There was therefore no need to refer to Strasbourg jurisprudence.<sup>209</sup>

Prior to *Witham*, *Derbyshire CC v Times Newspaper Ltd* ('*Times Newspaper*'),<sup>210</sup> which determined that a local authority could not bring an action for damages for libel against a newspaper that had questioned the propriety of investments made for its superannuation fund, had established that non-incorporation was not an obstacle to relying on the Convention. Borrowing from US case law, the House of

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Human Rights: Judicial Protection in the United Kingdom (Sweet & Maxwell 2008) 1-11-1-14.

<sup>204</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL).

<sup>205</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>206</sup> *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB) 585G. The proposition that general words should not be construed to allow interference with individual rights and freedoms was adopted in many other judgments from around this time: see *Morris v Beardmore* [1981] AC 446; *Wheeler v Leicester City Council* [1985] AC 1054 and *Marcel v Commissioner of Police of Metropolis* [1992] Ch 225, [1991] 2 WLR 1118.

<sup>207</sup> *R v Secretary of State for the Home Department, ex p Leech (No.2)* [1994] QB 198, [1993] 3 WLR 1125.

<sup>208</sup> [1983] 1 AC 1 (HL).

<sup>209</sup> *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB).

<sup>210</sup> [1993] AC 534 (HL).

Lords reasoned that the threat of a civil action for defamation would inevitably have an inhibiting effect on the common law right to freedom of speech. For the purposes of this chapter, these are the most important parts of Lord Keith of Kinkel's speech, which drew on the 'no inconsistency between foreign and domestic sources' approach adopted in the *Attorney-General v Observer Ltd (No. 2)*<sup>211</sup> (also known as the 'Spycatcher case'), and which warrant being spelled out at length. He said,

"The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain an action of damages for defamation. That was the conclusion reached by the Court of Appeal, which did so principally by reference to article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [...], to which the United Kingdom has adhered but which has not been enacted into domestic law [...] I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention. My noble and learned friend, Lord Goff of Chieveley, in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [...] expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and article 10 of the Convention. I agree, and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field".<sup>212</sup>

Many other cases stressed the strength and the sufficiency of the common law. They include *Morris v Beardmore* in which the House of Lords relied on the common law right to keep one's home free from unauthorised intruders<sup>213</sup> and *R*

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<sup>211</sup> [1990] 1 AC 109 (HL).

<sup>212</sup> *Derbyshire CC v Times Newspaper Ltd* [1993] AC 534 (HL) 550E, 551F-G.

<sup>213</sup> *Morris v Beardmore* [1981] AC 446 (HL).

*v Secretary of State for the Home Department, ex p Pierson* ('*Pierson*'), in which the House of Lords said that prisoners in this jurisdiction retain all such (common law) rights that are not expressly taken away from them by Parliament.<sup>214</sup> Finally, as previously stated, the judgment in *Simms* suggested that the English common law entailed "principles of constitutionality little different from those that exist in countries where the power of the legislature is expressly limited by a constitutional document".<sup>215</sup>

## **Enabling and Contributing Factors**

### *Domestic Public Law Developments*

One crucial step towards the facilitation of common law constitutional rights in the late 1980s and 1990s was the watershed moment marked by three judgments in the 1960s. During the wars and shortly thereafter, the acquisition of new powers by the government had been largely uncontrolled. Famous cases from the first half of the last century that gave successive governments somewhat of a blank cheque with regards to governmental power and ministerial discretion included *R v Local Government Board, ex p Arlidge*,<sup>216</sup> *Liversidge v Anderson*,<sup>217</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* ('*Wednesbury*')<sup>218</sup> and *R v Metropolitan Police Commissioner, ex p Parker*.<sup>219</sup> Then, as is well known, from

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<sup>214</sup> [1998] AC 539 (HL).

<sup>215</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) 131.

<sup>216</sup> [1915] AC 120 (HL).

<sup>217</sup> [1942] AC 206 (HL).

<sup>218</sup> [1948] 1 KB 223 (CA).

<sup>219</sup> [1953] 1 WLR 1150.

the 1960s onwards, we entered a transformative period in administrative law.<sup>220</sup> This was followed by a period in which “judicial review expanded exponentially [...], as the judiciary regained confidence lost during two wartime regimes”.<sup>221</sup> It is generally acknowledged that the rise of the administrative state and the connected growth of public power lies at the heart of the reasons of why the courts’ attitudes shifted. Writing extra-judicially in 1992, Lord Browne-Wilkinson said that politicians had to intervene in many aspects of the citizens’ daily lives, such as education and health, and that large areas of intervention were covered by subordinate legislation which lacked effective Parliamentary scrutiny.<sup>222</sup> The reaction by the courts, he said, was to develop the law of judicial review. The courts “dusted off old doctrine and writs” and they developed a more modern system of public law that would be capable of controlling this growing “post-war state apparatus”.<sup>223</sup>

There was a gradual moving away from adhering strictly to the statutory language in question. Interpretation became more nuanced through the recourse to constitutional principles such as fairness and natural justice, both viewed as common law constructs. Furthermore, the courts began to introduce and reinforce constitutional principles which impose restrictions on the elected branches of state. For instance, *Padfield and Others v Minister of Agriculture, Fisheries and Food* (*‘Padfield’*)<sup>224</sup> has become known as the authority for the proposition that there cannot be unfettered discretion in public law.<sup>225</sup> Moreover, where discretion is

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<sup>220</sup> TT Arvind and Lindsey Stirton, ‘The Curious Origins of Judicial Review’ (2017) 133 *Law Quarterly Review* 91.

<sup>221</sup> Carol Harlow and Richard Rawlings, *Law and Administration* (3<sup>rd</sup> edn, Cambridge University Press 2009) 98.

<sup>222</sup> Lord Browne-Wilkinson, ‘The Infiltration of a Bill of Rights’ [1992] *Public Law* 397.

<sup>223</sup> Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010) 13.

<sup>224</sup> [1968] AC 997 (HL).

<sup>225</sup> See CJS Knight, ‘A Framework for Fettering’ (2009) 14(1) *Judicial Review* 73.

exercised, it must be done in a way that accommodates for the underlying purpose of the Act in question. Parliament, the House of Lords stated,

“must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act [and] the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter for the Court”.<sup>226</sup>

Meanwhile, other cases defined more clearly some of the standards imposed by the common law. Thus, in *Ridge v Baldwin*<sup>227</sup> it was held that a breach of the common law requirement to have a fair hearing would render a decision void.<sup>228</sup> This initiated the development towards the modern understanding of procedural justice.<sup>229</sup>

Then came *Anisminic Ltd v Foreign Compensation Commission* ('*Anisminic*'),<sup>230</sup> the most famous of the three cases, and the foundation for the Supreme Court decision in *Privacy International*, which I discuss extensively in Chapter 4. Briefly, a company had applied to the Foreign Compensation Commission claiming it was entitled to parts of the Egyptian Compensation Fund in respect of property

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<sup>226</sup> *Padfield and Others v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) 1030.

<sup>227</sup> [1964] AC 40 (HL).

<sup>228</sup> David Feldman, 'Error of Law and Flawed Administrative Acts' (2014) 73(2) Cambridge Law Journal 275, 276.

<sup>229</sup> Christopher Forsyth, "Blasphemy against basics": Doctrine, Conceptual Reasoning and Certain Decisions of the UK Supreme Court' in John Bell and others, *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016) 151. *Ridge v Baldwin* [1964] AC 40 (HL) also signified a shift in emphasis from whether the process was judicial to whether it affected a person's rights.

<sup>230</sup> [1969] 2 AC 147 (HL).

requisitioned by Egypt in 1956. The Commission provisionally found that they had not established a valid claim, so the Company brought an action for a declaration that the Commission's determination was a nullity. The legislation vesting power in the Commission, the Foreign Compensation Act 1950, stated in section 4(4) that "the determination by the commission of any application made to them under this Act shall not be called in question in any court of law". However, the House of Lords held that this express statutory prohibition against considering the decision did not prevent it from considering whether a *purported* decision was actually a nullity due to procedural irregularity. As the Commission had based its decision on an inquiry it did not have the power to make - considering the nature of the Company - it had gone outside its jurisdiction, and the determination was accordingly a nullity. This being the case, the House of Lords found that there was no problem with a court calling it into question. Therefore, "the ouster was ousted".<sup>231</sup>

In the case of *In Re Racal Communications Ltd*, Lord Diplock said that since *Anisminic* the basic presumption in judicial review has been that,

"where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity".<sup>232</sup>

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<sup>231</sup> Jonathan Metzer, 'Anisminic 2.0' (*UK Human Rights Blog*, 15 May 2019) <https://ukhumanrightsblog.com/2019/05/15/anisminic-2-0/> accessed 18 August 2019.

<sup>232</sup> [1981] AC 374 (HL).



Had the courts not moved from construing discretion granted to public bodies *literally* to interpreting them *purposively* in *Anisminic*, *Padfield* and *Ridge v Baldwin*, thereby creating a system of robust judicial oversight, there would be not much room for ‘unwritten’ rights under the common law in statutory construction today. In other words, these authorities contributed significantly to the UK constitution’s contemporary nuanced approach.

### *The ‘ECHR Mirror’*

Moving from the facilitative historical background to the actual first wave of common law constitutional rights, one cannot explain their development without acknowledging the immense impact the UK’s membership of the Council of Europe and its obligations under the ECHR had on domestic judicial developments. The apparent gap between human rights protection on the domestic front and the rights guaranteed under the ECHR facilitated and incentivised their development under the common law. Indeed, the Command Paper accompanying the Human Rights Bill had criticised that the UK was falling behind other European countries whose acceptance of the Convention had gone hand in hand with the Convention’s incorporation into their domestic law.<sup>233</sup> Perhaps more crucially, it became increasingly clear that the UK’s record before the ECtHR was meagre at best, as only Italy had found itself in violation of Convention rights more often than the UK.<sup>234</sup> Further, in comparison to other jurisdictions that had seen many cases brought against them before the ECtHR, what distinguished the UK’s record was the serious nature of the cases brought in

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<sup>233</sup> This applies for dualist states. In monist states such as France the Convention was directly enforceable.

<sup>234</sup> It is estimated that two-thirds of these violations involved primary or secondary legislation: JUSTICE, ‘The Human Rights Bill: Briefing for the second reading in the House of Commons’ (16 February 1998) 1.

combination with a notable absence of speedy and effective domestic remedies to address these.<sup>235</sup>

Lord Neuberger recently said that it was a very frustrating time for UK judges, “as they realised that they were deciding cases which they knew would be held to be wrong by the Strasbourg court, while being unable to do anything about it”.<sup>236</sup> However, as Harlow and Rawlings point out, the UK’s dismal record needs to be qualified. There was in the UK at the time a longstanding tradition of political litigation and a generous system of legal aid. Further, in contrast to the UK, other jurisdictions only allowed for individual petitions at a later point in time. These factors mean that direct comparisons are difficult to make.<sup>237</sup> Nonetheless, there was an important human factor at play. To avoid the embarrassment of constantly being told their legal system offered insufficient human rights protection, the UK courts had to very actively engage with the particulars of their international obligations under the Convention to limit the risk of having their judgments overturned. I therefore suggest that the development of common law constitutional rights and their first significant peak in the late 1980s and all the 1990s cannot be separated from the UK’s membership of the Council of Europe. The common law became a vehicle for the *indirect* and *undisclosed* fulfilment of ECHR obligations during that period, and individual common law rights were introduced or strengthened to secure compliant standards.

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<sup>235</sup> Jack Straw and Paul Boateng, ‘Bringing rights home: Labour’s plans to incorporate the European Convention on Human Rights into UK law’ (1997) 1 *European Human Rights Law Review* 71.

<sup>236</sup> Lord Neuberger, ‘The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience’ (Supreme Court of Victoria, August 2014) 2 <https://www.supremecourt.uk/docs/speech-140808.pdf> accessed 17 August 2019.

<sup>237</sup> Carol Harlow and Richard Rawlings, *Pressure through Law* (Routledge 1992) 254-255.

The English common law provided the necessary legal source. We can see that areas in which some level of protection had been offered for decades if not centuries, such as the freedom of speech and access to justice, the case law contained helpful dicta and ratios that could be relied on and expanded. For example, in *Reynolds v Times Newspaper Ltd*,<sup>238</sup> a defamation case, the House of Lords could point to “what has become a classic statement”, Diplock J’s speech in *Silkin v Beaverbrook Newspapers*.<sup>239</sup> The latter contains, perhaps unsurprisingly given the time it was decided, no reference to non-domestic legal sources or principles. Thus, the fact that there was somewhat of an established reference to the right to make a fair comment in previous judgments facilitated the more rights-based but domestic approach taken in the run-up to the legislative incorporation of the ECHR into domestic law.

### *The Influence of EU Law*

Apart from domestic developments and the influence of the UK’s obligations under the ECHR, one should also not underestimate the role EU law played in this development. By the time these judgments were handed down, the CJEU had on numerous occasions declared domestic legislation to be incompatible with (then) Community legislation, having first read fundamental human rights into the latter.<sup>240</sup> Further, it had at the time already been the practice of the CJEU to refer to the ECHR in its judgments.<sup>241</sup> For example, in *Johnston v Chief Constable of*

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<sup>238</sup> [2001] 2 AC 127 (HL).

<sup>239</sup> [1958] 1 WLR 743 (QB) 746-747.

<sup>240</sup> Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* [1970] ECR 1125.

<sup>241</sup> For a very insightful analysis of this phenomenon see Nicholas Grief, ‘The domestic impact of the European Convention on Human Rights as mediated through Community

*the Royal Ulster Constabulary*<sup>242</sup> part of the statutory instrument implementing the Equal Treatment Directive<sup>243</sup> was held to be invalid as it did not comply with Directive itself, nor with the requirements under articles 6 and 13 ECHR. In that sense, the Convention had been - at least partially - indirectly incorporated into domestic law through the mandatory application (and supremacy) of EU law.

### *Influential Writings*

Finally, there was a large amount of influential extra-judicial writings promoting both the value of the ECHR and the capacity and tradition of the common law to protect fundamental rights. Sir John Laws, one of the early judicial champions of common law constitutional rights argued that the courts could - at the domestic level - secure basic rights by building on existing public law principles, and that these would essentially cover the substantive rights protected by the ECHR.<sup>244</sup> The latter was described as a “legitimate aid” to determine what the “policy of the common law” should be.<sup>245</sup> Other powerful extra-judicial statements from the time of the first peak were made by Lord Bingham,<sup>246</sup> Sir Stephen Sedley,<sup>247</sup> Lord

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Law’ [1991] Public Law 555. See also Marie Demetriou, ‘Using Human Rights through EC Law’ [1999] European Human Rights Law Review 484.

<sup>242</sup> Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

<sup>243</sup> Council Directive 76/207/EEC Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L39.

<sup>244</sup> Sir John Laws, ‘Is the High Court the guardian of fundamental constitutional rights?’ [1993] Public Law 59.

<sup>245</sup> *ibid* 64.

<sup>246</sup> Lord Bingham, ‘The European Convention on Human Rights: Time to Incorporate’ (1993) 109 Law Quarterly Review 390.

<sup>247</sup> Sir Stephen Sedley, ‘Human Rights: A Twenty First Century Agenda’ [1995] Public Law 386 and ‘A Bill of Rights for Britain’ [1997] European Human Rights Law Review 458.

Scarman<sup>248</sup> and Lord Irvine.<sup>249</sup> Furthermore, as Hickman points out,<sup>250</sup> this first wave also benefitted from the theoretical account of rights provided by Ronald Dworkin,<sup>251</sup> which had been further developed and ‘domesticised’ by a handful of prominent English law academics,<sup>252</sup> most notably Sir Jeffrey Jowell<sup>253</sup> and Trevor Allan.<sup>254</sup>

### 3. The Trough

The suggestion that the domestic development of rights was mainly reactive was echoed in *Watkins v Secretary of State for the Home Department*, a post-HRA case in which Lord Rodger said that once the HRA entered into force references to common law constitutional rights became superfluous. In other words, he suggested they had only been preparatory in character. Thus,

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<sup>248</sup> Lord Scarman, ‘English Law - The New Dimension’ (26<sup>th</sup> series, The Hamlyn Lectures, Stevens & Sons Ltd 1974).

<sup>249</sup> Lord Irvine, ‘Judges and Decision-Makers: The Theory and Practice of Wednesbury Review’ [1996] Public Law 59.

<sup>250</sup> Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010) 17.

<sup>251</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977); *Law’s Empire* (Fontana Press 1986).

<sup>252</sup> See for example Dawn Oliver, ‘Is the Ultra Vires Rules the Basis of Judicial Review?’ [1987] Public Law 543; Paul Craig, ‘What should Public Lawyers do? A Reply’ (1992) 12(4) Oxford Journal of Legal Studies 564.

<sup>253</sup> Sir Jeffrey Jowell, ‘Restraining the State: Politics, Principle and Judicial Review’ (1997) 50(1) Current Legal Problems 189.

<sup>254</sup> Selected works include TRS Allan, ‘Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism’ (1985) 44(1) Cambridge Law Journal 111; TRS Allan, ‘Dworkin and Dicey: The Rule of Law as Integrity’ (1988) 8(2) Oxford Journal of Legal Studies 266.

“In using the language of ‘constitutional rights’, the judges were, more or less explicitly, looking for a means of incorporation *avant la lettre*, of having the common law supply the benefits of incorporation without incorporation. Now that the Human Rights Act is in place, such heroic efforts are unnecessary”.<sup>255</sup>

It may be true that the HRA temporarily eclipsed the focus on common law constitutional rights to a certain extent. However, Dickson’s suggestion that “the coffin lid of constitutional rights” was “well and truly screwed down”<sup>256</sup> needs to be qualified in light of cases such as *R v Shayler*<sup>257</sup> and *R (ProLife Alliance) v British Broadcasting Corporation*,<sup>258</sup> both of which took domestic common law rights into account after the HRA had entered into force. There are a many other notable cases that challenge the notion of a complete incapacitation of human rights protection under the common law, sometimes indirectly. Such was the case in the 2003 House of Lords decision in *R (Anufrijeva) v Secretary of State for the Home Department*,<sup>259</sup> in which the Court found that an asylum seeker’s income support benefit termination took effect not from the time the rejection of the claim had been recorded, but instead only once that decision had been communicated to them. The majority placed a strong emphasis on the constitutional principle of elementary fairness. Also, in *R (Daly) v Secretary of State for the Home Department* the House of Lords decided that the common law constitutional right to privileged legal advice would be infringed where prison policy mandated inspection of such correspondence, suggesting that it was essential that the

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<sup>255</sup> [2006] UKHL 17, [2006] 2 AC 395 [64].

<sup>256</sup> Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 28.

<sup>257</sup> [2002] UKHL 11, [2003] 1 AC 247.

<sup>258</sup> [2002] EWCA Civ 297, [2002] 3 WLR 1080.

<sup>259</sup> [2003] UKHL 36, [2004] 1 AC 604.

common law remained a sufficient source for protection of this right.<sup>260</sup> It is therefore more fitting to say that human rights protection under the common law was not abandoned, but instead co-existed in the “shadow of the Convention”.<sup>261</sup>

It was not inevitable that the HRA would become as dominant as it indeed did in human rights cases. In fact, the Act itself expressly accommodates for the pre-existence and the recognition of human rights in domestic law, stating that,

“A person's reliance on a Convention right does not restrict (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9”.<sup>262</sup>

This is in line with article 53 ECHR, which states that,

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”.

I suggest that there are four main reasons for the HRA’s initial dominance.

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<sup>260</sup> *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.

<sup>261</sup> Mary Arden, *Human Rights and European Law: Building New Legal Orders* (Oxford University Press 2015) 27.

<sup>262</sup> HRA, s 11.

## Legal Authority and Duty through Statutory Foundation

The most decisive reason is undoubtedly that the HRA is statute law, which is traditionally regarded as “the apex of the hierarchy of legal norms”.<sup>263</sup> Orthodox legal thinking also dictates that administrative law allows limited room for substantive review.<sup>264</sup> Further, as I discuss extensively in Chapter 5, there is significant uncertainty surrounding the justificatory basis of common law constitutional rights, and unwritten constitutional principles more broadly, which presents an obstacle for effective fundamental rights enforcement. In other words, the common law legal authority in constitutional rights cases is contested - in particular in the face of clear legislative language. The HRA on the other hand makes it explicitly unlawful<sup>265</sup> for public authorities to act in a manner inconsistent with the rights guaranteed under it,<sup>266</sup> which includes both substance and procedure. It empowers UK courts to review legislation for compliance with the rights enshrined in the ECHR, requiring them to interpret legislation and administrative action in a Convention complaint way under section 3(1) of the Act.<sup>267</sup> This is a key mechanism under the HRA, “not an optional canon of

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<sup>263</sup> Carol Harlow and Richard Rawlings, *Law and Administration* (3<sup>rd</sup> edn, Cambridge University Press 2009) 40.

<sup>264</sup> Thomas Poole, ‘The Reformation of English Administrative Law’ (2009) 68(1) *Cambridge Law Journal* 142.

<sup>265</sup> Infringement of a Convention right by public authorities has become a ground of illegality.

<sup>266</sup> HRA, s 6(1): ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’.

<sup>267</sup> ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’, see *Ghaidan v Godin-Mendoza* [2004] UKHL 3, [2004] 2 AC 557; *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264; *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30.



construction”.<sup>268</sup> Indeed, there is no need to detect any ambiguity in the legislation.<sup>269</sup> Thus, UK courts are, by virtue of what has been recognised as a ‘constitutional statute’,<sup>270</sup> under an obligation to assess human rights compliance. The same cannot be said to be a feature of the English common law.

### **Accessibility and Certainty through a Concrete List of Rights**

Masterman and Wheatle summarise another main reason for the dominance of the HRA elegantly when they say that “whilst the protection of rights and interests through the common law had the benefits of vintage and domesticity on its side, it also lacked force and precision”.<sup>271</sup> Focusing on precision, there is in general no real difficulty to identify which right of the HRA to rely on. As I argue in Chapter 5, there is today still no equivalent comprehensive list of common law constitutional rights and, indeed, while it is possible to draw one up tentatively, there remains uncertainty as to the scope of common law constitutional rights due to the nuanced constitution’s uncertain philosophical footing. In the context of the HRA, neither counsel nor the courts need to engage in any guess-working or tracing exercise. One can point with ease to one or several of the rights listed in the HRA and then refer to what is by now an extensive body of case law, not only from domestic courts but also from the ECtHR itself.

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<sup>268</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 3, [2004] 2 AC 557 [29].

<sup>269</sup> A small selection of what is by now an extensive body of case law includes *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291; *R v A (No.2)* [2001] UKHL 25, [2002] 1 AC 45.

<sup>270</sup> *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 [207].

<sup>271</sup> Roger Masterman and Se-shauna Wheatle, ‘A Common Law Resurgence in Rights Protection?’ [2015] *European Human Rights Law Review* 57, 58.

## The Systematised Reasoning Pattern under the HRA

There is a well-established reasoning pattern under the HRA which facilitates the orderly preparation and resolution of a dispute. To illustrate, in *R (L) v Commissioner of Police of the Metropolis*,<sup>272</sup> the Appellant claimed that her human rights had been violated when the police issued an enhanced criminal records certificate which stated that she had been accused of neglecting her child and that she had allegedly not cooperated with social services. The question was whether section 115(7) of the Police Act 1997, (*as interpreted in R (X) v Chief Constable of the West Midlands Police*),<sup>273</sup> was incompatible with the Applicant's right to respect for her private life under article 8 ECHR, or would otherwise need to be read down to avoid incompatibility. The Supreme Court held that article 8 ECHR was applicable, and that interference could not be justified as being proportionate. The vast majority of cases will typically follow the same reasoning pattern, asking whether behaviour falls within the ambit of a Convention right, whether there has been an infringement of such right and whether such an infringement is, if the right is not an absolute one,<sup>274</sup> proportionate and pursuant of one of the legitimate aims listed in the respective Convention article. One of the main attractions under this approach is the reasoning template based on the principle of proportionality,<sup>275</sup>

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<sup>272</sup> [2009] UKSC 3, [2010] 1 AC 410.

<sup>273</sup> [2004] EWCA Civ 1068, [2005] 1 WLR 65.

<sup>274</sup> Four Convention rights are absolute, i.e. their restriction or suspension can never be justified, not even in a state of emergency: the right not to be subjected to torture or inhuman or degrading treatment, the right not to be held in slavery or servitude; the right not to be convicted for conduct which was not an offence at the time it occurred and the right to be punished for an offence as was applicable at the time the offence was committed.

<sup>275</sup> See Jeremy McBride, 'Proportionality and the European Convention on Human Rights' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford University Press 1999); Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful*

which the UK courts are also familiar with due to its pertinence and popularity in EU law.<sup>276</sup> In contrast, and I will discuss this in detail in Chapter 3, while there are certain key characteristics that that we also find in common law constitutional rights jurisprudence, including references to proportionality,<sup>277</sup> there is no coherent underlying orthodoxy yet. This makes it difficult to predict which way a case will be decided.

### **The New Toy**

Another factor which is more elusive than the ones proposed so far but arguably no less significant, is the human one. Put simply, the HRA was when it was first implemented exciting and fashionable. Having enthusiastically been described as having “the potential for being one of the most fundamental constitutional enactments since the Bill of Rights over 300 years ago”,<sup>278</sup> it has been said to have initiated “a shift in the legal tectonic plates”.<sup>279</sup> It has led to an unprecedented awareness and emphasis on human rights protection in this jurisdiction. The human rights era that followed was shaped not only through litigation under the Act, but also through the foundation of Matrix Chambers in 2000, the amassment

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*Trustees* (Oxford University Press 2015). See also Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 178–81.

<sup>276</sup> Richard Gordon, *EU Law in Judicial Review* (Oxford University Press 2014). For the concept of a ‘multi-stream jurisdiction’ and how different remedies and principles influence each other see Richard Rawlings and Carol Harlow, *Law and Administration* (Cambridge University Press 2009) ch 15; see also Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) 311–35.

<sup>277</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [54].

<sup>278</sup> Luke Clements and James Young, ‘Human Rights: Changing the Culture’ (1999) 26(1) *Journal of Law and Society* 1, 1.

<sup>279</sup> Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (Penguin 2000) 11.

of literature engaging with human rights, and an increasing offer of dedicated human rights courses and degrees at UK universities. The newly found appetite for and fascination with human rights apparent under this new regime could be witnessed at the judicial level, too. The “attitude of many lawyers and judges in the UK to the Convention was not unlike that of a child to a new toy [...] fascinated with the new toy, the old toy, the common law, was left in the cupboard”.<sup>280</sup>

#### 4. The Second (and Current) Wave

The substantive expansion of the rights protected under the Convention and the exponential increase in case law from Strasbourg taken together with the factors mentioned above meant that common law constitutional rights were enforced more subtly for approximately the first ten years of the HRA’s lifetime. However, this initial approach would soon change. In 2012, the Court of Appeal judgment in *Guardian News*<sup>281</sup> was the first in a line of cases that openly questioned the way in which the relationship between the Convention and the common law had developed. Specifically, Toulson LJ said that the open justice principle “is a constitutional principle to be found not in a written text but in the common law”.<sup>282</sup> Meanwhile, in *UNISON*, Lord Reed noted that,

“before this court, it has been recognised that the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law. The case has therefore been argued primarily on the basis of the common law right of access to

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<sup>280</sup> Lord Neuberger, ‘The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience’ (Supreme Court of Victoria, August 2014) [29] <https://www.supremecourt.uk/docs/speech-140808.pdf> accessed 17 August 2019.

<sup>281</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420, [2013] QB 618.

<sup>282</sup> *ibid* [69].

justice, although arguments have also been presented on the basis of EU law and the European Convention on Human Rights”.<sup>283</sup>

Since its inauguration, the Supreme Court has given more than two dozen judgments in which common law constitutional rights have featured. The judgments in *Guardian News, Osborn*,<sup>284</sup> *A v BBC*,<sup>285</sup> *Kennedy*<sup>286</sup> and *UNISON* are the key judgments of the second wave. They are united by powerful, and sometimes unexpected, ratios and obiter dicta. Apart from these cases, those with the strongest impact on this line of jurisprudence include *R (Prudential plc) v Special Commissioner of Income Tax* (the right to professional privilege),<sup>287</sup> *Moohan* (the right to vote),<sup>288</sup> *R (C) v Secretary of State for Justice* (the right to open justice)<sup>289</sup> and *PJS v News Group Newspapers Ltd* (the right to privacy).<sup>290</sup> In their aggregate, they present a jurisprudential phenomenon which in the future may be considered as a turning point that is no less significant than the changes brought about by *Anisminic*.

This latest wave of common law constitutional rights is more powerful than the first wave due to the institution in charge of the development. During the first wave, the phenomenon of common law constitutional rights was not very well supported by precedent at the highest level.<sup>291</sup> Now it is the highest court of the land that openly

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<sup>283</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [64].

<sup>284</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>285</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588.

<sup>286</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455.

<sup>287</sup> [2013] UKSC 1, [2013] 2 AC 185.

<sup>288</sup> *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901.

<sup>289</sup> [2016] UKSC 2, [2016] 1 WLR 444.

<sup>290</sup> [2016] UKSC 26, [2016] AC 1081.

<sup>291</sup> Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 26.

and powerfully endorses this line of reasoning, often in single majority judgments.<sup>292</sup> Also, the new wave is characterised by the endorsement of other unwritten constitutional concepts that had been missing during the first wave, such as the principle of proportionality, inherent jurisdiction and an ‘advanced’ notion of the principle of legality that appears to further restrict Parliament’s ability to abrogate fundamental constitutional principles, even where this is done expressly.<sup>293</sup> There is thus an overall *constitutionalisation effect*. Finally, and again in contrast to the first wave, through the HRA the UK courts are now explicitly authorised to protect human rights, which has shaped common law constitutional rights (and the nuanced constitution more broadly) significantly.

### **Politics, the Role of the Supreme Court and Rights Accustomisation**

Given the HRA’s initial dominance and its apparent advantages in comparison to the common law, the question arises why the common law re-emerged when it did given the factors I have identified as the underlying reasons for the HRA’s initial dominance have remained roughly the same. I suggest that there are three main reasons for the common law’s revival. First, there is the political ambition to scrap the HRA. Second, the resurgence is one manifestation of the constitutional role and status of the Supreme Court. Third, as I have already touched upon in Chapter 1, UK courts have become accustomed to human rights thinking, making it more natural to develop the English common law accordingly.

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<sup>292</sup> For example, Lord Reed in *A v BBC* [2014] UKSC 25, [2015] AC 588, *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 and *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>293</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [88].

The constant political threat of scrapping the HRA is not a new development.<sup>294</sup> However, it is probably right to say that attitudes towards the HRA have grown increasingly hostile. After the formation of the Coalition Government in 2010, a Commission was tasked with considering the creation of a 'British Bill of Rights', however it failed to yield any results due to internal disagreement. The idea of a domestic bill of rights is not a new one, and indeed not to be solely attributable to the Conservative party.<sup>295</sup> Political support for the HRA seemed to be at an all-time low after a judgment was handed down by the ECtHR which found that the UK's blanket ban on prisoner voting was incompatible with article 3 of the First Protocol.<sup>296</sup> Eventually, the Conservatives in their 2015 manifesto pledged to scrap the HRA and replace it with a 'British Bill of Rights'. Further details on this endeavour have not crystallised beyond what was originally formulated in the Conservatives' 2014 proposal,<sup>297</sup> which was unfavourably received (even by some Conservative party members).<sup>298</sup> Subsequently it was announced that any legislative changes to the UK's human rights regime would be put on hold until after Brexit, a statement supported by the Conservatives' Manifesto for the 2017

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<sup>294</sup> For a candid overview of this development, see Conor Gearty, 'Beyond the Human Rights Act' in Tom Campbell, KD Ewing, and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011).

<sup>295</sup> See for example the Labour Party's Green Paper 'The Governance of Britain' CM 7170 (2007).

<sup>296</sup> *Hirst v the United Kingdom* (2006) 42 EHRR 41.

<sup>297</sup> Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws [https://www.conservatives.com/~media/files/downloadable%20files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20files/human_rights.pdf) accessed 18 August 2019.

<sup>298</sup> See for example Ian McDonald, 'Dominic Grieve and the Human Rights Act, St Hugh's College, Oxford—13 November 2015' (*OxHRH Blog*, 24 November 2015), <http://ohrh.law.ox.ac.uk/dominic-grieve-and-the-human-rights-act-st-hughs-college-oxford-13-november-2015> accessed 18 August 2019.

General Election. Importantly, many high profile members of the newly selected Johnson cabinet have expressed very hostile views about the HRA in the past.

Given the continuing political threat to human rights protection in this jurisdiction, it is not unreasonable to suggest that the current renewed emphasis on domestic human rights protection is in some way reactive to a rather hostile environment, and preparatory for the unknown. Indeed, some members of the Supreme Court have expressed negative opinions about the potential scrapping of the Act.<sup>299</sup> Therefore, it is perhaps no coincidence that judgments such as *Osborn*<sup>300</sup> were handed down just after the ‘Prisoners Voting Saga’<sup>301</sup> unfolded. There is an obvious incentive to ‘get the common law up to speed’ to avoid a human rights vacuum should the HRA be repealed. In light of the negative impact Brexit is likely to have on human rights protection in the UK, this incentive is stronger still. Indeed, it is possible to draw a comparison between *Osborn* and *UNISON*<sup>302</sup> in this regard. In both cases, Lord Reed lamented that the submissions at the lower courts had been framed on the basis of European law. For example, in *Osborn*, he said that,

“The submissions on behalf of the appellants focused on article 5(4), and paid comparatively little attention to domestic administrative law. As I shall explain, that approach does not properly reflect the relationship between domestic law (considered apart from the Human Rights Act) and Convention rights”.<sup>303</sup>

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<sup>299</sup> Joshua Rozenberg, ‘Judges Would Regret Human Rights Act Repeal, warns Lady Hale’ (*The Guardian*, 14 March 2013).

<sup>300</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>301</sup> See Ed Bates, ‘Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg’ (2014) 14(3) *Human Rights Law Review* 503.

<sup>302</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>303</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [54].



I have already referred to the equivalent *UNISON* quote above. Here I will add that the primacy accorded to domestic law in *UNISON* is particularly striking given the supremacy and direct effect of EU law. Its application is - one could say - more 'inevitable' than the provisions of the HRA, and *UNISON* easily could have been decided purely on the basis of EU law. Accordingly, the Supreme Court's insistence to rely nonetheless on the English common law can possibly be seen as an attempt to cement in domestic law some of the rights that are likely to fall away post-Brexit. In both cases, we can suspect that this 'proofing exercise' was part of the motivation to rely exclusively on domestic law.

However, it would be a mistake to regard this as the sole factor for the Supreme Court's renewed interest in autochthonous human rights reasoning (as often appears to be the case in academic discussions at seminars and conferences). A second factor which should not be underestimated is the changing constitutional role and status of the Supreme Court. 1 October 2009 marked a defining moment in the constitutional history of the United Kingdom, as the highest judicial authority in this jurisdiction was transferred from the House of Lords to the Supreme Court for the United Kingdom.<sup>304</sup> It was established to achieve a complete separation between the UK's senior judges and the Upper House of Parliament, thereby emphasising the independence of the Law Lords and increasing the transparency between Parliament and the courts. Apart from the changes the foundation of the Supreme Court has brought in managerial financial and independence terms,<sup>305</sup> substantively, there are signs of the institution asserting itself as a confident and assertive player in the development of the UK constitution. As the UK's highest

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<sup>304</sup> Part 3 of the Constitutional Reform Act 2005. For a detailed account of the creation of the court see Andrew Le Sueur, 'From Appellate Committee to Supreme Court: A Narrative' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords, 1876–2009* (Oxford University Press 2009).

<sup>305</sup> See Graham Gee and others, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press 2015) ch 8.

appellate court, the Supreme Court aims to ensure “that cases are decided on the basis of coherent and consistent rules and principles”,<sup>306</sup> and it has attempted to do so confidently and increasingly in the public eye.

Putting the case law of the second wave of common law constitutional rights in perspective, it becomes clear that the resurgence of the latter is part of a bigger wave of constitutionalism at the Supreme Court. Other strands include the Supreme Court’s recognition of constitutional statutes,<sup>307</sup> which I touched upon in Chapter 1, a renewed emphasis on the rule of law in the face of arguably unequivocal statutory language,<sup>308</sup> and a more flexible approach to the ECtHR’s case law.<sup>309</sup> I accept that the suggestion that the establishment of the Supreme Court has led to changes on a substantive level is somewhat intangible. Clearly, the House of Lords was no stranger to assertive judgments with significant constitutional implications itself.<sup>310</sup> Also, there have of course been numerous

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<sup>306</sup> Joe Eric Khushal Murkens, ‘Judicious Review: Constitutional Practice of the UK Supreme Court’ (2018) 77(2) Cambridge Law Journal 349, 373.

<sup>307</sup> *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61. See also Paul Craig, ‘Constitutionalizing Constitutional Law: HS2’ [2014] Public Law 373.

<sup>308</sup> *R (Evans) v Her Majesty’s Attorney General* [2015] UKSC 21, [2015] AC 1787. The second main case to mention is *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 which will be analysed holistically in Chapter 4.

<sup>309</sup> The ‘mirror principle’, developed by Lord Bingham in *Ullah v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 meant that it was regarded as the duty of national courts to ‘keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less’. A summary of the judicial move away from this principle can be found in Lord Hodge’s majority judgment in *Moochan v Lord Advocate* [2014] UKSC 67, [2015] AC 901[104]. See also *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

<sup>310</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 highlights this point.

judgments in which the Supreme Court has shown significant deference to the state.<sup>311</sup> Yet, it seems that this institutional change and the ensuing exposure of the Supreme Court have led to a different appreciation of what it means to be the guardian of the UK constitution.<sup>312</sup>

Finally, I will make the equally intangible suggestion that a certain level of accustomisation with human rights thinking through the engagement with European and international human rights jurisprudence has over the past two decades led to a partial adaptation in legal thinking. It has become more natural for lawyers and judges to look at a legal problem from a rights-based angle, especially at the Supreme Court where there is a high percentage of cases with human rights elements. As I noted in Chapter 1, English administrative law “has undergone a ‘rights’-based ‘expansion’”,<sup>313</sup> as a result of, among other factors, the addition of the HRA. Where the common law is relied on as a legal source it therefore becomes natural to consider its compatibility with human rights, especially against the background of them being “almost universally accepted, at least in word, or as ideal standards”.<sup>314</sup>

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<sup>311</sup> *R (Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945. See also Eric C Ip, ‘The Institutional Foundations of Supreme Court Power in Britain’s Representative Democracy’ (2013) 49(3) *Representation: Journal of Representative Democracy* 281.

<sup>312</sup> For a more comprehensive account of the development from ‘Handmaids to Parliament’s will’ to vindicator of the rule of law see Roger Masterman and Jo Eric Khushal Murkens, ‘Skirting supremacy and subordination: the constitutional authority of the United Kingdom Supreme Court’ [2013] *Public Law* 800.

<sup>313</sup> Jason Varuhas, ‘The Reformation of English Administrative Law? “Rights”, Rhetoric and Reality’ (2013) 72(2) *Cambridge Law Journal* 369.

<sup>314</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (2<sup>nd</sup> edn, Cornell University Press 2003) 1.

## **5. External Influences and Internal Uncertainties**

The above overview of the historical development of common law constitutional rights shows that they are a phenomenon that is largely - but not exclusively - driven by external factors. Conscious of the domestic shortcomings that crystallised in comparison with European human rights standards, the courts have sought to develop the English common law in a way that would not offer lower levels of protection. This has not always been done in an incremental way, as the traditional common law method would suggest. Sometimes, the courts simply declare that the common law contains the same constitutional rights protection as European law - ECHR and EU-based - could offer. In this process - given the limitations placed on the courts by doctrines like dualism, which prevented an open transposition of ECHR rights into the domestic legal order without legislative implementation - the courts have often sought to stress the historical role the common law played in fundamental rights protection. However, as this chapter has shown predominantly by reference to the jurisprudence's famous antecedents, and as later chapters will continue to propose, the reality of the strength of constitutional rights protection is more underwhelming than the rhetoric would suggest.

The UK courts' renewed interest in the constitutional properties of the English common law raises a plethora of questions about democracy. Specifically, it brings to the forefront debates around the separation of powers, the boundaries of judicial reasoning, the relationship between domestic and international human rights protection, and the conceptualisation of the rule of law. As I will show in the following chapter, and analyse further in Chapter 5, these fundamental questions are largely skirted in the jurisprudence. It is further apparent that many of the precedents relied on to legitimise the enforcement of individual common law constitutional rights amount to nothing more than shaky normative claims. This

has serious consequences for the rigour of this jurisprudence, and it reveals some truths about the insecure foundations of the nuanced constitution more broadly.

## CHAPTER 3

### The Nature and Characteristics of Common Law Constitutional Rights\*

Traditional public law theory suggests that individuals are subjects of the Crown “without the benefit of positive and fundamental constitutional rights [...] against the public authorities of the state”.<sup>315</sup> According to this view, the English common law merely entails concepts referred to as negative freedoms or liberties, i.e. behaviour that is not prohibited by the state, and which is therefore lawful. Such negative freedoms are residual in character, existing in the gaps between laws; they remain after legal restraints have been subtracted.<sup>316</sup> Thus, even where ‘rights’ were recognised under this traditional view, they were ‘rights’ in name only but did not actually possess the qualities we associate with rights today.<sup>317</sup> This is evident from the case law. For example, Lord Browne-Wilkinson LJ said in *Wheeler v Leicester City Council*:

“Basic constitutional rights in the country such as freedom of the person and freedom of speech are based not on any express provision conferring

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\* This chapter grounds the following publication: Christina Lienen, ‘Common Law Constitutional Rights: Public Law at a Crossroad?’ [2018] Public Law 649.

<sup>315</sup> Anthony Lester, ‘Citizenship and the Constitution’ (2008) 79(3) The Political Quarterly 388, 393.

<sup>316</sup> Thus, they are at the risk of being abrogated by statute (or the common law itself): Michael Allen and Brian Thompson, *Cases and Materials on Constitutional and Administrative Law* (10<sup>th</sup> edn, Oxford University Press 2011) 407.

<sup>317</sup> For a summary of the leading jurisprudential framework by Wesley Newcomb Hohfeld see Luís Duarte d’Almeida, ‘Fundamental Legal Concepts: The Hohfeldian Framework’ (2016) 11(10) Philosophy Compass 554.

such a right but on a *freedom of an individual to do what he will save to the extent that he is prevented from doing so by law*".<sup>318</sup>

In contrast, common law constitutional rights cannot accurately be described as having an exclusively negative or gap-filling character. They are an independent source of law with heightened legal status.<sup>319</sup>

### **1. Why the Distinction between Rights and Residual Freedoms Matters**

This evolution from the concept of a freedom closer towards the concept of a fully-fledged right signifies a remarkable step in the English legal tradition because the distinction between a right and a residual liberty is a significant one. The concept of a residual liberty is understood to signify a "private sphere [...] with which others cannot interfere".<sup>320</sup> However, being characterised as the absence of constraint and restraint,<sup>321</sup> the key characteristic of a residual liberty is that it can be taken away very easily, particularly under the traditional reading of the UK constitution, by laws adopted by Parliament or indeed changes made to the English common law.<sup>322</sup> Thus, the concept of a residual liberty cannot be characterised as an independent, resilient legal value, as its existence is always conditional upon non-interference. There is nothing that the state cannot take away. This inherent

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<sup>318</sup> [1985] AC 1054 (HL) 1065 (emphasis added).

<sup>319</sup> Compare TRS Allan's terminology: 'perceived as an important value entitled to independent weight in adjudication' in *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1993) 139.

<sup>320</sup> Friedrich von Hayek, *The Constitution of Liberty: The Definite Edition* (Ronald Hamowy ed, Routledge 2013) 60.

<sup>321</sup> William Little, HW Fowler and J Coulson, *The Shorter Oxford English Dictionary on Historical Principles* (The Clarendon Press 1933).

<sup>322</sup> See Keith D Ewing and Conor A Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (Oxford University Press 2000).

vulnerability is increased further by the fact that liberties have been treated as an “undifferentiated mass, rather than an enumerated list”.<sup>323</sup> It should be apparent that the traditional exclusive adherence to the concept of residual freedoms in this jurisdiction is perfectly aligned with its orthodox understanding of the nature of the constitution and public power as outlined in Chapter 1. The notion of the political constitution is premised on the assumption that Parliament is legally omnipotent. Accordingly, values cannot be entrenched in such a way that they could not be (easily) taken away by the political branches of state. The associated philosophical position that residual liberties are afforded no protection from interference, limitation and abolition, makes them undeserving to be called ‘rights’.<sup>324</sup>

The detrimental impact the residual freedoms approach can have on legitimate governance was famously exposed in *Malone v Commissioner of Police of the Metropolis* (*‘Malone’*),<sup>325</sup> a judgment falling short of basic “notions of liberty and justice”.<sup>326</sup> During the trial at the Crown Court, the prosecution had admitted that Mr Malone’s telephone conversations had been intercepted on the authority of a warrant issued by the Secretary of State. Mr Malone issued a writ claiming that the interception was unlawful. At the domestic level, he could not complain that the police had tapped his phone. No right, whether of privacy or property, was recognised as having been infringed. As Sir Robert Megarry V-C said,

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<sup>323</sup> David Feldman, *Civil Liberties and Human Rights in England and Wales* (2<sup>nd</sup> edn, Oxford University Press 2002) 70.

<sup>324</sup> On this see Robert Stevens, *Torts and Rights* (Oxford University Press 2007) 4, referring to Herbert L A Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford University Press 1982).

<sup>325</sup> *Malone v Commissioner of Police of the Metropolis (No.2)* [1979] Ch 344, [1979] 2 WLR 700.

<sup>326</sup> Carol Harlow, ‘Comment: *Malone v Metropolitan Police Commissioner*’ [1980] Public Law 1 (note).



“England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden”.<sup>327</sup>

Thus, all the court did under the residual freedom model was to openly criticise the lack of any statutory regulation of the power. This approach was not endorsed at the European level. The ECtHR held (unanimously) in *Malone v United Kingdom*<sup>328</sup> that the Government’s action constituted an infringement of the right to privacy under article 8 ECHR by a public authority. Once more, this demonstrates the impact European law has had on the development of human rights in this jurisdiction.

Thinking about the hypothetical implications of the domestic legal analysis in *Malone*, one cannot help but worry about what the residual freedom approach can potentially lead to. First, *Malone* exposes that the concept of residual freedoms is confusing as it is unclear what level it should operate on. Is it the private individual or the state that this doctrine applies to? Also, and more importantly, the concept of residual freedoms creates an imbalance between private individuals and the state in that the state can always limit an individual’s freedom, but it will be much less inclined to limit its own freedoms. Notably, Dicey’s emphasis on legal equality between the state and individuals has been conducive to creating an unhelpful illusion as to equality between the former and the latter. It affords the state “no special existence in legal doctrine - with the result that public authorities enjoy the same residual freedom of action as private individuals, subject only to explicit legal restraint”.<sup>329</sup> Third, if *Malone* was considered to be the appropriate approach,

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<sup>327</sup> *Malone v Commissioner of Police of the Metropolis (No.2)* [1979] Ch 344, [1979] 2 WLR 700 [357].

<sup>328</sup> *Malone v United Kingdom* (1985) 7 EHRR 14.

<sup>329</sup> TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1993) 158.

“every novel exercise of police power [...] would be legal unless Parliament had, somewhat curiously, anticipated and forbidden it, or unless from time immemorial the common law had prohibited it”.<sup>330</sup> This really strengthens the Executive, not Parliament. Further, Mr Malone would not have been able to ‘return the favour’ as he would have faced charges under the Official Secrets Act 1911. Luckily, we have moved on from this account, the current approach going beyond the one laid down by Laws LJ in *R v Somerset County Council, ex p Fewings*. Whilst individuals “may do anything [...] which the law does not prohibit” the opposite holds true for public bodies, i.e. anything they do “must be justified by positive law”.<sup>331</sup>

Even if we consider *Malone* to be an exceptional case, or an anomaly that does not accurately reflect the conceptualisation and workings of residual freedoms, this thesis suggests that an exclusively residual freedom approach is still undesirable as it is always conditional upon non-interference. In other words, whatever value we attach to an interest, we cannot - under this approach - give it any teeth, rendering it potentially meaningless in the face of limiting legal rules.<sup>332</sup>

‘Rights’ are different: they are a legal source. The notion of a right implies either that government action cannot interfere or that special justification is needed for government or legislative action to override the right in question, even if such action is taken in the general interest. Of course, a ‘rights character’ does not necessarily mean that the right in question is adequately protected in English law. Indeed, as I argue in Chapter 5, the inbuilt fragility of common law constitutional rights means that the nuanced constitution is ultimately difficult to defend normatively. On the basis of that analysis, common law constitutional rights are

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<sup>330</sup> Carol Harlow, ‘Comment: *Malone v Metropolitan Police Commissioner*’ [1980] Public Law 1, 3.

<sup>331</sup> [1995] 1 All ER 513 (QB) 524 (Laws LJ).

<sup>332</sup> I discuss in detail in Chapter 6 why this is an untenable position in a liberal democracy.

best conceptualised as a weak variant of human rights.<sup>333</sup> This does not change the fact that these domestically recognised rights still provide a stronger protection than residual freedoms could. This is so for one main reason. When a freedom meets (or clashes with) legislative interference or an opposing common law rule, the freedom is annihilated.<sup>334</sup> It is not a legal source, and therefore simply cannot compete. They are two different species altogether. When the gaps between the laws are filled, no space remains for a residual freedom. The legal analysis starts and finishes with the focus being solely on the interference of the legal source higher up in the hierarchy. However, where a right meets legislative or common law interference, the starting point is to assert the importance of the right, which ordinarily becomes the focal point of the legal analysis. Any conflicting legal source will be interpreted accordingly or, where constitutional law permits, quashed or invalidated<sup>335</sup> to safeguard the content of the right. Thus, there are implications both in terms of emphasis and potentially in terms of outcome, too.

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<sup>333</sup> I will not dwell in more detail on the definition of human rights at this point; others have elaborated on this in, see for example Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015); Matthew Liao and Adam Etinson, 'Political and Naturalist Conceptions of Human Rights: A false Polemic?' (2012) 9(3) *Journal of Moral Philosophy* 327; James Griffin, *On Human Rights* (Oxford University Press 2008). For a civil rights-based account see Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press 2005) ch 3.

<sup>334</sup> See for example *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No. 2) [2001] QB 1067, [2001] 2 WLR 1219.

<sup>335</sup> As is the case in jurisdictions such as Germany and the United States of America, subject to their respective constitutional rules.

## 2. The Positive and Negative Dimensions of Common Law Constitutional Rights

Common law constitutional rights can be classified as ‘rights’ rather than ‘freedoms’. As I have stated previously, they typically require express statutory language to be overridden and, post-*UNISON*, even such express statutory language may be interpreted restrictively by the courts.<sup>336</sup> Common law constitutional rights are not necessarily negative rights, i.e. rights individuals hold not to be subjected to a specific kind of harmful action. Negative rights are said to be easier to respect as they merely require individuals and/or the state to refrain from interfering with each other, whereas it may prove more difficult, time-consuming and expensive to fulfil a positive duty.<sup>337</sup> The ECtHR increasingly recognises implied positive obligations on signatories to the Convention.<sup>338</sup> This has caused some difficulty in this jurisdiction as the English common law is traditionally seen as not imposing liability for pure omissions or the acts of third parties.<sup>339</sup> Exceptions such as the care required in certain professional

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<sup>336</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [88].

<sup>337</sup> Leif Wenar, ‘Negative and Positive Rights’ (2015) *The Stanford Encyclopaedia of Philosophy* <https://plato.stanford.edu/entries/rights/> accessed 18 August 2019; Matthias Klatt, ‘Positive Obligations under the European Convention on Human Rights’ (2011) 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 691, 693. It may perhaps be more sensible to view all rights as giving rise to a wide range of both positive and negative duties, see Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008). See further Henry Shue, who has classified three types of duty: duties to avoid, duties to protect, and duties to aid in *Basic Rights* (Princeton University Press 1980) 51.

<sup>338</sup> Alastair R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 229.

<sup>339</sup> *Michael and others (FC) v The Chief Constable of South Wales Police and another* [2015] UKSC 2, [2015] AC 1732 [174].

relationships<sup>340</sup> traditionally depend on some level of foreseeability and proximity.<sup>341</sup> Generally, public authorities do not owe a duty of care in negligence towards individuals who suffer harm as the consequence of a failure to perform duties,<sup>342</sup> as was exemplified in *In Re McKerr*,<sup>343</sup> in which the House of Lords held that there was, under the common law, no procedural obligation to investigate a death during fatal shootings.<sup>344</sup> A more 'positive' approach arguably sits at odds with the traditional emphasis UK public law has placed on legal positivism and Parliamentary Sovereignty.

Yet, it is evident that UK courts today regularly require the state not just not to interfere, but to positively act to secure the content of a right. In other words, some common law constitutional rights are positive in nature, requiring affirmative duties to benefit an individual bearing that right.<sup>345</sup> *Osborn*<sup>346</sup> is a case in point. Here, the Parole Board was required to hold an oral hearing before determining an application for release, or for a transfer to open conditions, of a prisoner to secure the common law right of procedural fairness. Equally, in *R v Secretary of State for the Home Department, ex p Anderson*,<sup>347</sup> it was held that "the right of access to a solicitor to obtain advice and assistance with regard to the initiation of civil

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<sup>340</sup> See *Lanphier v Phipos* (1838) 8 C&P 475, 173 ER 581.

<sup>341</sup> *Kent v Griffiths* (No. 3) [2001] QB 36, [2000] 2 WLR 1158; *Capital & Counties Plc v Hampshire CC* [1997] QB 1004 (QB).

<sup>342</sup> *Stovin v Wise* [1996] AC 923 (HL); *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057.

<sup>343</sup> [2004] UKHL 12, [2004] 1 WLR 807.

<sup>344</sup> *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11, [2019] AC 196.

<sup>345</sup> Aaron X Fellmeth, *Paradigms of International Human Rights Law* (Oxford University Press 2016) ch 5.

<sup>346</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>347</sup> [1984] QB 778 (QB).

proceedings is inseparable from the right of access to the courts". Additionally, there are other, more indirect ways in which the state can be required to fulfil certain positive rights. For example, in *R (Wagstaff) v Secretary of State for Health*<sup>348</sup> it was said that although there was no free-standing right to an investigation under the common law (outside an inquest), a refusal to hold such an investigation may be successfully challenged through judicial review on the ground of irrationality.<sup>349</sup>

### 3. The Six Characteristics

Having characterised common law constitutional rights as - the clue is in the name - 'rights', the remainder of this chapter is concerned with the characteristics commonly shared by these rights. My analysis is based predominantly on *UNISON*<sup>350</sup> and the 'quartet' of four leading cases, three by the Supreme Court and one Court of Appeal authority. These are, in chronological order, *Guardian News*,<sup>351</sup> *Osborn*,<sup>352</sup> *Kennedy*<sup>353</sup> and *A v BBC*,<sup>354</sup> whose facts I summarised in the Introduction. To recap briefly, *Guardian News*, *Kennedy* and *A v BBC* were concerned with the principle of open justice, whereas *Osborn* was about the right to procedural fairness. Meanwhile, *UNISON* was concerned with the right of access to justice.

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<sup>348</sup> [2001] 1 WLR 292 (QB).

<sup>349</sup> See *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653.

<sup>350</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>351</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618.

<sup>352</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>353</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455.

<sup>354</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588.

As I noted in Chapter 2, these cases form part of the second - and current - wave of common law constitutional rights jurisprudence. They have triggered some academic attention, having been analysed in legal articles,<sup>355</sup> speeches,<sup>356</sup> book chapters<sup>357</sup> and case comments.<sup>358</sup> However, they have predominantly been characterised as an ostensibly new movement in UK public law that relies on common law rights instead of, or prior to, the ECHR; the focus is on autochthony<sup>359</sup> or on the comparison of domestic rights and European human rights. For example, Elliott has compared common law constitutional rights with the protection offered

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<sup>355</sup> A selection includes Sir Philip Sales, 'Rights and Fundamental Rights in English Law' 75(1) *Cambridge Law Journal* 86; Eirik Bjorge, 'Common law rights: balancing domestic and international exigencies' (2016) 75(2) *Cambridge Law Journal* 220; Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68(1) *Current Legal Problems* 85; Scott Stephenson, 'The Supreme Court's Renewed Interest in Autochthonous Constitutionalism' [2015] *Public Law* 394; Roger Masterman and Se-shauna Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] *European Human Rights Law Review* 57.

<sup>356</sup> Lady Hale, 'UK Constitutionalism on the March?' (Constitutional and Administrative Law Bar Association Conference, 12 July 2014) <https://www.supremecourt.uk/docs/speech-140712.pdf> accessed 17 August 2019.

<sup>357</sup> Se-shauna Wheatle, *Principled Reasoning in Human Rights Adjudication* (Hart Publishing 2017) ch 8.

<sup>358</sup> See Eirik Bjorge, 'Fundamental rights at English (and European?) common law' (2015) 131 *Law Quarterly Review* 192; Brian Pillans, 'Another serving of alphabet soup: A v British Broadcasting Corporation (Scotland)' (2014) 19(4) *Communications Law* 130.

<sup>359</sup> See particularly Scott Stephenson, 'The Supreme Court's renewed interest in autochthonous constitutionalism' [2015] *Public Law* 394. By way of contrast, Se-shauna Wheatle, *Principled Reasoning in Human Rights Adjudication* (Hart Publishing 2017) ch 8. briefly explores some of this development's constitutional dimension.

by the ECHR/HRA by looking at “three vectors”: normative reach, protective rigour and constitutional resilience.<sup>360</sup>

This thesis suggests that the relationship between the ECHR and domestic common law is only one aspect of common law constitutional rights that is worth exploring. By identifying and analysing the other main characteristics of this concept, I aim to provide the first holistic account of contemporary common law constitutional rights jurisprudence. To do so realistically, and more comprehensively, I also refer to common law constitutional rights judgments other than the ones that are typically associated with this development, such as *Beghal*<sup>361</sup> and *Moohan*.<sup>362</sup> If we look at common law constitutional rights’ domestic dimension, i.e. their implication for the domestic legal order, in addition to their relationship with the human rights protection offered by the ECHR, we see that there are some shared characteristics. Specifically, the six key characteristics emerging are:

- (1) the absence of a clearly discernible foundational or philosophical source of power;
- (2) a wide-ranging understanding of the principle of legality;
- (3) an attempted redefinition of the relationship between the common law and the ECHR, in which the former is accorded primacy;
- (4) a broad conceptualisation of domestic precedent;
- (5) extensive reliance on judicial reasoning from other common law jurisdictions; and
- (6) the use of proportionality review.

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<sup>360</sup> Mark Elliott, ‘Beyond the European Convention: Human Rights and the Common Law’ (2015) 68(1) *Current Legal Problems* 85.

<sup>361</sup> *Beghal v DPP* [2015] UKSC 49, [2016] AC 88.

<sup>362</sup> *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901.



I will discuss each of these in turn.

### **The Enabling Power: Inherent Jurisdiction or the Rule of Law?**

The concept of inherent jurisdiction is derived, “not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called inherent”.<sup>363</sup> It has been exercised before the superior courts’ jurisdiction was first recognised by statute which means that Parliament, by virtue of the Senior Courts Act 1981 merely recognised such jurisdiction, instead of creating it.<sup>364</sup> The criteria used to determine whether a court has inherent jurisdiction are almost always vague, ‘injustice’ and ‘need’ being only two of many triggers relied on in the UK, and in other jurisdictions.<sup>365</sup> Many judgments have suggested that the scope of the inherent jurisdiction of the High Court<sup>366</sup> is potentially infinite, unless Parliament has expressly curtailed it.<sup>367</sup>

*Kennedy*, *Guardian News* and *A v BBC* all rely to some extent on the concept of inherent jurisdiction in a procedural sense, and they present it as what could be referred to as the court’s *enabling power*, i.e. the power that enables the courts to

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<sup>363</sup> IH Jacob, ‘The Inherent Jurisdiction of the Court’ (1970) 23(1) *Current Legal Problems* 23 which says that the High Court’s judicial review jurisdiction is derived from the inherent common law jurisdiction.

<sup>364</sup> Jonathan Auburn, Jonathan Moffett and Andrew Sharland, *Judicial Review: Principles and Procedure* (Oxford University Press 2013). Already in 1886 it was recognised that ‘rules [...] do not [...] deprive the Court in any way of the inherent power which every Court has to prevent the abuse of legal machinery [...]’: *Willis v Earl of Beauchamp* (1886) 11 PD 59.

<sup>365</sup> See for example Yihan Goh, ‘The inherent jurisdiction and inherent powers of the Singapore Courts’ [2011] *Singapore Journal of Legal Studies* 178.

<sup>366</sup> The Court of Appeal, on an appeal from the High Court, has the power to exercise such jurisdiction as the High Court may exercise, see Senior Courts Act 1981, s 15(3).

<sup>367</sup> *Re E (SA) (A Minor) (Wardship)* [1984] 1 WLR 156 (HL).

recognise, develop and enforce common law constitutional rights. The clearest connection between common law constitutional rights and the concept of inherent jurisdiction is made in *A v BBC*, in which Lord Reed unequivocally, and unprecedentedly at Supreme Court level, established a link between *principles, constitutional status* and *inherent jurisdiction*. Specifically, he suggested that principles that are of constitutional status lead automatically to an inherent jurisdiction of the court. In his words,

“Since the principle of open justice is a *constitutional principle to be found in the common law*, it follows that it is for the courts to determine its ambit and its requirements, subject to any statutory provision. The courts *therefore have an inherent jurisdiction to determine how the principle should be applied*”.<sup>368</sup>

This quote is similar to the words uttered by Toulson LJ in *Guardian News*, which precedes *A v BBC*, namely,

“The *open justice principle is a constitutional principle* to be found not in a written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. *It follows that the courts have an inherent jurisdiction to determine how the principle should be applied*”.<sup>369</sup>

It is puzzling that the ‘constitutional status equals inherent jurisdiction’ connection was not recognised as the enabling power to ground common law constitutional rights in *Osborn*, in which Lord Reed gave the single majority judgment. There are two possible explanations for this. Either there was an oversight of the importance

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<sup>368</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588 [27] (emphasis added).

<sup>369</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618 [69] (emphasis added).

of inherent jurisdiction in *Osborn*, which seems unlikely given Lord Reed's approach in *A v BBC*. Alternatively, the actual connecting factor here is not the relationship between a constitutional right under the common law and inherent jurisdiction, but instead the case fell into a category that would have triggered inherent jurisdiction in any case, and the 'constitutional rights element' is simply gloss. This latter explanation seems more likely. There is a longstanding tradition by the courts to use their inherent jurisdiction to grant non-party access to certain documents to ensure open justice.<sup>370</sup> Thus, whether categorised as constitutional rights or not, the court in all cases but *Osborn* could have relied on its inherent jurisdiction to grant the orders that it did.

This discrepancy also signals that common law constitutional rights are not necessarily perceived of by the Judiciary as one uniform concept. Rather, rights are determined individually on a case by case - and area by area (of law) - basis. Thus, although based on the same legal concept, that of common law constitutional rights, there is, similarly to *Osborn*, no mention of inherent jurisdiction in *UNISON*. Instead, the judgment is based exclusively on the rule of law.<sup>371</sup> There are two ways of looking at this. One is to say that common law constitutional rights are henceforth to be considered to be based on the rule of law. The other is to suggest that this specific right of access to the courts is - according to the courts - based on the rule of law, and that future common law constitutional rights cases may entail yet another foundational basis or enabling power. The latter seems more likely given Lord Reed's context-specific elaboration

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<sup>370</sup> See for example *GIO Personal Investment Services Ltd v Liverpool & London Steamship Protection and Indemnity Association Ltd* [1999] 1 WLR 984 (CA) and *Church of Scientology of California v Department of Health and Social Security* [1979] 1 WLR 723 (CA).

<sup>371</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [66]. Other common law constitutional rights authorities mention the rule of law only in a fleeting manner.

on the rule of law. Specifically, he emphasised the importance of the role of the courts in upholding the rule of law, and reasoned that for the courts to fulfil their function in a democracy, individuals need to be able to bring cases to the courts in the first place, the latter thus not just benefiting the respective individuals concerned but society at large.<sup>372</sup>

### **The Principle of Legality**

Common law constitutional rights are, as opposed to *ordinary* common law principles, in some way entrenched. Specifically, the principle of legality ensures that common law constitutional rights *cannot* “be as easily repealed as, say, the Animals Act 1971 or the Estate Agents Act 1979”.<sup>373</sup> The broader dimension of the principle of legality encompasses a wider set of constitutional precepts which require that any governmental action needs to be undertaken only under positive authorisation.<sup>374</sup> The narrow dimension of the principle of legality is most commonly associated with Lord Hoffmann’s speech in *Simms*: there is a presumption that Parliament does not intend to interfere with fundamental common law rights.<sup>375</sup> As Varuhas has said, the principle of legality *may* be “triggered” by the recognition of a common law constitutional right in any given case.<sup>376</sup> As the following shows, the principle of legality is indeed not always invoked explicitly, yet it operates powerfully in the background, providing a starting point for statutory interpretation and, often, giving rights teeth. Finally, there are

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<sup>372</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [69]-[72].

<sup>373</sup> Eric Barendt, *An Introduction to Constitutional Law* (Oxford University Press 1998) 27.

<sup>374</sup> Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37(2) Melbourne University Law Review 372.

<sup>375</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL).

<sup>376</sup> Jason Varuhas, ‘Conceptualising the Principle(s) of Legality’ (2018) 29(3) Public Law Review 196.

common law constitutional rights cases where the principle of legality does not work in favour of an individual whose constitutional rights are affected.

*Kennedy* outlines the relevance of the principle of legality for common law constitutional rights, albeit in a somewhat abstract and academic fashion. This is so, because the common law constitutional right in question is not directly classified as such by Lord Mance; his judgment focuses on general common law principles of statutory construction. For instance, he said that the issue at stake concerned “the principles of accountability and transparency, which are contained in the Charities Act and reinforced by common law considerations [...]”.<sup>377</sup> Inspired by the approach taken in *Guardian News*, Lord Mance’s analysis emphasises the balancing of different interests instead. He finds that section 32 FOIA “was intended to provide an absolute exemption which would not cease abruptly at the end of the court, arbitration or inquiry proceedings, but would continue until the relevant documents became historical records”.<sup>378</sup>

Lord Toulson’s judgment is somewhat different but reaches the same result. However, he outlines how the principle of legality shields - to some extent - common law constitutional rights from statutory interference. Also relying in part on *Guardian News*, in which he himself had given the single majority judgment at the time, Lord Toulson reiterates that “open justice is a principle at the heart of our system of justice and vital to the rule of law”.<sup>379</sup> Consequently, he stated,

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<sup>377</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [55]. *Kennedy* has been noted to be a somewhat odd judgment, see for example Richard Clayton, ‘The Curious Case of Kennedy v Charity Commission’ (*UK Constitutional Law Association Blog*, 18 April 2014) <https://ukconstitutionallaw.org/2014/04/18/richard-clayton-the-curious-case-of-kennedy-v-charity-commission/> accessed 20 August 2019.

<sup>378</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [34].

<sup>379</sup> *ibid* [112].

“although the sovereignty of Parliament means that the responsibility of the courts for determining the scope of the open justice principle may be affected by an Act of Parliament, Parliament should not be taken to have legislated so as to limit or control the way in which the court decides such a question unless the language of the statute makes it plain beyond possible doubt that this was Parliament’s intention”.<sup>380</sup>

Meanwhile *Osborn*, even though Lord Reed’s reasoning can be said to be implicitly based on the principle of legality, is somewhat negligible in terms of the implications for this characteristic. Equally, *A v BBC* mainly deals with the exceptions to the principle of open justice, and with how the latter can limit protection under article 10 ECHR. It is therefore not concerned with legality for the purposes of this section either. Thus, the other main case to be considered is *UNISON*. In short, *UNISON* endorses the rule that “nothing less than express words in the statute taking away the right of the King’s subjects of access to the courts of justice would authorize or justify it”.<sup>381</sup> The approach the courts should take in access to justice cases - according to Lord Reed - was to ask themselves “whether the impediment or hindrance in question had been clearly authorised by primary legislation”.<sup>382</sup> In the absence of such express curtailment, if it was the practical effect of fees to deny absolutely the right of access to justice, they would be unlawful. The test applied was simple, and it relied on an uncompromisingly high threshold. Thus,

“In order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission. The

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<sup>380</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [117].

<sup>381</sup> *Chester v Bateson* [1920] 1 KB 829 (KB) 836, cited in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [76].

<sup>382</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [79].

evidence now before the court, considered realistically and as a whole, leads to the conclusion that that requirement is not met”.<sup>383</sup>

Accordingly, *UNISON* is indeed a strong principle of legality case in all but name.<sup>384</sup> As Rawlings remarks, “the further the judges go down the legality+ route, the greater may be the sense of constitutional illusion around legislative intention. The very fact that the ‘rights’ or ‘principles’ triggering it are within their control underwrites the potency and flexibility of this weapon in the judicial armoury”.<sup>385</sup>

Personally, I am not convinced that it is helpful to distinguish between different kinds, facets or modes of the principle of legality.<sup>386</sup> Rather, I suggest that cases such as *UNISON* are best understood as taking what the principle entails to its full conclusion. The test is not (and arguably never has been) merely that there are clear statutory words along the lines of ‘the Secretary of State is entitled to restrict prisoners communicating with their legal representatives’. The threshold of Parliament accepting squarely the political cost for its legislation is only passed when the statutory section in question is also clear about the implications this has for common law constitutional rights, as exemplified in section 31(1) of the Theft Act 1968, which I cite just below.

Further, as I stated above, the principle of legality does not always lead to the protection of common law constitutional rights. Cases such as *UNISON* make the principle appear particularly potent, however - the UK constitution being a nuanced one - examples on the other end of the spectrum can be found with relative ease.

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<sup>383</sup> *ibid* [91].

<sup>384</sup> Richard Rawlings, ‘The *UNISON* Case: A New High-Water Mark’ (2018) 29 Public Law Review 190, 192.

<sup>385</sup> *ibid* 192.

<sup>386</sup> See Jason Varuhas, ‘Conceptualising the Principle(s) of Legality’ (2018) 29(3) Public Law Review 196.

*Beghal*, which I touched upon in Chapter 1, demonstrates how a right protected by the English common law can be abrogated at the hands of the Judiciary without explicit statutory language to that effect. To reiterate, in this case the Supreme Court held that the privilege against self-incrimination, a common law constitutional right, was legally abrogated by Schedule 7 of the Terrorism Act 2000. The Justices focused on the second part of the test devised in *Simms*, which says that in the alternative to a clear and unequivocal enactment, a right may be taken away by necessary implication. This is problematic as it suggests that it is sufficient for Parliament to have legislated in an area of public importance, which may suggest that a constitutional right has been abrogated. This provides a deficient threshold for human rights protection.

We can contrast this mechanism of necessary implication with an example of an express abrogation of the privilege against self-incrimination. The Theft Act 1968 provides that “A person shall not be excused, by reason that to do so may incriminate that person [or the spouse or civil partner of that person] of an offence under this Act”.<sup>387</sup> What we can take from this is that - under the principle of legality - there is ample opportunity for common law constitutional rights to be limited or abrogated. Further, as I argue in later chapters, though express derogation appears to carry greater weight in terms of legitimacy compared to abrogation by necessary implication, the former is still difficult to defend on normative grounds where constitutional rights constitutive of a liberal democracy are at stake.

### **Strasbourg and the Common Law**

In “an age of rights”,<sup>388</sup> the Supreme Court’s common law constitutional rights jurisprudence “presents an opportunity to mainstream human rights into the UK’s bloodstream and build upon the jurisprudence of the Strasbourg court to take a

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<sup>387</sup> The Theft Act 1968, s 31(1).

<sup>388</sup> Noberto Bobbio, *The Age of Rights* (Polity Press 1996).



more developed and nuanced approach to rights protection”.<sup>389</sup> The judgments in question indicate a seemingly novel methodology - or approach - in human rights adjudication. In each case the Appellants’ approach was considered by the courts as erroneous for assuming that “because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem should begin and end with the Strasbourg case law”.<sup>390</sup>

The judgment in *Guardian News* is the most straightforward example of the judges putting the common law, which is “in vigorous health and flourishing”,<sup>391</sup> truly centre-stage. Whilst there is a survey of the status quo of ECtHR jurisprudence, this is not presented as the foundation for Toulson LJ’s appreciation of the law, but rather as part of counsel’s submissions.<sup>392</sup> His conclusions start with an unequivocal commitment to domestic law. The open justice principle “is a constitutional principle to be found *not in a written text but in the common law*”.<sup>393</sup> This constitutes the firm basis of his judgment, which is marked by explicit criticism of what he identified as an imbalance he “regrets”, namely the UK courts’ frequent citing of Strasbourg decisions instead of referring to decisions of senior courts in other common law jurisdictions. Lord Neuberger MR and Hooper LJ did not even consider the applicability of the ECHR in their concurring judgments, making *Guardian News* the most common law-exclusive judgment of the ‘quartet’.

The reasoning in *Osborn*, *Kennedy* and *A v BBC* is less independent from the ECHR. Blair sees the trio as standing for the following two suggestions about the

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<sup>389</sup> David Blair, ‘Quis custodiet ipsos custodes? The opportunities and democratic legitimacy of the post-*Osborn* human rights debate’ (2016) 2 *Juridical Review* 83, 103.

<sup>390</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [63].

<sup>391</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420, [2013] QB 618 [88].

<sup>392</sup> *ibid* [41]-[53].

<sup>393</sup> *ibid* [69] (emphasis added).

relationship between Strasbourg and domestic law. First, they reject the notion that Strasbourg has primacy. Second, the Convention is utilised as an inspiration.<sup>394</sup> However, this may be too simple a view. In fact, the cases selected show that there is no firmly established approach as to the relationship between domestic law and the HRA/ECHR. They also reveal other problematic tendencies. For example, in *Osborn*, Lord Reed said that action falling short of satisfying the common law duty of fairness automatically leads to the consequential failure of the equivalent principles or rights under the ECHR.<sup>395</sup> Lord Reed further supposed that,

“in order to comply with common law standards of procedural fairness, the board should hold an oral hearing [...] whenever fairness to the prisoner requires such a hearing [...]. By doing so the board would also fulfil its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged”.<sup>396</sup>

This approach bears several risks. For example, one can quite easily imagine a situation where the common law provides a lower standard than the Convention, and would therefore be in breach of the latter. Assuming compatibility risks not being aware of any potential discrepancies, which in turn prevents the courts from rectifying them. It would be more sensible to view Convention rights as *threshold protection* without insinuating that,

“especially in view of the contribution which common lawyers made to the Convention’s inception, [the Convention] may be expected, at least generally

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<sup>394</sup> David Blair, ‘Quis custodiet ipsos custodes? The opportunities and democratic legitimacy of the post-*Osborn* human rights debate’ (2016) 2 *Juridical Review* 83, 87.

<sup>395</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [113].

<sup>396</sup> *ibid* [2].

even if not always, to reflect and to find their homologue in the common or domestic statute law”.<sup>397</sup>

Of course, “in time a synthesis may [...] emerge”,<sup>398</sup> however assuming compliance bears the risk of the common law under-delivering and/or the UK being in breach of binding international human rights standards.

Further problems arise. In *Kennedy*, Lord Toulson doubted that article 10 ECHR could add anything to what he found in domestic law. Commenting on what he perceived to be an unsatisfactory state of the Strasbourg case law, he reasoned,

“What is so far lacking from the more recent Strasbourg decisions, with respect, is a consistent and clearly reasoned analysis of the “right to receive and impart information” within the meaning of article 10 [...]”.<sup>399</sup>

Does this mean that the Convention would apply (and be the first port of call) if the case law was more satisfactory? Also, as it happens, the claim that the Strasbourg jurisprudence in question was indeed ambiguous appeared to be ill-founded. The dissenting opinions given by Lord Carnwath and Lord Wilson on this point were subsequently validated when the Supreme Court’s majority’s approach in *Kennedy* was rejected by the ECtHR’s Grand Chamber in *Magyar Helsinki Bizottság v Hungary*.<sup>400</sup> In this judgment, it was held that article 10 did indeed confer a right of access to information. This, as I have argued elsewhere, is “a powerful reminder that under the current constitutional set-up, there is a higher

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<sup>397</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [46].

<sup>398</sup> *ibid* [46].

<sup>399</sup> *ibid* [145].

<sup>400</sup> Application No 18030/11 (8 November 2016), unreported.

instance in human rights questions that unsatisfied claimants can resort to, and that can ‘correct’ domestic interpretation of the ECHR”.<sup>401</sup>

*Kennedy* thus also showcases how fragile common law constitutional rights protection can be. Its majority opinions were utterly confused and incomplete, unveiling uncertainty as to the basic elements and the strength of the common law constitutional right in question. As Lord Wilson noted in his concerned (and highly persuasive) dissent,

“the scheme identified by the majority for disclosure by the commission outside the FOIA is profoundly unsatisfactory. With respect, it can scarcely be described as a scheme at all and there is certainly no example of its prior operation or other recognition of its existence [...] Although the majority of my colleagues reject Mr Kennedy’s assertion that he has rights under article 10 which are engaged by his request for disclosure by the Commission, they proceed to suggest that his entitlement to disclosure otherwise than under the FOIA would be likely to be as extensive as any entitlement under article 10 (Lord Mance, paras 45, 50, 56, 92 and 101(iv)). The suggested scheme otherwise than under the FOIA is so vague and generalised that I regard the determination thereunder of any request for disclosure as impossible to predict”.<sup>402</sup>

This brings us back to my earlier criticism of the assumption that the two sources of law - the Convention and the common law - offer the same level of protection. To reiterate, in *UNISON*, Lord Reed noted that,

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<sup>401</sup> Christina Lienen, ‘When Strasbourg Won’t Have It – Push for or Limitation of Common Law Constitutional Rights?’ (*UK Constitutional Law Association Blog*, 10 January 2017) <https://ukconstitutionallaw.org/2017/01/10/christina-lienen-when-strasbourg-wont-have-it-push-for-or-limitation-of-common-law-constitutional-rights/> accessed 20 August 2019.

<sup>402</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [198]-[199].

“the issue concerning the effect of the Fees Order on access to justice was argued before the courts below on the basis of EU law, although some domestic authorities and judgments of the European Court of Human Rights were also cited. Before this court, it has been recognised that the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law. The case has therefore been argued primarily on the basis of the common law right of access to justice, although arguments have also been presented on the basis of EU law and the European Convention on Human Rights”.<sup>403</sup>

As opposed to the meddled approach present in some of the cases analysed above, here we find a clear commitment not only to the *primacy*, but also to the *sufficiency* of the common law. Again, the question emerges whether the court - by not engaging with the Strasbourg jurisprudence at all - is at the risk of violating its own obligation under the HRA, which explicitly mandates that it screen domestic law for Convention compatibility.<sup>404</sup> Naturally, this risk is significantly higher, and in some instances only present, where the outcome of a case is not beneficial to the individual seeking to rely on a common law constitutional right, i.e. where no violation is established.

Before moving on to the next characteristic, it is important to point out that any conceptualisation of common law primacy paired with exclusivity is also necessarily flawed. Common law constitutional rights cannot convincingly be labelled as *purely* domestic alternatives to which the ECHR is complementary. In reality, it will be hard to find a purely domestic common law constitutional rights case that has not been influenced by Strasbourg jurisprudence. Indeed, digging a little deeper into the case law shows that, unsurprisingly, over the past few

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<sup>403</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [64].

<sup>404</sup> HRA, s 6(3).

decades there has been a significant blurring between domestic law and European law in human rights adjudication. For example, in *Osborn* the main domestic authorities relied on to determine the requirements of procedural fairness were *R (Smith) v Parole Board for England and Wales*,<sup>405</sup> Byles J's citation in *Cooper v Wandsworth Board of Works*<sup>406</sup> of the dictum of Fortescue J in *R v Cambridge University, ex p Bentley* 93 ER 698,<sup>407</sup> *R v Parole Board, ex p Bradley*,<sup>408</sup> and *R v Parole Board, ex p Wilson*<sup>409</sup> The intertwined relationship between the English common law and European Law becomes clear if we look more closely at these cases and by tracing them further. For example, in *R (West) v Parole Board*, the 1994 judgment of *Doody*,<sup>410</sup> which concerned the sentencing of a convicted murderer, was applied. Importantly, *Doody* in turn was decided against the background of the ECtHR judgment in *Thynne v United Kingdom*,<sup>411</sup> after which Parliament changed the law in the UK to comply with its Convention obligations.<sup>412</sup> This shows that common law constitutional rights do not operate in a world of their own; often they will have been directly or indirectly influenced by ECtHR judgments at some point in time. Lord Rodger suggested as much when he said that it would be wrong "to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth they soak through and permeate the areas of our law in which they apply".<sup>413</sup>

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<sup>405</sup> [2005] UKHL 1, [2005] 1 WLR 350.

<sup>406</sup> [1863] 143 ER 414, (1863) 14 CB NS 180 (Court of Common Pleas).

<sup>407</sup> (1724) 2 Ld Raym 1334.

<sup>408</sup> [1991] 1 WLR 134 (QB).

<sup>409</sup> [1992] QB 740 (CA).

<sup>410</sup> *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 (HL).

<sup>411</sup> (1991) 13 EHRR 666.

<sup>412</sup> Criminal Justice Act 1991, s 34.

<sup>413</sup> *HM Advocate v Montgomery (David Shields)* (2000) JC 111 (JC) [117].

## Domestic Foundation: A Fluid Notion of Precedent

Where do common law constitutional rights come from, where do they originate? In the four cases analysed, references to precedent or legal principles from older authorities are notably sparse. Apart from *UNISON*, which relies heavily on relatively recent precedent, the cases analysed mention only a handful of other cases spanning several centuries. Generally, a strong emphasis is placed on the notion that common law constitutional rights have been around for a long time - legitimacy through longevity. For example, as I stated previously, in *A v BBC*, Lord Reed identified the roots of the constitutional principle of open justice as being ancient enough to have been covered by “the constitutional legislation enacted following the accession of William and Mary” in the Court of Session Act 1693.<sup>414</sup> The case law is then traced very sporadically to outline the development of the right in question to its most recent judicial citation.

The precedential foundation of a common law constitutional right may be very weak. This is demonstrated formidably by the repeated references to *Scott v Scott*,<sup>415</sup> on which all judgments analysed other than *Osborn* and *UNISON* - which do not deal with the right to open justice - rely to a varying degree. *Scott v Scott* suggests that the principle of open justice requires the judicial process to be open to the public, unless there are strong countervailing reasons. Toulson LJ begins his judgment in *Guardian News* by referring to Lord Shaw’s speech in *Scott v Scott* where he said, quoting Jeremy Bentham, that “publicity is the very soul of justice”.<sup>416</sup> The ratio is that only where publicity potentially jeopardises the entire case, or where compelling, exceptional factors such as “wardship and lunacy” are present, the principle of open justice can be departed from. In the beginning of 2016, in the Supreme Court judgment of *R (C) v Secretary of State for Justice*,

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<sup>414</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588 [24].

<sup>415</sup> [1913] AC 417 (HL).

<sup>416</sup> *ibid* [477].

Lady Hale acknowledged *Scott v Scott* to still be the leading case reflecting a long-standing common law principle.<sup>417</sup>

Importantly, the factual situation in *Scott v Scott* differed significantly from the judgments analysed. It concerned the unlawful distribution or leaking of transcripts from marriage annulment proceedings by one of the parties to the proceedings, whereas *A v BBC*, *Guardian News* and *Kennedy* relate to inquiries into concerns of public interest through the media. Lord Carnwath was apprehensive about this disconnect in his dissenting opinion in *Kennedy*. He reasoned that,

“there is nothing in the *Guardian News* case, or any other existing authority to support the view that common law principles relating to disclosure of documents in the courts can be transferred directly to inquiries. It must depend on the statutory or other legal framework within which the particular inquiry is established”.<sup>418</sup>

Another example of scepticism towards a flexible notion of precedent is evident in Lord Wilson’s dissenting opinion in *Kennedy*, which suggested that what was said in *Guardian News* about the courts cannot simply be extended to public bodies such as the Charity Commission.<sup>419</sup> He further noted that this comparison disclosed a basic fallacy as the foundation of the *Guardian News* decision lay in the strong constitutional principle that courts sit in public. Accordingly, it was,

“no surprise that the starting point of Toulson LJ’s judgment is a quotation from the great case of *Scott v Scott* [1913] AC 417, in which that principle was set in stone. It is not a large step from that principle to hold that papers supplied to the judge for the purpose of an open hearing should in principle be

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<sup>417</sup> *R (C) v Secretary of State for Justice* [2016] UKSC 2, [2016] AC 1081 [16], [17].

<sup>418</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [241].

<sup>419</sup> *ibid* [236]-[238].



made available to the public, absent good reasons to the contrary. For statutory inquiries, such as those conducted by the Charity Commission, there is no such underlying principle that they should sit in public. The essential foundation that is needed for application of the *Guardian News* approach is wholly absent”.<sup>420</sup>

However, these remarks were, literally, in the minority. Meanwhile, the main case relied on in *Osborn* is *R (West)*. Again, the legal framework in this case was very different from the legal framework in *Osborn* itself. At the time, indeterminate sentence prisoners in England and Wales were entitled to an oral hearing, and they were also entitled to challenge the revocation of their licence. Yet, Lord Bingham’s thoughts on what procedural fairness requires were adopted in *Osborn*, as the underlying considerations of principle were considered to be the same.

Some may see reason for concern here. The cases suggest reliance on a broad principle that may undermine the importance of the legal and factual framework in which it applies. However, not only can it be argued that this is simply how the common law has always operated, but it is also worth acknowledging that human rights law is best conceptualised and developed not by exclusively or overly emphasising similarities in factual patterns. Yet, another issue remains: that of the ultimate, original foundation. All things considered, it may be fair to point to *Scott v Scott* despite the very different factual and legal circumstances. However, where does *Scott v Scott* come from? *Scott v Scott* itself does not offer a solid answer. Indeed, there is no reference to any other relevant case law. Rather, what we find is that *Scott v Scott* is infused with obiter dicta such as “I am of opinion that every Court of justice is open to every subject of the King”.<sup>421</sup>

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<sup>420</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [240].

<sup>421</sup> *Scott v Scott* [1913] AC 417 (HL) [442] (Lord Earl of Halsbury).

There must always be a case - such as *Scott v Scott* - in which a common law constitutional right was first relied upon, a case in which no other cases could be used to provide 'historical validation' or legitimacy. Accordingly, in such cases, the sole foundation would have been logic or normative moral considerations. If this is considered acceptable as the foundation for principles and rights enforced today - logically - there is nothing that prevents new rights from being recognised and enforced as well. However, realistically, as I discuss in Chapter 5, the common law's reliance on the past is bound to hamper the recognition of rights for which no precedent can be found. Indeed, the historical tracing of common law constitutional rights shows that the foundation of common law constitutional rights is normative - the initial recognition of a constitutional right is based on considerations of political morality. However, a right's subsequent maintenance and development through judicial endorsement turns them into 'tradition'. The notion of tradition - embodied through the system of precedent - frames and legitimises the use of common law constitutional rights, and substantive normative elaborations become secondary.

### **Building Substance: Validation through Comparativism**

As there is no established constitutional rights framework in this jurisdiction, the courts have traditionally held back with the development of the content of common law constitutional rights. Consequently, it seems almost inevitable that the courts look to external sources which can provide both substance and legitimacy now that common law constitutional rights are being increasingly enforced. One such mechanism is the reference to - and reliance on - foreign judgments from other common law jurisdictions. There is ample evidence of judicial constitutional comparativism in the context of common law constitutional rights. Of course, the citation and use of foreign legal sources is by no means a phenomenon exclusive

to constitutional cases,<sup>422</sup> however some argue it is more contentious in the latter context due to the considered special status of constitutional law and its intimate connectedness with the social, cultural and wider legal framework of nation states.<sup>423</sup>

In *A v BBC*, Lord Reed, reasoning that the exceptions developed in *Scott v Scott* are not exhaustive, and that the principle of justice will develop in response to societal changes, suggested that this right could also be developed by,

“having regard to the approach adopted in other common law countries, some of which have constitutional texts containing guarantees comparable to the Convention rights, while in others the approach adopted reflects the courts’ view of the requirements of justice”.<sup>424</sup>

The same approach can be detected in other common law constitutional rights judgments, young<sup>425</sup> and old.<sup>426</sup> As I have written elsewhere,<sup>427</sup> overall, the Supreme Court’s general approach to judicial comparativism in constitutional cases is commendable, as it is thorough, flexible and humble. What must equally

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<sup>422</sup> See for example Elaine Mak, ‘Comparative Law before the Supreme Courts of the UK and the Netherlands: An Empirical and Comparative Analysis’ in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015).

<sup>423</sup> On this see Vicki C Jackson, ‘Constitutional Comparisons: Convergence, Resistance, Engagement’ (2005) 119(1) *Harvard Law Review* 109; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights Comparative Constitutional Law* (Princeton University Press 2008).

<sup>424</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588 [40].

<sup>425</sup> See for example *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901.

<sup>426</sup> See for example *Attorney General v Times Newspapers Ltd* [1974] AC 273 (HL).

<sup>427</sup> Christina Lienen, ‘Judicial Constitutional Comparativism at the UK Supreme Court’ (2019) 39(1) *Legal Studies* 166.

be recognised, however, is that constitutional comparativism is a mechanism that facilitates the courts in skirting the underlying questions about the legitimacy of common law constitutional rights.

In saying this, I do not mean to suggest that the engagement in judicial comparativism to help build the content of domestic rights is in any way disingenuous. I merely point out that relying on constitutional comparativism provides a 'short-cut' to legitimacy. The fact that other eminent common law courts have enforced certain rights is viewed as partly legitimising their domestic enforcement. However, to address concerns over legitimacy satisfactorily, the courts must engage more consciously with the aspects of political morality that lie behind constitutional rights - individually, and in relation to the constitutional framework. Thus, constitutional comparativism contributes to these questions being left unaddressed.

The heavy reliance on constitutional comparativism also shows that domestic constitutional rights jurisprudence is relatively 'hollow', arguably due to the historical rights-scepticism in this jurisdiction.<sup>428</sup> The courts need to *prop up* domestic jurisprudence to provide a solid foundation for common law constitutional rights, the borrowing from other common law jurisdictions being one way of achieving this. As the cases analysed show, such references to foreign law need not necessarily be limited to judicial decisions. Notably, Toulson LJ cited not only case law to strengthen his interpretation of the principle of open justice, but also softer forms of authority, such as a report by the Law Commission of New Zealand on Access to Court Records (2006).<sup>429</sup> His approach, which relies heavily on foreign law, is worth citing in full. Toulson LJ said that he based his decision,

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<sup>428</sup> Subject to the exceptions I discussed in Chapter 2.

<sup>429</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618 [2].

“on the common law principle of open justice. In reaching it I am fortified by the common theme of the judgments in other common law countries to which I have referred. Collectively they are strong persuasive authority. The courts are used to citation of Strasbourg decisions in abundance, but citation of decisions of senior courts in other common law jurisdictions is now less common. I regret the imbalance. The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere”.<sup>430</sup>

Meanwhile, in *UNISON* and *Osborn* no reference is made to judgments from other common law jurisdictions. This supports my argument that judicial constitutional comparativism operates as a sort of gap-filler and means of external validation. *UNISON* shows that the right of access to the courts is clearly considered ‘established’ enough to go all the way by itself. The Supreme Court could rely on precedents that point to a foundation in domestic law - it even had case law at its disposal that specifically mentioned the constitutional right of access to the courts (as opposed to case law that point to related rights or principles). Specifically, Lord Reed said that “in English law, the right of access to the courts has long been recognised”,<sup>431</sup> listing Magna Carta, Edward Coke’s *Institutes of the Laws of England*, Blackstone’s *Commentaries on the Laws of England*, and numerous cases form the first wave of common law constitutional rights in the 1980s and 1990s.<sup>432</sup>

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<sup>430</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [88].

<sup>431</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [74].

<sup>432</sup> Such as *Bremer Vulkan Schiffsbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909 (HL), *Raymond v Honey* [1983] 1 AC 1 (HL) and *R v Secretary of State for the Home Department, ex p Leech (No.2)* [1994] QB 198, [1993] 3 WLR 1125.

## Proportionality Review

Proportionality review is a legal construction that operates as a methodological tool in public law adjudication working with the two components of “the distinction between the scope of the constitutional right and the justification for its limitation which determines the extent of its protection”.<sup>433</sup> It embodies and acknowledges the relativity of constitutional rights.<sup>434</sup> In *Bank Mellat v Her Majesty’s Treasury (No. 2)*, Lord Sumption restated the four stages of the proportionality test, saying that one had to determine,

“(i) whether [a measure’s] objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether [a measure] is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community”.<sup>435</sup>

Opinion has differed as to whether proportionality exists as a separate, or indeed the only, ground of review in cases not concerned with EU law or human rights protected by the ECHR. Williams has encapsulated the academic debate comprehensively, and I will not repeat the argument.<sup>436</sup> Suffice it to say that proponents of the unification of reasonableness and proportionality (or the replacement of the former by the latter) experienced a momentary triumph when

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<sup>433</sup> Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 131.

<sup>434</sup> *ibid* 134.

<sup>435</sup> [2013] UKSC 39, [2014] AC 700 [20].

<sup>436</sup> Rebecca Williams, ‘Structuring Substantive Review’ [2017] Public Law 99. See also the more recent Jonathan Lee, ‘Substantiating Substantive Review’ [2018] Public Law 632, which partially endorses Williams’ paper.

*Pham v Secretary of State for the Home Department* ('Pham')<sup>437</sup> was handed down in the Supreme Court in 2015. The question in *Pham* had been whether the Home Secretary could deprive the Appellant, who was born in Vietnam, of his acquired British citizenship and to deport him to Vietnam on the grounds of terrorist charges. This, it was argued, would leave him stateless, as the Vietnamese Government had subsequently alleged that he was no longer considered a Vietnamese national. The Home Secretary's decision was unanimously held to be lawful. The judgments of Lords Carnwath, Mance and Reed can be interpreted as standing for a softening of the traditionally rigid distinction between domestic and supranational legal sources. Indeed, the judgment stands not for a replacement of rationality review, but rather for the conclusion that the application of the principle of proportionality would not differ in practice from the application of a context-sensitive standard of common law unreasonableness.<sup>438</sup>

Just a few months later, in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* ('Keyu'),<sup>439</sup> the Supreme Court declined the opportunity to determine definitively whether Wednesbury reasonableness should be replaced by - or merged with - proportionality review. The case concerned the decision by the Secretaries of State for Foreign Affairs and Defence to refuse to hold a public inquiry into the events which took place in December 1948. A patrol of Scots Guards had killed 23 unarmed civilians in the village of Batang Kali in Selangor, then one of the states of the former federation of Malaya, of which the UK was the colonial power at the time. The question of proportionality and whether it had

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<sup>437</sup> [2015] UKSC 19, [2015] 1 WLR 1591.

<sup>438</sup> *ibid* [59] (Lord Carnwath).

<sup>439</sup> [2015] UKSC 69, [2016] AC 1355. See also Paul Daly, 'Wednesbury and Proportionality — Where are We Now?' (*Administrative Law Matters Blog*, 28 November 2016) <https://www.administrativelawmatters.com/blog/2016/11/28/wednesbury-and-proportionality-where-are-we-now/> accessed 20 August 2019.

become a separate ground of judicial review was engaged with in reaction to the Appellants' argument,

“that the time has come to reconsider the basis on which the courts review decisions of the executive, and in particular that the traditional *Wednesbury* rationality basis for challenging executive decisions should be replaced by a more structured and principled challenge based on proportionality”.<sup>440</sup>

Lord Neuberger, with whom Lord Hughes agreed, reasoned that a panel of five judges could not determine such a constitutionally significant question. Lord Kerr, dissenting, stated that the question “will have to be frankly addressed by this court sooner rather than later”.<sup>441</sup>

More recent case law casts further doubt over the burial of the traditional standard of review while failing to clarify the relationship between the two tests. For instance, *R (Gallaher Ltd) v Competition and Markets Authority* (*'Gallaher'*), which advocates a simplification of the increasingly convoluted test, seems to suggest that *Wednesbury/unreasonableness* is wide enough to accommodate within it, depending on the context, proportionality review.<sup>442</sup> Furthermore, *Wednesbury* continues to be routinely applied in a wide range of public law cases.<sup>443</sup>

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<sup>440</sup> *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 [131].

<sup>441</sup> *ibid* [271].

<sup>442</sup> [2018] UKSC 25, [2019] AC 96 [27].

<sup>443</sup> See for example *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd* [2017] UKSC 66, [2017] PTSR 1413. See also the recent decision in *R (DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289, in which the Court said that the correct test for the article 14 ECHR issue at stake was whether a measure was “manifestly without reasonable



Opposed to the uncertainty surrounding the standard of review in administrative law more generally,<sup>444</sup> we find relative uniformity when it comes to common law constitutional rights protection. I stress the word 'relative' here as in 2018 the Court of Appeal conducted a Wednesbury-type review in a common law constitutional rights case on the basis of outdated jurisprudence.<sup>445</sup> However, at Supreme Court level the position is clear. In fact, out of the six characteristics identified, this is the most consistent one: in the context of common law constitutional rights, proportionality review has been adopted as the standard of review.

*Kennedy* is the most relevant judgment for this characteristic. It endorses Craig's view that the underlying function of both tests is the same, namely to weigh and to balance.<sup>446</sup> What proportionality is said to offer is "an element of structure [...] by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages".<sup>447</sup> In line with supporters of the merging of the two tests, Lord Mance stated that there is no reason why these factors should not be appropriate to be considered in purely domestic cases. With reference to Lord Bridge of Harwich's remarks in *R v Secretary of State for*

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foundation". This suggests that proportionality review itself may be on the decline in certain contexts.

<sup>444</sup> See also *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [2016] AC 1457 [55]-57.

<sup>445</sup> *Browne v The Parole Board of England & Wales* [2018] EWCA Civ 2024, [2018] 9 WLUK 246.

<sup>446</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [54]; Paul Craig, 'The Nature of Reasonableness' (2013) 66(1) *Current Legal Problems* 131. See also Mark Elliott, 'Common-law constitutionalism and proportionality in the Supreme Court: *Kennedy v The Charity Commission*' (*Public Law for Everyone Blog*, 31 March 2014) <https://publiclawforeveryone.com/2014/03/31/common-law-constitutionalism-and-proportionality-in-the-supreme-court-kennedy-v-the-charity-commission/> accessed 20 August 2019.

<sup>447</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [54].

*the Home Department, ex p Bugdaycay*,<sup>448</sup> he then reasoned that the gravity of the issue determines the intensity of review in every particular case.<sup>449</sup> Meanwhile, in *UNISON*, proportionality review was endorsed in a clear-cut way without any reference to scholarly works.<sup>450</sup> Thus, it can be concluded that while “it is at best uncertain to what extent the proportionality test [...] has become part of domestic public law”,<sup>451</sup> in the context of common law constitutional rights the principle has been wholeheartedly endorsed at the highest level.

Importantly though, and to repeat the above point, this falls short of suggesting that proportionality review has become an independent head of review in English law. As was shown above, common law constitutional rights and rights covered by the ECHR are not entirely distinct as their paths will generally have crossed, if only tangentially, at some moment in time. Furthermore, they are in any case referred to and relied on alongside each other, operating as alternative options in human rights adjudication. Finally, even where a case is based on the English common law as a starting point, strictly speaking, it subsequently needs to be ‘tested’ against Strasbourg jurisprudence to confirm compatibility with international human rights obligations. Accordingly, having two separate standards of review for the same rights protected by different legal sources would indeed be bizarre.<sup>452</sup>

#### **4. Taking Stock**

The current chapter and the previous have provided an in-depth analysis both of the development and the shared characteristics of common law constitutional

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<sup>448</sup> [1987] AC 514 (HL) 531.

<sup>449</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [51].

<sup>450</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [88]-[89].

<sup>451</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [246].

<sup>452</sup> For the opposite view see James Goodwin, ‘The last defence of *Wednesbury*’ [2012] Public Law 445.

rights in the UK. The main emphasis in both chapters has been to provide the material on which this thesis' two final chapters, which are predominantly normative in nature, are based.

Given this impending critical analysis of the findings presented in the first three chapters, at this stage I will merely make one observation. While common law constitutional rights incorporate many other public law principles and reasoning techniques, the quest to characterise them uniformly as one model or concept proves, despite their likeness in nature, challenging. The fragility and uncertainty that can thus be associated with this jurisprudential development is reflective of the wider fragility and uncertainty underlying the nuanced constitution. In the next chapter, I will further explore the framework common law constitutional rights operate in and take their shape from - the nuanced constitution - by a case study of one of most significant manifestations of the latter: the *Privacy International* litigation.

## CHAPTER 4

### **A Case Study of *Privacy International v Investigatory Powers Tribunal***

There has been no shortage of remarkable constitutional law cases in recent times. In 2019, one judgment in particular stood out: *Privacy International v Investigatory Powers Tribunal*.<sup>453</sup> The key issue in this case was whether section 67(8) of the Regulation of Investigatory Powers Act 2000 prevents judicial review of a decision of the Investigatory Powers Tribunal. When this thesis was still in its infancy, *Privacy International* was not on the horizon. However, the majority's judgment had been foreshadowed by the Supreme Court's common law constitutional rights jurisprudence. Indeed, *UNISON*<sup>454</sup> in particular paved the way by contributing to a rich constitutional soil on which future rule of law-centric reasoning - such as the majority opinion in the Supreme Court's *Privacy International* judgment - could flourish.

This chapter will highlight some of the key aspects of the nuanced constitution by taking a close look at the various stages and outcomes of the *Privacy International* proceedings. Specifically, I make one observation and one argument in this regard. First, I note that the evolution from the Divisional Court judgment in 2017 to the majority's Supreme Court judgment earlier this year signifies a remarkable shift from what started as a Parliamentary Sovereignty and legislative intention-centric approach to a substantive rule of law-based one. Indeed, if we unpack the different judgments and individual opinions in these proceedings, we find serious disagreement on almost every level, which is emblematic of the spectrum of constitutional theory inherent in the nuanced constitution. Second, I argue that Lord Carnwath's obiter dicta, endorsed by Lady Hale and Lord Kerr, on whether

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<sup>453</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219.

<sup>454</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

Parliament could ever oust the jurisdiction of the High Court, is logically vulnerable. It attempts to rationalise the essence of the judgment, which is legal constitutionalism, within a Parliamentary Sovereignty framework, thereby exposing the inherent tension underlying the nuance constitution.

I conclude this chapter by arguing that, contrary to what the judgment itself suggests, the constitutional question underlying the issue raised in *Privacy International* is not dissimilar to the one at the core of *Jackson*.<sup>455</sup> Indeed, Lord Carnwath's obiter dicta on the second issue is comparable to - and in many ways a natural extension of - the revolutionary obiter dicta in *Jackson*. I further caution that despite the significance of these obiter dicta, and the majority's conclusion that the High Court's jurisdiction was not ousted on this occasion, *Privacy International* does not change the nature of the UK constitution. Instead, it reveals some of the nuanced constitution's strength and weaknesses, the latter of which I explore in more detail in the remainder of this thesis.

## 1. The Constitutional Significance of Ouster Clauses

Ouster clauses are statutory provisions which aim to prevent the courts from considering a question or from reviewing a decision. They are,

“usually found in primary legislation. As such, ouster clauses can claim to have a direct link to some form of democratic approval and, by virtue of the Parliamentary process, they usually have a justification or justifications that are a matter of public record”.<sup>456</sup>

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<sup>455</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

<sup>456</sup> Joe Tomlinson, 'Framing Questions About Ouster Clauses' (*Admin Law Blog*, 20 November 2018 <https://adminlawblog.org/2018/11/20/joe-tomlinson-privacy-international-symposium-ouster-clauses-material-exclusions-on-judicial-review-and-the-role-of-policy-justifications/> accessed 20 August 2019).

However, as case law in this area shows, even an apparently clear legislative prohibition on the courts reviewing certain decisions will generally be insufficient for the clause to have any meaningful legal effect. Indeed, on the basis of several centuries of consistent case law on this matter, in *Anisminic* itself the special treatment of ouster clauses in this jurisdiction was alluded to in forceful terms. Specifically, Lord Reid said,

“statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity”.<sup>457</sup>

As both *Anisminic* and *Privacy International* show, the powerful judicial tool of judicial interpretation is here brought to the fore. Indeed, one could say that ouster clause cases demonstrate the outer boundaries of statutory interpretation. What looks - on the face of it - like unambiguous statutory wording is interpreted in a nuanced way, taking into account complex constitutional principles. Thus, ouster clauses speak directly to the constitutional authority of - and the power dynamic between - the two branches of state. Indeed, as the way in which “statutes are interpreted is crucial to the implementation of the doctrine of parliamentary sovereignty”,<sup>458</sup> we can say that the judicial interpretation of ouster clauses exemplifies the softening of “the potentially hard edges of legislative

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<sup>457</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL). The courts’ attitude towards ouster clauses pre-dates modern cases like *Anisminic*, see for example *Andrews v Mitchell* [1905] AC 78 (HL) and *Smith, Lluellyn v Commissioners of Sewers* (1669) 1 Mod 44, 86 ER 719.

<sup>458</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010) 225.

sovereignty”.<sup>459</sup> Therefore, a close analysis of ouster clauses promises to provide insights into the nature of the nuanced constitution as well as the nature of judicial reasoning within this constitutional framework.

## **2. *Anisminic v Foreign Compensation Commission***

The nature of the courts’ interpretative power in their adjudication of ouster clauses - and the consequences thereof - have prompted Edlin to observe that,

“one striking difference between the English and American constitutional systems is the power of American federal courts to nullify primary legislation for unconstitutionality. English courts lack this authority, or at least, they say they do. As we will see, the reality is more complicated”.<sup>460</sup>

This ‘complicated reality’ was enabled and shaped significantly by *Anisminic*, which we need to understand to grasp the significance of *Privacy International*. To repeat briefly, the Appellants in *Anisminic* had had some of their property seized by the Egyptian government in the aftermath of the UK’s invasion of Egypt in 1956, and they applied for compensation under the Foreign Compensation Act 1950 (‘the Foreign Compensation Act’). The body authorised - by an Order in Council made under this Act - to deal with such claims, the Foreign Compensation Commission, decided that the Appellants were not eligible for compensation. This was due to their successor in title - an Egyptian owned organisation *Anisminic* had sold its

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<sup>459</sup> Adam Tucker, ‘Parliamentary Intention, *Anisminic*, and the *Privacy International* Case (Part One)’ (*UK Constitutional Law Association Blog*, 18 December 2018) <https://ukconstitutionallaw.org/2018/12/18/adam-tucker-parliamentary-intention-anisminic-and-the-privacy-international-case-part-one/> accessed 20 August 2019.

<sup>460</sup> Douglas E Edlin, ‘A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States’ (2009) 57(1) *The American Journal of Comparative Law* 67, 68.

mining properties to - not being British, as required by subordinate legislation. This prompted *Anisminic* to initiate judicial review proceedings seeking declarations that the Commission's determinations had been erroneous in law. However, section 4(4) of the Foreign Compensation Act stated that "the determination by the Commission of any application made to them under this Act shall not be called in question in any court of law".

Nonetheless, the House of Lords found that the Commission had "rejected the appellants' claim on a ground which they had no right to take into account".<sup>461</sup> It would only have been within its power to consider the issue of succession in title where "the claimant was successor in title to an original claimant who no longer existed".<sup>462</sup> As this had not been the case here, the Commission had had no right to consider this matter. Accordingly, their determination was a nullity; it was merely a 'purported determination'. This being the case, the jurisdiction of the courts had not been ousted, as there was never a determination in the first place. Finally, Lord Reid reasoned that a provision, which was intended to oust any inquiry by the court, would have to be "much more specific than the bald statement that a determination shall not be called in question in any court of law".<sup>463</sup>

Arguably, the main legacy of *Anisminic* is that it was subsequently considered<sup>464</sup> to have rendered obsolete the distinction between errors going to the jurisdiction

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<sup>461</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

<sup>462</sup> David Feldman, 'Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective' in Satvinder Juss and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Hart Publishing 2017) 82.

<sup>463</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) 170E.

<sup>464</sup> See David Feldman who argues that this is stretching the relatively narrow ratio decidendi of *Anisminic* in 'Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective' in Satvinder Juss and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Hart Publishing 2017) 92-95.



of the tribunal and other errors of law.<sup>465</sup> Any error of law is a jurisdictional error, rendering a decision ultra vires and void. Lord Diplock expressed the new status quo elegantly - and authoritatively - in *O'Reilly v Mackman*. He said,

“The break-through that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination,' not being 'a determination' within the meaning of the empowering legislation, was accordingly a nullity”.<sup>466</sup>

As Daly has argued, what at first glance looks like formalistic reasoning (mainly the distinction between ‘determinations’ and ‘purported determinations’) has a strong *substantive* underpinning: the protection of fundamental and well-settled constitutional principles.<sup>467</sup> It is this relationship between the rich substantive underpinning and the influence these constitutional principles have on the construction of statutory language that we also see at play in *Privacy International*.

### **3. *Privacy International*: The Facts**

As I stated above, the question in *Privacy International* was whether section 67(8) of the Regulation of Investigatory Powers Act 2000 (‘the Act’) prevents judicial review of a decision of the Investigatory Powers Tribunal (‘IPT’). The IPT had been established under the Act to examine, among other things, the conduct of the UK’s

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<sup>465</sup> *R v Hull University Visitor, ex p Page* [1993] AC 682 (HL) 701 (Lord Browne-Wilkinson).

<sup>466</sup> [1983] 2 AC 237 (HL) 278.

<sup>467</sup> Paul Daly, ‘Three aspects of Anisminic’ (*Admin Law Blog*, 27 November 2018) <https://adminlawblog.org/2018/11/30/joanna-bell-privacy-international-symposium-framing-questions-about-ouster-clauses/> accessed 20 August 2019.

intelligence services. Privacy International, a UK-based charity promoting the importance of privacy and data protection world-wide, suspected that it had been subjected to computer hacking by the Government Communications Headquarters under a ‘thematic warrant’ - a warrant authorising a broad class of possible hacking activity for a broad class of possible property. Privacy International challenged the legality of thematic warrants before the IPT arguing that section 5 of the Intelligence Services Act 1994, which authorises the Secretary of State to issue warrants on an application made by the security services, needs to be construed against the background of the long-established aversion of the common law to general warrants.<sup>468</sup>

The IPT held that the UK security and intelligence services’ (admitted) collection of bulk personal datasets was lawful,<sup>469</sup> which prompted Privacy International to seek judicial review. It was only after the commencement of the proceedings that a statutory right to appeal to the Court of Appeal or Court of Sessions on points of law was introduced against certain decisions made by the IPT.<sup>470</sup> This appellate route did not apply retrospectively, and was therefore not material to these proceedings. Throughout the proceedings on the judicial review claim, which was dealt with as a preliminary issue, the IPT argued that there could be no judicial review as the jurisdiction of the High Court had been ousted by section 67(8) of the Act, which provides that,

“except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the [IPT]

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<sup>468</sup> As initially cemented in *Entick v Carrington* (1765) 2 Wilson, KB 275, 95 ER 807.

<sup>469</sup> *Privacy International v SSFCA* [2016] UKIP Trib 14\_85-CH, [2016] 2 WLUK 35.

<sup>470</sup> This was done by enacting (by section 242 of the Investigatory Powers Act 2016) a new section 67A into the Act, which was brought into force on 31 December 2018 by Regulation 2 of the Investigatory Powers Act 2016 (Commencement No 10 and Transitional Provision) Regulations 2018/1397.

(including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court”.

#### **4. Three Judgments, Seven Individual Opinions, Two Views of the UK’s Constitutional Dynamics**

The key question in this litigation was whether those words were sufficiently clear to prevent judicial review of the decision by the IPT, even in the event of an error of law. As the following analysis of the three different judgments shows, not only was there significant disagreement between the Divisional Court and the Court of Appeal on one side, and the Supreme Court on the other, but individual judges across the board also voiced very different opinions as to whether section 67(8) of the Act ousts the jurisdiction of the High Court.

Concisely, the Divisional Court held that section 67(8) of the Act ousts the jurisdiction of the High Court.<sup>471</sup> Sir Brian Leveson P gave the longer of the two judgments. Leggatt J concurred with him albeit with strong reservations. The Court of Appeal subsequently dismissed Privacy International’s appeal in a unanimous judgment by Sales LJ<sup>472</sup> (Floyd LJ and Flaux LJ agreeing). Finally, the Supreme Court allowed Privacy International’s appeal on a narrow majority of four, finding that section 67(8) does not oust the jurisdiction of the High Court. Lord Carnwath (with whom Lord Kerr and Lady Hale agreed) gave the lead judgment, with which Lord Lloyd-Jones concurred. Lord Sumption (with whom Lord Reed agreed) and Lord Wilson gave dissenting judgments. Contrary to the Divisional Court and the Court of Appeal, the Supreme Court addressed a second issue, namely whether Parliament may by statute oust the supervisory jurisdiction of the High Court. Lord Carnwath (with whom Lady Hale and Lord Kerr agreed) reasoned in obiter dicta

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<sup>471</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), [2017] 3 All ER 1127.

<sup>472</sup> Sir Philip Sales became a Justice of the Supreme Court on 11 January 2019.

that there may be circumstances, to be determined by the courts, in which binding effect cannot be given to such a clause. Lord Lloyd-Jones did not express any views on the second issue. Finally, Lord Sumption thought it unwise to consider it but made some general remarks, whereas Lord Wilson said that, looked at narrowly, the answer to the second issue had to be ‘yes’.

### **The Divisional Court Judgment**

In early 2017, the Divisional Court held in favour of the IPT. Taking as the starting point that Parliament could generally oust the supervisory jurisdiction of the court provided it did so clearly, Sir Brian Leveson P reasoned that while there was, post-*Anisminic*, a presumption against ouster clauses, in this case there were several reasons why the ouster was effective.

Sir Brian Leveson P noted first that the IPT performed a similar function to that performed by the High Court in judicial review proceedings, being required to apply the same principles under the Act. Second, he said it was crucial that the IPT was dealing with highly sensitive material, which ought to be kept secret. Third, he stated that this case had to be distinguished from authorities in which the court’s jurisdiction had not been ousted, such as *R (Cart) v Upper Tribunal* (*‘Cart’*).<sup>473</sup> The IPT was exercising a supervisory jurisdiction over public authorities whereas institutions such as the Upper Tribunal or, as in *Anisminic*, the Foreign Compensation Commission adjudicated on the enforcement of individual rights. Fourth, he noted that section 67 of the Act provided a potential appeal mechanism for appealing against IPT decisions, the key reason that had led to the Supreme Court accepting that section 67(8) operated as an ouster clause in *A v B (Investigatory Powers Tribunal: Jurisdiction)*.<sup>474</sup> He noted that the Secretary of State had not authorised an appeal yet, however, surprisingly, this did not seem

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<sup>473</sup> [2009] EWHC 3052, [2010] 2 WLR 1012.

<sup>474</sup> [2009] UKSC 12, [2010] 2 AC 1.

to impact on his reasoning. Thus, Sir Brian Leveson P concluded, “the provision achieves *the aim that Parliament clearly intended of restricting the means by which decisions of the IPT may be challenged* in the courts to the system of appeals for which the Act itself provides”.<sup>475</sup>

Leggatt J concurred albeit with strong reservations, which essentially amount to challenging the key points made by Sir Brian Leveson P. Indeed, he openly acknowledged that he was inclined to find that section 67(8) of the Act does not exclude the possibility of judicial review. However, “having read the judgment of the President”, Leggatt J said he saw “the cogency of the contrary opinion”, and “in circumstances where this court at least is not the final arbiter of the law that it applies, nothing would be served by causing the issue to be re-argued before a different constitution” of the Divisional Court.<sup>476</sup> This would have been the case given there were only two judges on the bench. Accordingly, it was mainly for external reasons that he concluded that it was right “to concur in the result, while recording [his] reservations”.<sup>477</sup>

Regarding the differences in reasoning, he opined, for example, that whether a tribunal has been given comparable standing and powers to those of the High Court was insufficient to determine whether it was immune from the supervision of the High Court.<sup>478</sup> He also noted that despite the duty vested in the Secretary of

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<sup>475</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), [2017] 3 All ER 1127 [44] (emphasis added).

<sup>476</sup> *ibid* [62].

<sup>477</sup> *ibid*.

<sup>478</sup> He did so endorsing the logic behind Sir Stephen Sedley LJ’s opinion in the Court of Appeal decision in *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859, [2011] QB 120 [20]: “The statute invests with standing and powers akin to those of the High Court a body which would otherwise not possess them precisely because it and the High Court are not, and are not meant to be courts of co-ordinate jurisdiction”.

State under section 67(9) of the Act to secure a route to appeal for decisions of the IPT, no such order had in fact been made despite the legislation having been in force for 16 (now 18) years.<sup>479</sup> Specifically, he said that while he would, “readily accept that, once [...] there will be an adequate system of appeals from decisions of the IPT [...] it will not be appropriate for the High Court to entertain claims for judicial review”.<sup>480</sup> However, he would,

“have much more difficulty in accepting that the jurisdiction of the High Court has been ousted, with the result that unless and until such an appeal procedure has been introduced any legal error made by the IPT is incapable of correction, however serious the error and whatever the public importance of the issue”.<sup>481</sup>

Relatedly, Leggatt J pointed out that any concerns regarding the sensitivity of the materials before the IPT and the ousting of judicial review in consideration thereof were weakened by the appeal system foreseen by the Act. He reiterated that it was “firmly established that, unless ousted by statute, the reach of the High Court's jurisdiction to consider claims for judicial review extends to all lower courts and statutory tribunals”.<sup>482</sup> Displaying a firmer appreciation of the constitutional dimensions of this case, his judgment continued with a strong emphasis on the rule of law, arguing that judicial review serves the latter in two ways:

“First and foremost, it does so by providing *a means of correcting legal error*. It is an important aspect of the administration of justice that, when a

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<sup>479</sup> Note, as I highlight above, that a route to appeal has now been introduced.

<sup>480</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), [2017] 3 All ER 1127 [59].

<sup>481</sup> *ibid.*

<sup>482</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), [2017] 3 All ER 1127 [46].

court or tribunal at first instance gets the law wrong or follows an improper procedure, the error (at least if it is sufficiently serious) can be put right. To acknowledge the need for such a facility is not in any way to impugn the expertise of the members of the tribunal, who in the case of the IPT are all lawyers of great distinction. But as Baroness Hale observed in *Cart*, we all make mistakes and no one is infallible: [2012] 1 AC 663 at [37] [...] Moreover, where a mistake is one of law or due process, it is liable to be repeated in other cases, unless some mechanism is available which allows it to be corrected. For all lower courts and statutory tribunals, judicial review by the High Court provides such a mechanism. There is also a principle [...] that *a statutory tribunal should not be completely cut off from the court system, and that there should be some means by which questions of law of general public importance can be channelled to the higher courts* [...] The integrity of the legal system would be undermined if a statutory tribunal operated as a legal island without any means by which its decisions on significant questions of law can reach the higher courts. Again, judicial review provides such a means”.<sup>483</sup>

### **The Court of Appeal Judgment**

On 5 October 2017, the Court of Appeal dismissed Privacy International’s appeal, affirming the Divisional Court’s decision that the High Court had no jurisdiction to entertain a claim for judicial review of any decision of the IPT, even where such a decision was made on the basis of an erroneous interpretation or application of the law.

Like Sir Brian Leveson P in the Divisional Court, Sales LJ initially focused extensively on the structure and functions of the IPT. He noted that “it is a cardinal

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<sup>483</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), [2017] 3 All ER 1127 [48]-[49] (emphases added).

feature of the legislative regime which governs the IPT that its proceedings may be conducted in private and at certain stages in the absence of the complaining party<sup>484</sup> given the “sensitivity in relation to the evidential material in issue and the public interests which may be jeopardised if it is disclosed”.<sup>485</sup> Relatedly, he also emphasised that the president of the IPT must, by statute, hold or have held high judicial office and that its other members must be lawyers with specified qualified experience.

These observations are in stark contrast to Leggatt J’s opinion on the ‘same rank issue’ (“It is not a relevant consideration that a member of a tribunal is, for example, a High Court judge when he or she is not acting in that capacity”).<sup>486</sup> As Hickman further shows, while the composition of the IPT may make it look very much like a court, “it is not a court of law”, diverging from a court of law in various respects. For example, it is not a court of record, it has an investigatory rather than an adversarial function, and, crucially, “it is required to exercise its jurisdiction in conformity with rules which are made not by the tribunal itself or by the Civil Procedure Rule Committee, but by the Secretary of State, who is effectively a party to many of the matters that the tribunal considers”.<sup>487</sup> Yet, Sales LJ reasoned that the IPT’s composition and function was a significant feature that had to be taken into account when construing section 67(8) of the Act.<sup>488</sup>

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<sup>484</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868, [2018] 1 WLR 2572 [6].

<sup>485</sup> *ibid* [7].

<sup>486</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), [2017] 3 All ER 1127 [47].

<sup>487</sup> Tom Hickman, ‘The Investigatory Powers Tribunal: a law unto itself?’ [2018] Public Law 584, 586.

<sup>488</sup> See also *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868, [2018] 1 WLR 2572 [43] where Sales LJ repeats this point in his conclusion saying that not respecting the ouster clause “would mean that despite the elaborate regime put



While acknowledging that the UK courts' "highly restrictive approach" to the interpretation of ouster clauses "reflects the fundamental importance of the rule of law in our legal and political system",<sup>489</sup> Sales LJ's subsequent stipulation as to what the rule of law requires is limited. It is apparent from his judgment that he focused on an individual's ability to have a complaint against a public authority determined without stipulating that it would have to be determined by an ordinary court. In other words, as long as *some* independent body hears complaints, the rule of law is sufficiently safeguarded.

Sales LJ agreed with Dinah Rose, who acted as counsel for Privacy International both at the Court of Appeal and the Supreme Court, that the restrictive approach towards ouster clauses is an example of the principle of legality in action. He also endorsed the view that the principle of legality creates a strong presumption in statutory interpretation that "Parliament intends to legislate for a liberal democracy subject to the rule of law, respecting human rights and other fundamental principles of the constitution".<sup>490</sup> He further noted that "the rule of law and the ability to have access to a court or tribunal to rule upon legal claims constitute principles of fundamental character".<sup>491</sup> However, he ultimately still reduced the case to turning on "a short point of statutory construction".<sup>492</sup>

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in place to allow the IPT to determine claims against the intelligence services in a closed procedure while guaranteeing that sensitive information about their activities is not disclosed, judicial review proceedings could be brought in which no such guarantee applied".

<sup>489</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868, [2018] 1 WLR 2572 [19].

<sup>490</sup> *ibid* [21].

<sup>491</sup> *ibid*.

<sup>492</sup> *ibid*. The correctness of this one dimensional approach had been questioned before the Supreme Court judgment was handed down, see for example Paul Daly, 'Three aspects of Anisimic' (*Admin Law Blog*, 27 November 2018)

He concluded that while any isolation of a tribunal from the prospect of appeal on a point of law “involves a substantial inroad upon usual rule of law standards in this jurisdiction”,<sup>493</sup> the language of section 67(8) clearly means that jurisdiction for judicial review has been ousted. *Anisminic* did not, he reasoned, necessitate a different conclusion given the difference in the wording of the two ouster clauses in question (principally the addition of the phrase: “including decisions as to whether they have jurisdiction”) and the context, which was said to be materially different.

Thus, the Court of Appeal’s legal analysis largely starts and finishes with what the relevant part of the statute, on the face of it, seems to suggest. There are no allowances for the nuance created by constitutional principles, which are recognised and endorsed formalistically without having any material impact on the court’s determination. This approach goes hand in hand with the high level of trust Sales LJ has in the elected branch of state. He reasoned that,

“It is implicit in reading section 67(8) in this way that Parliament considered that the IPT can be trusted to make sensible decisions about matters of this kind and on questions of law which arise and need to be decided for the purpose of making determinations on claims or complaints made to it”.<sup>494</sup>

In summary, the combined effect of the judgments of the Divisional Court and the Court of Appeal was “to make the tribunal sovereign and master over its own jurisdiction and to make the tribunal’s pronouncements as to what it regards the

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<https://adminlawblog.org/2018/11/27/paul-daly-privacy-international-symposium-three-aspects-of-anisminic/> accessed 20 August 2019.

<sup>493</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868, [2018] 1 WLR 2572 [25].

<sup>494</sup> *ibid* [38].

law to be incapable of correction by any court of law”.<sup>495</sup> Parliament, the two courts held, had successfully manifested its intention to oust the jurisdiction of the High Court.

### ***Privacy International in the Supreme Court***

Privacy International appealed to the Supreme Court. During a two-day hearing in December 2018, the Supreme Court was asked to determine two questions: (i) whether section 67(8) of the Act ousts the supervisory jurisdiction of the High Court to quash a judgment of the IPT for error of law, and (ii) whether - and, if so, on the basis of which principles - Parliament may generally by statute oust said jurisdiction to quash the decision of an inferior court or tribunal of limited statutory jurisdiction. Allowing the appeal, Lord Carnwath, Lord Kerr and Lady Hale in their joint judgment and Lord Llyod-Jones in his concurring judgment confirmed what some academics had begun to argue, namely that, contrary to Sales LJ’s Court of Appeal judgment, “the legal effect of an ouster clause is never a ‘short point of statutory construction’, and the meaning of ouster clauses cannot be found merely from their language and legislative context”.<sup>496</sup>

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<sup>495</sup> Tom Hickman, ‘The Investigatory Powers Tribunal: a law unto itself?’ [2018] Public Law 584, 584.

<sup>496</sup> Adam Tucker, ‘Parliamentary Intention, Anisminic, and the Privacy International Case (Part One)’ (*UK Constitutional Law Association Blog*, 18 December 2018) <https://ukconstitutionallaw.org/2018/12/18/adam-tucker-parliamentary-intention-anisminic-and-the-privacy-international-case-part-one/> accessed 20 August 2019.

*The First Issue: Does section 67(8) of the Act Oust the Jurisdiction of the High Court?*

Lord Carnwath took *Anisminic*<sup>497</sup> as the starting point. He reasoned that by the time the predecessor to the Act was drafted in 1985, which was after Lord Diplock's aforementioned explanation as to the legal significance of *Anisminic* in *O'Reilly v Mackman*,<sup>498</sup> it would have been clear to Parliament that a determination which is wrong in law, going to the court's jurisdiction or otherwise, was to be treated as no determination at all. He pointed out that it was necessary to set the parties' submissions in the context of the historical development - through case law - of the relationship between the High Court and other judicial or adjudicative bodies. The reference to a 'determination' in section 67(8) of the Act was to be read as a reference only to a legally valid determination, not to 'purported' ones.<sup>499</sup>

Apart from *Anisminic*, Lord Carnwath's judgment relied heavily on the Supreme Court judgment in *R (Cart) v Upper Tribunal*.<sup>500</sup> which was said to provide "the essential background to the resolution of the issues in the present appeal".<sup>501</sup> In *Cart*, it had been held that unappealable decisions of the Upper Tribunal were in fact reviewable where an important point of principle or practice was in issue, or where there was some other compelling reason for the relevant appellate court to

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<sup>497</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

<sup>498</sup> *O'Reilly v Mackman* [1983] 2 AC 237 (HL).

<sup>499</sup> The court recognised the leap which was taken in *Anisminic*, whose relatively narrow ratio was transformed by later judgments, most notably *O'Reilly v Mackman* [1983] 2 AC 237 (HL).

<sup>500</sup> *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663.

<sup>501</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [85].

hear the appeal.<sup>502</sup> The way the case law had developed post-*Anisminic*, Lord Carnwath said in obiter dicta, is connected to the development of judicial review itself, which “has grown from being little more than a method of correcting the errors of law of inferior courts to its present eminence as the remedy for protecting individuals against unlawful action by the Government and other public bodies”.<sup>503</sup>

Given the well-established common law presumption against ousting the jurisdiction of the High Court, this was no case of ordinary statutory interpretation. In line with the principle of legality, judicial review could only be excluded by the most clear and explicit words, which had not been adopted here. Lord Carnwath proceeded to suggest that a different, more explicit formula might have been successful in excluding challenges to both ‘determinations’ and ‘purported determinations’. As the remainder of this chapter shows, the significance of this statement must be questioned in light of Lord Carnwath’s obiter dicta as to the second issue.

Lord Lloyd-Jones concurred with Lord Carnwath’s view. He noted the similarities between the wordings of section 67(8) of the Act and the relevant wording in *Anisminic*, reasoning that Parliament would have adopted clearer wording had it intended to oust the jurisdiction of the High Court on this occasion. Some of his reasoning under the first issue resembles Lord Carnwath’s reasoning on the second issue, which Lord Lloyd-Jones did not entertain. Specifically, he endorsed Laws LJ’s opinion in *Cart* that “it is a necessary corollary of the sovereignty of

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<sup>502</sup> For a critique of this decision see Joanna Bell, ‘The relationship between judicial review and the Upper Tribunal: what have the courts made of *Cart*?’ [2018] Public Law 394.

<sup>503</sup> Lord Woolf and others (eds), *De Smith’s Judicial Review* (8<sup>th</sup> edn, Sweet & Maxwell 2018) paragraph 4-006-7, cited in *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [60].

Parliament that there should exist an authoritative and independent body which can interpret and mediate legislation made by Parliament”.<sup>504</sup>

Meanwhile, dissenting, Lord Sumption (with whom Lord Reed agreed), reasoned that Parliament had expressed itself clearly and that - in light of the judicial character of the IPT - the rule of law was sufficiently vindicated. He noted further - obiter dicta - that finding, as he did, that section 67(8) ousts the jurisdiction of the High Court, should not be seen as an “all or nothing” approach; decisions that demonstrate “the grossest bias”, for example, may still be reviewable.<sup>505</sup> Lord Sumption’s dissent can be contrasted with Lord Wilson’s dissent, which focused more on the precise wording of section 67(8). The latter, according to Lord Wilson, rebuts “the initial presumption that Parliament did not intend such an exclusion” and, accordingly, there is a need to construct this section strictly.

*The Second Issue: Can Parliament Oust the Supervisory Jurisdiction of the High Court?*

Lord Carnwath’s judgment on this point, which can be separated from the binding ratio of the judgment, clearly demonstrates that the parameters for this question are set by the courts. In what, in parts, reads very much like an open endorsement of common law constitutionalism as described in Chapter 1, Lord Carnwath (with whom Lady Hale and Lord Kerr agreed), reasoned that it is ultimately for the courts, not the Legislature, to determine the limits set by the rule of law, i.e. whether the latter allowed the exclusion of judicial review. Indeed, he said that there was no disagreement as to the need for independent judicial interpretation

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<sup>504</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [160] citing *R (Cart) v Upper Tribunal* [2009] EWHC 3052, [2010] 2 WLR 1012 [36]-[40].

<sup>505</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [205].

of legislation; “the dispute is as to the power of the legislature, consistently with the rule of law, to entrust that task to a judicial body such as the IPT, free from any possibility of review by the ordinary courts (including the appellate courts)”.<sup>506</sup> He noted that the courts had,

“not adopted a uniform approach, but have felt free to adapt or limit the scope and form of judicial review, so as to ensure respect on the one hand for the particular statutory context and the inferred intention of the legislature, and on the other for the fundamental principles of the rule of law, and to find an appropriate balance between the two. Even if this was not always the way in which the decisions were justified at the time, it may be seen as providing a sounder conceptual basis”.<sup>507</sup>

This proposition, he reasoned, was a natural application of the constitutional principle of the rule of law “and an essential counterpart to the power of Parliament to make law”.<sup>508</sup> Concluding on the second issue, he considered there to be,

“a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal

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<sup>506</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [127].

<sup>507</sup> *ibid* [130].

<sup>508</sup> *ibid* [132].

issue in question; and to determine the level of scrutiny required by the rule of law”.<sup>509</sup>

As stated above, Lord Lloyd-Jones did not express a view on the second issue. Lord Sumption (with whom Lord Reed agreed) did not think it helpful to address the latter in the abstract. His observations confirm the view he takes in his ratio, i.e. that Parliament *is* able to exclude the High Court’s jurisdiction to review the merits of a tribunal’s decisions. Finally, as stated above, Lord Wilson also narrows down the second issue, rephrasing it to establish a link to the current proceedings, and reiterating that the High Court’s jurisdiction can be ousted.

## **5. The Workings of the Nuanced Constitution**

As I noted in the Introduction, the UK constitution’s ‘nuance’ mainly stems from the fact that there is no uniformly recognised justification for the exercise of public power; there is no one paramount constitutional theory or principle. Both Parliamentary Sovereignty and a commitment to limited government, manifested in the substantive notion of the rule of law - which entails fundamental constitutional values - feature, but neither command absolute respect. The *Privacy International* proceedings are an exemplification of the nuanced constitution in that beneath the surface we can observe in it (i) both schools of thought, i.e. political and legal constitutionalism, across all judgments as well as within individual opinions, (ii) significant disagreement as to which of the two schools of thought deserves primary consideration, and (iii) judicial reasoning - foremostly highlighted by Lord Carnwath’s reasoning concerning the second issue - which attempts the impossible by trying to reconcile what is in essence common law constitutionalist reasoning with the orthodox position of unlimited legislative law-making powers.

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<sup>509</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [144].



The nuanced constitution has been shaped incrementally. Contrary to what Bogdanor has suggested,<sup>510</sup> it is a reality that has not been solely brought about by our EU membership or the advent of the Human Rights Act 1998. Indeed, the Supreme Court's heavy reliance in *Privacy International* on *Anisminic*, a case from the 1960s, demonstrates that this cannot be so. Just as Parliament acquired its status and power progressively, the courts have evolved in their constitutional role. The UK's uncodified constitution has facilitated this evolution. Inherently flexible, it has moved towards a model of democracy and adjudication that is - often, but not always - based upon limited government, rather than majority rule alone.

### **Judicial Disagreement as a Manifestation of the Constitutional Spectrum**

In the beginning of this chapter, I said that the evolution from the Divisional Court's judgment to the majority's Supreme Court judgment signifies a remarkable shift from what started as a Parliamentary Sovereignty and legislative intention-centric approach to one based on legal constitutionalism. Indeed, unpacking the different judgments, we saw that there was serious disagreement on almost every level. The level of disagreement at the Supreme Court alone has prompted some commentators to say that "the judgments run all the way along the spectrum, from Lord Carnwath's expression of doubt about the ability of Parliament to legislate to exclude judicial review to Lord Wilson's apparent bafflement at the proposition that s. 67(8) was anything but pellucidly clear".<sup>511</sup>

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<sup>510</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009).

<sup>511</sup> Paul Daly, 'Of Clarity and Context: R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22' (*Administrative Law Matters*, 15 May 2019) <https://www.administrativelawmatters.com/blog/2019/05/15/of-clarity-and-context-r-privacy-international-v-investigatory-powers-tribunal-2019-uksc-22/> accessed 13 August 2019.

If we look at Lord Carnwath's opinion on both issues and Lloyd-Jones' opinion on the second issue, we can see that their combined effect is that the rule of law is thought to be "*as foundational as Parliamentary Sovereignty*".<sup>512</sup> There is no perceived incompatibility of the two. Thus, Lord Carnwath conceptualises the courts' power to determine the limits on Parliament's ability to exclude judicial review not as a limitation on Parliamentary Sovereignty but as "a natural application of the constitutional principle of the rule of law [...] and as an essential counterpart to the power of Parliament to make law".<sup>513</sup> As I argue below, this distorts the doctrine of Parliamentary Sovereignty as it reduces its essence to the 'power to make law' as opposed to 'the power to make *any law it pleases*'.

Indeed, this is the key distinction between the two different approaches evident in the *Privacy International* proceedings. Those judges on the Parliamentary Sovereignty side of the spectrum subscribe to Parliament's unlimited law-making power. This demands judicial interpretation that is fully respectful of the legislative choices made, including any 'undesirable' ones. It is important to note that the issue political constitutionalists would have with Lord Carnwath's conceptualisation in *Privacy International* is not that he recognised the courts' role in interpreting and enforcing legislation. Rather, they would disagree with statutory interpretation that focuses not on Parliament's intention but instead on intention-independent, judicially developed concepts that risk skewing said intention.

We can see from the first part of this chapter that we find the same spectrum of opinion which we find in academic argument manifest itself on the judicial level. Sir Brian Leveson P's judgment, the Court of Appeal's unanimous decision and the dissenting judgments by the Supreme Court are a manifestation of political constitutionalism being the dominant theory. All these judgments found - as the

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<sup>512</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [114] (emphasis added).

<sup>513</sup> *ibid* [132].

IPT had submitted to the Supreme Court - that there was nothing constitutionally offensive about legislative arrangements whereby Parliament reallocates the High Court's judicial review jurisdiction to a judicial body that is both independent of the Executive and capable of providing an authoritative interpretation of the law. This is based on the simple assumption that,

“The rule of law applies as much to the courts as it does to anyone else, and under our constitution, that requires that effect must be given to Parliamentary legislation. In the absence of a written constitution capable of serving as a higher source of law, the status of Parliamentary legislation as the ultimate source of law is the foundation of democracy in the United Kingdom. The alternative would be to treat the courts as being entitled on their own initiative to create a higher source of law than statute, namely their own decisions”.<sup>514</sup>

Meanwhile, closer towards the legal constitutionalism end of the spectrum, we find not just the Supreme Court's majority opinion but also Leggatt J's Divisional Court judgment. As Scott has argued, it is remarkable that judges openly (and casually) question - as Leggatt J did in his opinion at the Divisional Court - whether there is indeed a way to draft an ouster clause that actually ousts the jurisdiction of the High Court. The implication of Leggatt J's reflection that “it is difficult to conceive how Parliament could have been more explicit than it was” in the Foreign Compensation Act 1950, the statute in question in *Anisminic*, implies that Parliament's absolute legislative competencies are openly doubted.<sup>515</sup>

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<sup>514</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [209] (Lord Sumption).

<sup>515</sup> Paul F Scott, 'Ouster clauses and national security: judicial review of the Investigatory Powers Tribunal' [2017] Public Law 355, 358.

## **The Nuanced Constitution's Inherent Tension and its Potential Impact on Judicial Reasoning**

As the essence of the majority's reasoning in *Privacy International* shows, the UK constitution is one in which the rule of law may be vying with Parliamentary Sovereignty as the UK's primary constitutional principle. This also means that our constitution - Lord Carnwath's opinion goes as far as suggesting - may in certain circumstances not recognise primary legislation as having a binding effect where the interest at stake (e.g. judicial review) is important enough. However, at the same time political constitutionalism can still be seen to continue to shape the way in which cases are argued and determined. This is evident in the persistent quest for Parliament's 'true' intention, even in the majority judgment.

Thus, while the substance of the UK constitution has evolved to the point that some judges give equal status, if not primacy, to the rule of law, the conceptual framework the courts operate in has yet to catch up. This is apparent from Lord Carnwath's attempts to demonstrate that his judgment supports and respects Parliamentary Sovereignty. Due to the inherent tension between the two principles - Parliamentary Sovereignty is one-dimensional in that it contains merely one absolute rule whereas the substantive notion of the rule of law is multi-dimensional in that it is composed of various values - issues arise concerning the cogency and fluidity of his reasoning. Indeed, as a closer analysis of Lord Carnwath's judgment on both issues shows, the real question guiding his reasoning is not 'What is Parliament trying to tell us?'. It is, in fact, 'To what extent is this provision consistent with what is permitted in a liberal, constitutional democracy?'.

### *Lord Carnwath's Conceptualisation*

Parts of Lord Carnwath's judgment openly acknowledge the real underlying logic of his judgment. Indeed, he bases the view that "it is ultimately for the courts, not

the legislature, to determine the limits set by the rule of law to the power to exclude review [...] not on such elusive concepts as jurisdiction (wide or narrow), ultra vires, or nullity”.<sup>516</sup> Instead, he considers the courts’ authority to be,

“a natural application of the constitutional principle of the rule of law [...], and as an essential counterpart to the power of Parliament to make law. The constitutional roles both of Parliament, as the maker of the law, and of the High Court, and ultimately of the appellate courts, as the guardians and interpreters of that law, are thus respected”.<sup>517</sup>

The relationship between Parliament and the courts, he says, is governed by accepted principles of the rule of law.<sup>518</sup> It is in his obiter dicta on the second issue, the hypothetical one, where the importance of legislative intention is ultimately abandoned altogether. Lord Carnwath said,

“consistently with the rule of law, [...] In all cases, *regardless of the words used*, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld [...]”.<sup>519</sup>

It is difficult to argue, despite his attempts to convince his readership otherwise by stressing his approach’s respect for and compatibility with legislative intent, that Lord Carnwath’s approach is not a manifestation of common law constitutionalist thought. In seeking “to resolve disputes in a manner that achieves integrity with past decisions” while simultaneously seeking “a morally just outcome in the light

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<sup>516</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [132].

<sup>517</sup> *ibid.*

<sup>518</sup> *ibid* [119].

<sup>519</sup> *ibid* [144] (emphasis added).

of the context of the particular dispute”,<sup>520</sup> his reasoning resembles the basic premise of common law constitutionalism. The latter theory challenges the view that,

“principles of judicial review can be satisfactorily explained by reference to legislative intent. Proponents of the common law theory argue that the principles of judicial review are in reality developed by the courts. They are the creation of the common law. The legislature will rarely provide any indication as to the content and limits of what constitutes judicial review. When legislation is passed the courts will impose the controls which constitute judicial review which they believe are normatively justified on the grounds of justice, the rule of law, etc. These controls have always been set within a broader constitutional canvass. [...] *A finding of legislative intent is not necessary for the creation or general application of these principles*”.<sup>521</sup>

Lord Carnwath’s judgment is not a manifestation of a desire to discern and enforce what Parliament intended. It is an exposition of the boundaries of legislative intention followed by an attempt to reconcile the majority’s reasoning with constitutional orthodoxy; as in *Anisminic*, the majority in *Privacy International* “worked backwards”.<sup>522</sup> This approach largely echoes the Appellant’s written case, in which it was argued that,

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<sup>520</sup> Sir Jeffrey Jowell, ‘Beyond the rule of law: towards constitutional judicial review’ [2000] Public Law 671, 673.

<sup>521</sup> Paul Craig and Nicholas Bamforth, ‘Constitutional analysis, constitutional principle and judicial review’ [2001] Public Law 763, 767 (emphasis added).

<sup>522</sup> This is how Lord Wilson characterised the approach taken in *Anisminic*, see *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [217]-[218].

“Parliament is sovereign. But that seemingly straightforward statement conceals as much as it reveals. For example, the opinion of Parliament from time to time is not sovereign. A vote as to the meaning of a law would be of no legal effect. Parliament exercises its sovereignty only by primary legislation, through written texts. Even then, Parliament may not bind its successors. Giving meaning to the concept of sovereignty means that Parliament may always change its mind. Similarly, to give effect to Parliamentary sovereignty, and applying the principle of separation of powers, there must be an independent, authoritative interpreter of legislation. The text of primary legislation does not have effect in and of itself. It has to be interpreted in order to give effect to Parliament’s intention. To give effect to Parliamentary sovereignty, ultimate control over the interpretation of a statute must be exercised by a court of unlimited jurisdiction, such as the High Court in England and Wales, or the Court of Session in Scotland. A tribunal of limited powers cannot fulfil that role”.<sup>523</sup>

The submission continued by saying that the alternative, allowing Parliament to restrict judicial oversight to isolated fora such as a specialised tribunal, would potentially jeopardise Parliament’s intention. This is the case because a tribunal or court with limited powers may go beyond the powers vested in them thereby frustrating Parliament’s intention; a transgression which could not be rectified due to the absence of further review. This, *Privacy International* maintained, does not amount to questioning the principle of Parliamentary sovereignty – it “merely seeks to explain its boundaries”.<sup>524</sup> On this basis, it is concluded that “ejecting an ouster clause is an incident of Parliamentary sovereignty, not an affront to it”.<sup>525</sup> Lord

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<sup>523</sup> Appellant’s Written Case [132]-[134].

<sup>524</sup> *ibid*, page 71, footnote 25.

<sup>525</sup> *ibid* [139]. It is likely this type of reasoning that Goldsworthy had in mind when he said “what is called ‘interpretation’ might be tantamount to disobedience under cover of a ‘noble

Lloyd-Jones makes similar suggestions in his judgment on the first issue, endorsing the view previously espoused by case law that the existence of an authoritative and independent institution that interprets and mediates legislation made by Parliament “is not a denial of legislative sovereignty but an affirmation and a condition of it”.<sup>526</sup>

### *The Flaws in Lord Carnwath’s Attempted Reconciliation*

The majority judgment is inherently illogical. If Parliament is sovereign, but only within the boundaries set by the courts, what does sovereignty amount to? An analogy that is befitting is to tell a person that they are an autonomous human being, fully in control of their destiny, but that they are not allowed to take their own life as this would take away what they were in charge of in the first place. How then, we may ask, can Parliament express an intention if the courts are reluctant to attribute to Parliament an intention to achieve a certain result?

In fact, Parliamentary Sovereignty properly understood, would suggest a different outcome in this case for - under the political constitutionalist view - “the balance between the correction of judicial error and the policy considerations in favour of finality is a judgement properly for the legislature”.<sup>527</sup> Thus, every statute adopted by Parliament is legally valid, and everyone, including the courts, are legally obligated to obey it.

In line with this conceptualisation of Parliamentary Sovereignty, section 67(8) of the Act may indeed have “the effect of preventing judicial review even of a decision

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lie”, see Jeffrey Goldsworthy, *Parliamentary Sovereignty Contemporary Debates* (Cambridge University Press 2010) 225.

<sup>526</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [160].

<sup>527</sup> *ibid* [115].



affected by bias or other serious procedural irregularity or made in ignorance of a binding precedent or statutory provision”, as had been argued before the Divisional Court.<sup>528</sup> Indeed, this had also been the conclusion reached by Lord Wilberforce who said in *Anisminic* that “the position may be reached, as the result of statutory provision, that even if [specialised tribunals] make what the courts might regard as decisions wrong in law, these are to stand”.<sup>529</sup> Allowing this into the equation as a calculated risk, the Divisional Court and the Court of Appeal focused extensively on the composition and the function of the IPT in order to discern Parliament’s intention. The task of interpretation is to be approached, the IPT had argued,

“by reference, not simply to a general presumption against ouster clauses of any kind, but rather to careful examination of the language of the provision, having regard to all aspects of the statutory scheme, and the status or the body in question, in order to “discern the policy Parliament intended in the legislation” (*R (Woolas) v Parliamentary Election Court* [2012] QB 1, para 54 per Thomas LJ)”.<sup>530</sup>

The “special character and functions of the IPT, combined with the specific references to decisions relating to ‘jurisdiction’”, the IPT had argued, “show a clear intention to protect it from any form of review by the ordinary courts, even in cases to which the *Anisminic* principle would otherwise have applied”.<sup>531</sup> Lord Wilson agreed. In a lucidly reasoned dissenting opinion, he said that he was in “no doubt” about the significance of the addition of the words “including decisions as to whether they have jurisdiction” to section 67(8) of the Act. He said,

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<sup>528</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), [2017] 3 All ER 1127 [59].

<sup>529</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) 207B.

<sup>530</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [106].

<sup>531</sup> *ibid* [106] (Lord Carnwath).

“In 1985 Parliament, including its drafter of the 1985 Act, was aware that its attempted ouster of judicial oversight in section 4(4) of the 1950 Act had failed. In the *Anisminic* case the majority of the appellate committee had used different terms to describe the sort of decisions of which judicial oversight survived the ouster. But they had been collected by Lord Diplock in the *O’Reilly* case into one word, namely decisions made without “jurisdiction”. Lord Diplock had delivered his speech less than three years prior to publication of the bill which became the 1985 Act. Necessarily considered in their context, the meaning of the words in parenthesis in section 7(8) of the 1985 Act, now replicated in section 67(8) of the 2000 Act, is surely to encompass within the exclusion of judicial supervision all the decisions of the IPT in relation to its “jurisdiction”; and to ascribe to that word the Page 105 strained extension of its effect adopted in the *Anisminic* case so as to cover ordinary errors of law as well, of course, as errors in the proper sense of it. The initial presumption that Parliament did not intend such an exclusion and the need in consequence for a strict construction of the subsection have to yield to what I consider to be the only reasonable meaning of its words, which is to the contrary”.<sup>532</sup>

On this view, Parliament did indeed attempt to “legislate in the context of known principles of statutory interpretation and decided cases”.<sup>533</sup> The added part in parentheses can reasonably be viewed as signalling a change from the wording rejected by the courts in *Anisminic*. It therefore appears increasingly difficult, if not impossible, to argue that the majority opinion’s ‘constitutional aversion’ to this

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<sup>532</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [223]-[224].

<sup>533</sup> Tom Hickman, ‘The Investigatory Powers Tribunal: a law unto itself?’ [2018] Public Law 584, 588.

ouster clause is not challenging Parliamentary Sovereignty.<sup>534</sup> If we take Parliamentary Sovereignty seriously, “proper recourse to the presumed intention of Parliament cannot justify straining the meaning of statutory words too far”.<sup>535</sup>

Clearly, the majority in *Privacy International* felt the need to demonstrate the judgment’s compatibility with Parliamentary intention. How can we square this with Lord Carnwath noting in obiter dicta that it is ultimately for the courts to decide what makes an ouster clause legally binding? I suggest that the main factor at play is that the traditional constitutional philosophy centring on Parliamentary Sovereignty is so deeply embedded in our collective psyche that an open advancement of the rule of law at the expense of Parliamentary Sovereignty would be unpalatable. Indeed, deciding cases on the basis of the rule of law - even where Parliamentary intention is not a matter in dispute - is regularly perceived as something impermissible and revolutionary. For example, Hooper recently wrote about the very sensible and carefully reasoned *UNISON* judgment that,

“Lord Reed, for the majority, explained that ‘even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation...the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve.’ (UNISON [88]). The substance of the UNISON challenge was that the fees were prohibitively expensive compared with ordinary courts, and would have a disproportionate impact upon certain categories

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<sup>534</sup> See Paul F Scott, ‘Ouster clauses and national security: judicial review of the Investigatory Powers Tribunal’ [2017] Public Law 355, 357.

<sup>535</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [214] (Lord Wilson).

of claimants, and women in particular. At first blush *this looks like judicial radicalism*".<sup>536</sup>

This type of language, common among academics, to describe or condemn the courts' gradual development of constitutional law reveals our continued attachment to Diceyan thinking. Thus, while the legal constitutionalist component of the nuanced constitution grows steadily, it remains widely accepted that "the courts in this country have no power to declare enacted law invalid"<sup>537</sup> if the source of the law is an Act of Parliament.

Given this inherent tension, what public law jurisprudence has increasingly witnessed is a lack of integrity between the reality of judicial law-making and the framework within which said reality is rationalised. Lord Carnwath's judgment in *Privacy International* embodies this paradox. As Jowell, in fact one of the senior counsel for Privacy International at the Supreme Court, stated just recently,

"While the UK courts have been increasingly willing to restrict "the exercise of power of public officials, they have always accepted Dicey's hierarchy of constitutional principle, and have therefore never sought directly to challenge the constitutional validity of any Act of Parliament that may offend the rule of law or other constitutional principle".<sup>538</sup>

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<sup>536</sup> Hayley J Hooper, 'Balancing Access to Justice and the Public Interest: Privacy International and Ouster Clauses in the Broader Constitutional Context' (UK Constitutional Law Association Blog, 12 February 2018) <https://ukconstitutionallaw.org/2018/02/12/hayley-j-hooper-balancing-access-to-justice-and-the-public-interest-privacy-international-and-ouster-clauses-in-the-broader-constitutional-context/> accessed 20 August 2019 (emphasis added).

<sup>537</sup> *Pickin v Board of British Railways* [1974] AC 765 (HL).

<sup>538</sup> Sir Jeffrey Jowell, 'Parliamentary Sovereignty under the new constitutional hypothesis' [2016] Public Law 562, 563.

This captures the observations made in the Introduction. The nuanced constitution's orthodox political constitutionalist framework is - strictly speaking - conceptually incompatible with legal constitutional principles. As the majority judgment in *Privacy International* shows, tension arises in cases where Parliament can be seen to have made itself clear, but what it dictates creates problems for constitutional law more broadly.

## 6. The *Jackson* Connection

I suggest that the majority opinion in *Privacy International*, and in particular Lord Carnwath's obiter dicta remarks on the second issue, are the strongest manifestation on the legal constitutionalism or rule of law-end of the spectrum within the UK's nuanced constitution to date. Looked at in isolation, i.e. without regard to other case law, one would have to concede that our uncodified constitution seems, following the majority's logic, based on common law constitutionalism. As I have maintained throughout this thesis, and as I will continue to show in the final two chapters, overall the UK constitution is best not understood as one based on common law constitutionalism. However, this does not mean that there have not been cases that imply as much. Under the nuanced constitution, context may well bring out a legal constitutionalist type of approach, of which common law constitutionalism is one manifestation.

In fact, have we not been here before? Is the majority's reasoning in *Privacy International* not a natural extension of the reasoning in the seminal judgment of *Jackson*?<sup>539</sup> The case was referred to in *Privacy International*'s written case, and the Supreme Court discussed it on numerous occasions, including in the dissenting opinions. The consensus on the bench appeared to be that *Privacy International* is inherently different from *Jackson*. However, engaging with some

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<sup>539</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

of *Jackson*'s famous obiter dicta shows that - in essence - the two cases are more alike than is suggested.

To summarise briefly, the well-known background to *Jackson* is the Hunting Act 2004 ('the Hunting Act'), which was passed without the approval of the House of Lords. The Government had invoked the Parliament Acts of 1911 and 1949, which stipulate conditions under which a bill that has not received approval by the House of Lords may still be passed into law. Importantly, the 1949 Act had amended the 1911 Act by shortening the period during which the Lords could delay legislation, "thereby allowing the lower chamber unilaterally to manipulate the balance of parliamentary power to its own advantage".<sup>540</sup> The validity of the Hunting Act was subsequently contested by Mr Jackson. He argued that it was invalid given the invalidity of the Parliament Act of 1949 itself. In a unanimous judgment, the House of Lords upheld the validity of both Acts in question, the Parliament Act 1949 and the Hunting Act. They concluded that "the 1911 Act contemplated the use of the bypassing procedure to alter the circumstances under which it could be used in the future".<sup>541</sup>

Given that the case was - unusually - about whether Parliament had created a statute, the judgment, especially in obiter dicta, engaged heavily with the boundaries of Parliamentary Sovereignty. Chiefly, Lord Steyn expressed views that point to a recalibration of UK constitutional theory when he said that,

"We do not in the United Kingdom have an uncontrolled constitution [...]  
The classic account given by Dicey of the doctrine of the supremacy of  
Parliament, pure and absolute as it was, can now be seen to be out of place

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<sup>540</sup> Mark Elliott, 'The sovereignty of Parliament, the hunting ban and the Parliament Acts' (2006) 65(1) Cambridge Law Journal 1, 1-2.

<sup>541</sup> Michael Plaxton, 'The Concept of Legislation: Jackson v Her Majesty's Attorney General' (2006) 69(2) Modern Law Review 249, 252.

in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. *In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish*.<sup>542</sup>

Meanwhile, Lord Hope said that “Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law”.<sup>543</sup> Relatedly, some commentators have sought to reconcile the obiter dicta in *Jackson* with Parliamentary Sovereignty in a way that bears resemblance to how ouster clauses have been treated. For example, Young has argued that,

“It was unanimously held that the court had jurisdiction to ascertain whether the Hunting Act 2004 was an Act of Parliament, with four of their Lordships providing detailed justification for their conclusions. It might appear that this challenges Dicey's theory of continuing parliamentary legislative supremacy, which requires that “no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament”. Here, the House of Lords had jurisdiction to assess the validity of the Hunting Act 2004. The House of Lords could have determined that the Hunting Act 2004 was invalid; implying that the court could set aside legislation. However, this is not the case. The House of Lords had

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<sup>542</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 (emphasis added).

<sup>543</sup> *ibid* [120].

jurisdiction to determine whether the Hunting Act 2004 is an Act of Parliament. If the House of Lords were to have concluded that the Hunting Act 2004 was not an Act of Parliament, this would not amount to overriding or setting aside the legislation of Parliament. Rather, the courts would be concluding that a purported Act of Parliament was not an Act of Parliament”.<sup>544</sup>

I would argue that there are clear parallels between the two cases. First, both cases suggest that there may be legal limits as to what Parliament can do, thereby uprooting the long-held view that Parliament is omnipotent. Second, both speak of constitutional principles, rooted in the rule of law, which the courts are in charge of protecting. Meanwhile, they differ in the following way. In the majority judgment in *Privacy International*, the rule of law takes centre-stage without the continuity and strength of Parliamentary Sovereignty explicitly being questioned. This is in contrast to *Jackson*, in which Parliamentary Sovereignty is openly challenged. Equally, whereas in *Jackson* the Acts of Parliament in question were affirmed, and Parliament’s authority cemented, in *Privacy International* Parliament’s ouster clause was rejected.

Contrasting these two cases allows further insights into judicial law-making - in particular concerning the difference between what is done and *what is said* is done. Lord Carnwath’s obiter dicta go further than *Jackson* in its commitment to the rule of law. Lord Carnwath explicitly states that,

“both parties start from the premise that the relationship between Parliament and the courts is governed by accepted principles of the “rule of law”. Unsurprisingly, there is no challenge to the proposition [...] that there is - “no principle more basic to our system of law than the maintenance of

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<sup>544</sup> Alison L Young, ‘Hunting sovereignty: Jackson v Her Majesty’s Attorney-General’ [2006] Public Law 187, 191.



the rule of law itself and the constitutional protection afforded by judicial review”.<sup>545</sup>

Further, he says that,

“it is not I believe in dispute, and indeed was clearly established by the time of *Anisminic*, that there are certain fundamental requirements of the rule of law which no form of ouster clause (however “clear and explicit”) could exclude from the supervision of the courts”.<sup>546</sup>

Accordingly, it is somewhat misleading to suggest that,

“we are not therefore concerned with the difficult constitutional issues which might arise if Parliament were to pass legislation purporting to abrogate or derogate from those accepted principles: see eg *Jackson v Attorney General* [...]”.<sup>547</sup>

Just as in *Jackson*, the majority in *Privacy International* in effect reviewed the validity of a section of an Act of Parliament, “albeit under the rubric of statutory interpretation”.<sup>548</sup> In other words, the conclusion Lord Carnwath reaches through reasoning backwards allows him to avoid the apparent clash between Parliamentary Sovereignty and the rule of law. However, this does not take away the fact that what we have here is an example of the review of an Act of Parliament, albeit without impugment of its validity.

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<sup>545</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [119].

<sup>546</sup> *ibid* [122].

<sup>547</sup> *ibid* [119].

<sup>548</sup> Sir Jeffrey Jowell, ‘Parliamentary Sovereignty under the new constitutional hypothesis’ [2016] Public Law 562, 563.

## 7. The Shortcomings of the Constitution Painted in *Privacy International*: a Prelude

What would an ouster clause that actually ousts the courts' jurisdiction have to look like? Dinah Rose suggested that any such clause would have to include reference not merely to 'determinations' but also to 'purported determinations' to properly reflect the judgment in *Anisminic*. She further argued that such a clause should specify that judicial review was excluded (in addition to the stipulation that a decision is not liable to be questioned in any court), and that the ouster bars any further review even if there had been an error of law. A practical example is provided by the Asylum and Immigration (Treatment of Claimants etc.) Bill, whose ouster clause specified that it prevented a court from,

“entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity by reason of (i) lack of jurisdiction, (ii) irregularity, (iii) error of law, (iv) breach of natural justice, or (v) any other matter [...]”.<sup>549</sup>

It is noteworthy that this provision, which triggered significant judicial backlash, was never enacted.<sup>550</sup> One commentator suggested that the fact “that the clause in question [was] met with tremendous political opposition (including in extra-curial judicial interventions)” highlights “the existence of great doubt as to the possibility

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<sup>549</sup> Asylum and Immigration (Treatment of Claimants, etc.) HC Bill (2003–04), cl.10 (7), para.5. If passed, this would have amended the Nationality, Immigration and Asylum Act 2002.

<sup>550</sup> For a detailed account on the evolution of this provision and its ultimate abandonment see Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68(3) *Modern Law Review* 378. See also Andrew Le Sueur, 'Three strikes and it's out? The UK Government's strategy to oust judicial review from immigration and asylum decision making' [2004] *Public Law* 225.

of interpreting away its effect”.<sup>551</sup> Yet, as some of the obiter dicta in *Privacy International* suggest, the Judiciary might indeed reject such a clause.

The Supreme Court decision in *Privacy International* is a constitutional landmark judgment, however we must still not overestimate its effect. Most importantly, the judgment does not signal or confirm that the UK (now) has a common law constitution. While there is an overall trend of the UK constitution moving closer towards a legal constitution, there is - and remains post-*Privacy International* - in public law adjudication a perpetual to-and-fro between the parameters set by the two opposing theories. This leads the UK to be currently trapped in constitutional limbo.

Just as the debate between proponents of the two schools of thought can be seen as “the offering up of various arguments for different constitutional visions which can never be proven to be correct”,<sup>552</sup> the case law takes its fair share in sustaining and adding to the confusion. Sandwiched in-between political and common law constitutionalism, the reality of judicial law-making is difficult to pinpoint conclusively and its normative underpinnings are more difficult to detect still. Cases such as *Jackson* and *Privacy International* make it clear that “just as the unwritten constitution rules little in, so it could be said to rule little out, even the notion of the courts treating some rights” and principles “upon which the fabric of

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<sup>551</sup> Paul F Scott, ‘Ouster clauses and national security: judicial review of the Investigatory Powers Tribunal’ [2017] Public Law 355, 358.

<sup>552</sup> Joe Tomlinson, ‘Framing Questions About Ouster Clauses’ (*Admin Law Blog*, 20 November 2018 <https://adminlawblog.org/2018/11/20/joe-tomlinson-privacy-international-symposium-ouster-clauses-material-exclusions-on-judicial-review-and-the-role-of-policy-justifications/> accessed 20 June 2019, citing Martin Loughlin, ‘Theories and values in public law: an interpretation’ [2005] Public Law 48.

a liberal democracy depends, as inviolable".<sup>553</sup> Yet, as the following two chapters argue, this 'possibility' of protection is insufficient.

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<sup>553</sup> Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68(3) *Modern Law Review* 378, 404.

## CHAPTER 5

### **The Shortcomings of the Nuanced Constitution**

So far, this thesis has focused on portraying aspects of the way in which constitutional law adjudication works, and what these practices say about the nature of our constitution. I have focused - though not exclusively - on common law constitutional rights to outline some of the characteristics of the contemporary UK constitution, which I have described as nuanced. I have argued that we can conceptualise constitutional law adjudication as a spectrum, and I showed that judicial opinions as to the correct approach to the interpretation of legislation are scattered across this spectrum. I also showed that while in traditional constitutional theory there are no red lines, i.e. no legal limits to Parliament's authority, judicial practice paints a more 'nuanced' and indeed convoluted picture. This stems from the fact that judges recognise substantive constitutional values - including constitutional rights - that compromise the concept of Parliamentary Sovereignty.

In this chapter, I review the implications of the nuanced constitution. Specifically, I make three points. First, on an adjudicative level, i.e. in judicial reasoning, there is no set understanding how we ought to interpret constitutional law cases. Due to the nuanced constitution's lack of a principled constitutional philosophy, the process of moving along the spectrum has no clear structure. This manifests itself, for example, by the fact that no coherent justification for the enforcement of common law constitutional rights has been developed by the courts. Second, on a substantive level, given the strong pull towards the political constitutionalist side of the spectrum, which is triggered by clear statutory language, the substantive constitutional values we supposedly adhere to are at constant risk of being undermined. Third, the principled development of a comprehensive rights regime anchored in a firm philosophical foundation has been hampered by the workings of the English common law. Cumulatively, these three shortcomings of the

nuanced constitution can render public law adjudication, including in cases concerning constitutional rights, ambiguous and uncertain.

## 1. Navigating the Spectrum

As Gee and Webber observe, “Britain's constitution today embraces, perhaps in uncertain ways and to an uncertain extent, both a political model and a legal model”.<sup>554</sup> The first implication of the nuanced constitution is that there is - in practice - no approach to public law adjudication that is consistently followed. In other words, there is no set understanding of how much value ought to be given to common law or political constitutionalist principles and ideals. This creates a natural tension in the case law because the two models are ultimately irreconcilable. Political constitutionalism, even in contemporary thought, cannot accommodate reasoning that limits the elected branches' law-making ability.<sup>555</sup> Legal constitutionalism on the other hand is a commitment to limiting government by law, often including the protection of constitutional non-derivatives.<sup>556</sup> Therefore, while both theories may be able to acknowledge and promote a “multi-layered”<sup>557</sup> perception of constitutional arrangements, political constitutionalism

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<sup>554</sup> Graham Gee and Gregoire CN Webber, ‘What is a Political Constitution?’ (2010) 30(2) Oxford Journal of Legal Studies 273, 292.

<sup>555</sup> See for example Jeffrey Goldsworthy who in 2013 wrote that “the constitution’s most fundamental ‘unwritten’ doctrine [...] maintains that Parliament possesses sovereign law-making authority - authority that is legally (but not morally or practically) unlimited” in ‘Parliamentary Sovereignty and Constitutional Change in the United Kingdom’ in Richard Rawlings, Peter Leyland and Alison L Young, *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 50.

<sup>556</sup> András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017) 1.

<sup>557</sup> Nicholas Bamforth and Peter Leyland, *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003).

cannot attribute to the courts a role that is not focused on the faithful enforcement of legislative intent; if it did so, its core premise would collapse. Equally, legal constitutionalism's central tenet would be undermined if it accepted that Parliament, although constrained in some ways, remained legally unrestrained in all circumstances.

Accordingly, there is bound to be tension when - as in UK public law - elements of both schools of thought are acknowledged, though often implicitly, simultaneously. Elliot describes this as,

“a tension between two visions of the constitutional order. As we have seen, the first - the traditional - vision places the sovereignty of Parliament centre stage and refracts other constitutional principles, and hence the judicial role, through it. But a competing vision postulates a different dynamic: one that acknowledges fundamental constitutional principles' capacity to influence and shape one another, and that therefore gives rise to a different understanding of the judicial role - one that is informed to a greater degree by constitutional principles' potential to drive, as well as constrain, judicial intervention”.<sup>558</sup>

The indeterminate footing of the nuanced constitution seems indefinitely torn between the two influential schools of thought of legal and political constitutionalism. As I argued in Chapter 4, the resulting lack of a principled constitutional philosophy can manifest itself in judicial attempts to rationalise substantive rule of law-based reasoning within a Parliamentary Sovereignty framework. Building onto my observations in Chapter 3, the following analysis shows that it can also manifests itself in the absence of a justificatory foundation for the judicial enforcement of common law constitutional rights.

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<sup>558</sup> Mark Elliott, 'Judicial Power and the United Kingdom's Changing Constitution' (2017) 36(2) University of Queensland Law Journal 273, 275.

## **In Search of a Justificatory Foundation for Common Law Constitutional Rights**

Lester noted before the advent of the Human Rights Act 1998 that “without the benefit of a Bill of Rights or other Parliamentary code to guide them, English judges [had] the difficult task of developing coherent legal principles to protect fundamental human rights and freedoms where the common law suffers from ethical aimlessness or worse”.<sup>559</sup> Now that such ‘guidance’ is in place, the senior Judiciary’s engagement with the development of common law constitutional rights has intensified and, as Chapter 2 argued, increased in authority. However, as I suggested in Chapter 3, the case law is unable to produce a uniform, properly reasoned foundation for the judicial power to recognise and enforce common law-based human rights. The following overview is a more detailed account of the Judiciary’s struggle to identify a sound justificatory basis for the enforcement of non-legislative rights against the state. It shows that while some attempts have been made to arrive at a firmer theoretical foundation, these remain underdeveloped and disjointed.

### *Procedural Foundations*

As I showed in Chapter 3, sometimes the courts invoke jurisdictional principles to legitimise the development and enforcement of common law constitutional rights. For instance, *Kennedy*,<sup>560</sup> *Guardian News*<sup>561</sup> and *A v BBC*<sup>562</sup> all rely to some extent on the concept of inherent jurisdiction as the power that enables the courts

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<sup>559</sup> Lord Lester, ‘English judges as law makers’ [1993] Public Law 269, 278.

<sup>560</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455.

<sup>561</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420, [2013] QB 618.

<sup>562</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588.



to recognise, develop and enforce common law constitutional rights. In *A v BBC* Lord Reed said,

“Since the principle of open justice is a *constitutional principle to be found in the common law*, it follows that [...] the courts [...] *have an inherent jurisdiction to determine how the principle should be applied*”.<sup>563</sup>

This is the sole argument in the judgment justifying the judicial creation and enforcement of constitutional rights, and it encapsulates the lack of sufficient substantive engagement with which the Supreme Court typically addresses questions of legitimacy and institutional competence. Anything that is part of the English common law, the quote suggests, is for judges to determine. This reasoning is self-fulfilling and circular: a judge identifies something as part of the common law, which means that she is constitutionally entitled to develop it. In other words, there is a ‘non-test’. No criteria are developed and no actual justification is given which takes into account the constitutional complexities of the enforcement of non-Parliamentary rights.

Closer examination of the concept of inherent jurisdiction, the ‘enabling power’ in these cases and others,<sup>564</sup> raises further concerns. Like the rule of law, it can act as a vessel for the expression of a deeper political theory; its strength and reach are contested. Accordingly, at one end of the judicial spectrum we find the belief that inherent jurisdiction is in effect a mechanism “to correct any injustice, however it may have arisen”.<sup>565</sup> There are those who suggest that the concept can be

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<sup>563</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588 [27].

<sup>564</sup> See also *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No. 2) [2001] QB 1067, [2001] 2 WLR 1219 (Lord Mance and Lord Bingham dissenting).

<sup>565</sup> *R (Edwards) v Environment Agency* [2010] UKSC 57, [2011] 1 WLR 79 [35] (Lord Hope).

invoked on “a regular basis” and that one should *not* “conclude that the circumstances justifying its use must always be ‘dire and exceptional’ or ‘at the very extreme end of the spectrum’”.<sup>566</sup> This fits with the wider belief that common law constitutional rights are ultimately about the attainment of justice, a notion emerging regularly from the case law. Meanwhile, other senior judicial figures have characterised inherent jurisdiction as an anomaly in “an age of detailed and comprehensive statutory provisions”.<sup>567</sup> They have also cautioned that, if the concept is not limited to exceptional circumstances, there is a high potential for it - illegitimately - to cut across the statutory scheme. This, then, reinforces a rather relaxed commitment to substantive notions of justice, and a stronger allegiance to the principle of Parliamentary Sovereignty.

This contrast between the two different understandings of inherent jurisdiction signals two things. First, we observe, once again, that the analysis of common law constitutional rights jurisprudence confirms the tension inherent in today’s nuanced constitution. Second, senior members of the UK Judiciary are in serious disagreement, in a large share of the cases analysed, about the scope and reach of the power that is supposedly the foundation for the enforcement of common law constitutional rights.

To this, we can add that, on top of the disagreement concerning the intricacies of a concept that supposedly enables constitutional rights protection, inherent jurisdiction is not relied on systematically throughout the case law. In sharp contrast to the *Kennedy*, *Guardian News* and *A v BBC* type approach are the judgments in *Osborn*<sup>568</sup> and *UNISON*.<sup>569</sup> Whereas in *Osborn* no enabling power

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<sup>566</sup> *R (Edwards) v Environment Agency* [2010] UKSC 57, [2011] 1 WLR 79 [59] (Lord Toulson, Lady Hale).

<sup>567</sup> *ibid* [81] (Lord Sumption).

<sup>568</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>569</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

or justificatory basis is specifically suggested, in *UNISON* there is an elaborate explanation as to why the common law constitutional right in question is inherent in the rule of law. Strikingly, Lord Reed authored three of these judgments - *A v BBC*, *Osborn* and *UNISON* - which further strengthens the claim that there is deeply entrenched uncertainty as to the justification for common law constitutional rights, or indeed any legal concept that may compromise Parliamentary Sovereignty.

### *Substantive Foundations*

While there are some rare examples of substantive justificatory principles being recognised - for example, in *Ghaidan v Godin-Mendoza* Lady Hale suggested that equality was one of the foundational principles underlying democratic orders<sup>570</sup> - these are not consistently applied. What is more, the recognition and endorsement of such principles may not, according to the Supreme Court, trigger any meaningful legal protection. For instance, in *Gallagher*, the Supreme Court suggested that “fairness, like equal treatment, can readily be seen as a fundamental principle of democratic society; but not necessarily one directly translatable into a justiciable rule of law”.<sup>571</sup>

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<sup>570</sup> The characterisation of equality as a constitutional principle has been criticised as merely being a rhetorical figleaf, see KD Ewing, ‘The Unbalanced Constitution’ in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 105, citing Sir Jeffrey Jowell, ‘Is Equality a Constitutional Principle?’ (1994) 47(2) *Current Legal Problems* 1. For a shorter discussion on the constitutional status of equality see Colm O’Cinneide, ‘Equality: A Constitutional Principle?’ (*UK Constitutional Law Association Blog*, 14 September 2011) <https://ukconstitutionallaw.org/2011/09/14/colm-ocinneide-equality-a-constitutional-principle/> accessed 20 August 2019.

<sup>571</sup> *R (Gallagher Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96 [31].

We can contrast this with the Court of Appeal judgment in *Guardian News*. Here, Toulson LJ focused on maintaining elements that he deemed fundamental to a liberal democracy. Specifically, he opined that in a democratic system public power depends on the consent of the people governed, and that there needs to be transparency of the legal process so that the guardians of the rule of law - the Judiciary - can be scrutinised.<sup>572</sup> The key consideration underlying the right to open justice is the attainment of a certain model of democracy we aspire to. Lack of judicial bias, a sense and enforcement of fairness, competence and accountability are only a few of the virtues that can be policed by the public if open justice is guaranteed. The right is about the responsibility of the state, with accountability at the core of its rationale. Borrowing from Lord Scarman's opinion in *Harman v Home Office*,<sup>573</sup> Toulson LJ continued to state that open justice is crucial as society needs to be able to judge the way and quality with which justice is administered and, based on what they can observe, whether the law requires modification. To that end, he concluded that the Guardian should be able to refer to court documents,

“for the purpose of stimulating informed debate about the way in which the justice system deals with suspected international corruption and the system for extradition of British subjects to the USA. Unless some strong contrary argument can be made out, the courts should assist rather than impede such an exercise”.<sup>574</sup>

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<sup>572</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618 [1]. It is somewhat ironic that he proceeds to quote Jeremy Bentham, one of history's chief critics of the English common law, to mount the moral justification of the right of open justice.

<sup>573</sup> [1983] 1 AC 280 (HL).

<sup>574</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618 [76]-[77].

While *Guardian News* can be said to be democracy-driven, we find a dignity-driven justification in *A v Secretary of State for the Home Department*.<sup>575</sup> In this case, the House of Lords held that a UK court could not admit as evidence information obtained through torture overseas. Specifically, the Court concluded that the common law alone, i.e. without regard to international law, demanded exclusion thereof. Lord Nicholls began his opinion by saying “torture is not acceptable. This is a bedrock moral principle in this country. For centuries the common law has set its face against torture”.<sup>576</sup> Lord Hoffmann found equally clear words when he said that “the use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it”.<sup>577</sup> Referring to the liberty and dignity of the individual, their Lordships endorsed academic statements proclaiming that torture is “repugnant to reason, justice and humanity”,<sup>578</sup> and that the common law developed as it did due to the cruelty of the practice, the unreliability of confessions obtained through torture and the degrading of all involved in the practice. Lord Bingham explicitly recognised the “doubtful validity” of the legal sources and principles relied on in support of this constitutional protection against torture<sup>579</sup> without letting that become a bar to enforcing it, leaving no room for doubting that its enforcement was motivated by moral considerations rather than being demanded by precedent.

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<sup>575</sup> [2005] UKHL 71, [2006] 2 AC 221. See also ATH Smith, ‘Disavowing torture in the House of Lords’ (2006) 65(2) Cambridge Law Journal 251.

<sup>576</sup> *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221 [64].

<sup>577</sup> *ibid* [82].

<sup>578</sup> *ibid* [12], citing David Jardine, *A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth: Delivered at New Inn Hall in Michaelmas Term* (1836) 6, 12.

<sup>579</sup> *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221 [11].

Similarly, in *Osborn*, Lord Reed illustrated the dignitarian point he made with respect to the right to be granted a hearing by invoking the Bible, saying that,

“The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence”.<sup>580</sup>

The point, Lord Reed says, is that granting an individual a hearing has value even where the quality of a decision cannot be improved - if an omnipotent God allowed a hearing,<sup>581</sup> surely public authorities should do the same. Lord Reed noted that this reference from the 18th century “has been the law from that time to the present”.<sup>582</sup> He went on to cite research reports and papers to underpin the negative impact the lack of a hearing or engagement in a process that determines one’s fate can have. Lord Reed also quoted Jeremy Waldron, who had opined in his academic writings that,

“applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea - respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves”.<sup>583</sup>

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<sup>580</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [69] citing Byles J’s citation in *Cooper v Wandsworth Board of Works* (n 418) 195 of a dictum of Fortescue J in *R v Cambridge University, ex p Bentley* 93 ER 698 (1724) 2 Ld Raym 1334.

<sup>581</sup> He cites the dictum of Fortescue J that in the Old Testament ‘even God himself did not pass sentence on Adam before he was called on to make his defence.’ [69].

<sup>582</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [69].

<sup>583</sup> *ibid* [68].

## **The Unprincipled Nature of the Spectrum and Rights Protection**

The relationship between the above overview and the spectrum is as follows. Given the perpetual pulling of cases in two directions (triggered by the courts' dual commitment to Parliamentary Sovereignty and the rule of law), human rights justifications will inevitably be formulated with a desire or sense of duty to respect legislative intent. In other words, human rights justifications are not considered in the abstract. This hampers the development of fully-fledged justifications in individual cases as the inevitably moral core of these rights is not engaged with systematically.

### **2. Parliamentary Sovereignty as the Framework of the Spectrum**

In sum, the previous section showed that what Douglas averred about ECHR-based human rights protection holds true for rights grounded in the common law tradition as well: they lack "a fundamental justificatory basis".<sup>584</sup> In this current section, I argue that it is equally clear that while there is a lot of room for constitutional rights protection through value-infused interpretation under the nuanced constitution, ultimately there is an insurmountable barrier: express statutory wording.

The latter is widely regarded as trumping constitutional rights - even those of the most cherished kind. In other words, express statutory language can be characterised as operating similarly to a joker in a card game; as soon as the card is played, there are typically no safeguards for constitutional rights. Thus, the second implication of the nuanced constitution is that - given the historical development of the UK legal order - Parliamentary Sovereignty in many ways still

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<sup>584</sup> Benedict Douglas, 'Undignified rights: the importance of a basis in dignity for the possession of human rights in the United Kingdom' [2015] Public Law 241, 241.

provides the framework within which constitutional rights are inadequately protected.

### **A Predominantly Institutional Focus: How Dicey and Griffith Set the Scene**

Legal scholarship and the Judiciary have been pre-occupied with thinking about institutional legitimacy. The latter has framed and dominated constitutional debate, and it continues to provide a barrier to the development of an effective constitutional rights system. Given the UK's political history, it is not surprising that public law is predominantly perceived as a battle for institutional sovereignty. Judicial support for royal power, at the expense of Parliament's authority, "was one of the key factors underlying Parliament's assertion of its omnipotence in the aftermath of the 'glorious revolution'".<sup>585</sup> The legacy of this historical development is apparent in contemporary legal thought. Some leading scholarly opinions have essentially reduced the complexities of the normative considerations underlying public law adjudication to one criterion, i.e. Parliamentary supremacy. Dicey's dominant focus on the proposition that Parliament can make and unmake any law, and that law thus promulgated cannot be questioned by any other institution, has shaped the constitutional fabric of this jurisdiction significantly. As I argue in the next chapter, Dicey's institution-centric account "led the field in the wrong direction",<sup>586</sup> a trajectory that needs to be corrected. Here I simply provide the background to this facet of the nuanced constitution.

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<sup>585</sup> Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press 2005) 39.

<sup>586</sup> Iain McLean, 'Constitutionalism since Dicey' in Christopher Hood, Desmond King, and Gillian Peele (eds), *Forging a Discipline: A Critical Assessment of Oxford's Development of the Study of Politics and International Relations in Comparative Perspective* (Oxford University Press 2014) Editor's Note.



It is widely accepted that it was Griffith's 1978 lecture - regarded "as a benchmark for those who see representative and parliamentary government as important constitutional desiderata"<sup>587</sup> - which reinforced the Diceyan path. Warning that the law should not be a substitute for politics, Griffith argued that government by law was an unattainable idea, and that calling political claims 'rights' would see the "waters of natural law close over our heads".<sup>588</sup> His exclusive focus on the 'political' led him to say that,

"the constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also".<sup>589</sup>

Kavanagh suggests that we should not read Griffith's famous statement that the constitution is "no more and no less than what happens", and that "everything that happens is constitutional" literally, as this would mean that it was (a) hyperbolic, (b) wrong, or (c) that there would be no constitution whatsoever.<sup>590</sup> She further argues that it would be dangerous to take Griffith's statement at face value as it implies that Government is able to do anything, without being subject to constitutional restraints. However, taken to its full conclusion, if one reads 'constitutional' as 'legal values that are able to contradict Parliament', this is what the political constitution represents. First, there are no antecedent rights or higher values. Second, only elected representatives can determine which values a

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<sup>587</sup> Carol Harlow, 'The Political Constitution Reworked' in Rick Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis 2006) 190.

<sup>588</sup> JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 7.

<sup>589</sup> *ibid* 19.

<sup>590</sup> Aileen Kavanagh, 'Recasting the Political Constitution' (2019) 30(1) *King's Law Journal* 43, 49.

democracy ought to embody and uphold. Third, there can be no authority higher than Parliament. The logical consequence of these beliefs is that there should be “no legal limit to the wishes of the people”,<sup>591</sup> which is reflective of Griffith’s remarks.<sup>592</sup>

Kavanagh rightly observes that it would be extreme to suggest that the UK constitution is devoid of norms and principles. There are of course many principles that - as a matter of legal practice - inform public law adjudication in the constitutional as well as the administrative law sphere. If they are of political origin, e.g. enacted by Parliament, Griffith himself would refer to them as ‘legal’.<sup>593</sup> However, as a matter of constitutional theory, which is traditionally based on the idea of the political constitution (which is largely synonymous with Parliamentary Sovereignty),<sup>594</sup> those norms and principles may not amount to anything meaningful if this would go against express Parliamentary intention.

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<sup>591</sup> KD Ewing, ‘The Resilience of the Political Constitution’ (2013) 14(12) *German Law Journal* 2111, 2118.

<sup>592</sup> Note that he argued that primary legislation is not subject to any legal limits elsewhere too, see for example John AG Griffith and Michael Ryle, Michael AJ Wheeler-Booth, *Parliament: Functions, Practice and Procedures* (Sweet & Maxwell 1989) 244-45.

<sup>593</sup> John AG Griffith, ‘The Brave New World of Sir John Laws’ (2000) 63(2) *Modern Law Review* 159, particularly 168. See also on this point Graham Gee and Gregoire CN Webber, ‘What is a Political Constitution?’ (2010) 30(2) *Oxford Journal of Legal Studies* 273, 280.

<sup>594</sup> See Michael Gordon who says “While there are no doubt many dimensions of the constitution that might be analysed through a prism of political constitutionalist thought, the fundamental principle of parliamentary sovereignty has a special status given its nature and position in the constitutional hierarchy” in ‘Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit’ (2019) 30(1) *King’s Law Journal* 125, 126; see also KD Ewing who has argued that “it is difficult to see how a political constitution could operate without [Parliamentary Sovereignty]” in ‘The Resilience of the Political Constitution’ (2013) 14(12) *German Law Journal* 2111, 2118.

Indeed, there have only been two prominent cases in which judges of the highest judicial rank (though not unanimously) endorsed the idea that certain constitutional principles may be so fundamental to our democratic system, that an Act of Parliament eradicating these values may not be accepted by the courts: *Jackson*<sup>595</sup> and *Privacy International*.<sup>596</sup> Moreover, legal practice aside, staunch political constitutionalists regularly challenge the legitimacy of non-legislative constitutional norms and principles. Indeed, their criticism also includes what is deemed an expansive interpretation of statutory human rights.

Furthermore, the political constitutionalist school of thought's criticism is not exclusive to 'extreme' judicial decisions that indirectly challenge the validity of an Act of Parliament, as was the case in *Evans*.<sup>597</sup> Less 'controversial' cases are viewed with equal suspicion. For example, in *Huang v Secretary of State for the Home Department* the House of Lords held that the removal of an asylum seeker from the UK could be a disproportionate interference with that individual's right to respect for his private and family life, which is protected by the Human Rights Act 1998.<sup>598</sup> The Court further held that there need not be any exceptional circumstances to reach such a conclusion. The judgment features on the '50 Problematic Cases' list assembled by the Judicial Power Project, self-described as being concerned with the expansion of judicial authority.<sup>599</sup> The reason the Judicial Power Project is critical of this judgment is that it supposedly usurps power rightfully vested in elected politicians to assess "where the appropriate balance lies between family life and immigration control".<sup>600</sup> The right to respect for one's private and family life is relegated to a secondary issue.

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<sup>595</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

<sup>596</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>597</sup> *R (Evans) v Her Majesty's Attorney General* [2015] UKSC 21, [2015] AC 1787.

<sup>598</sup> [2007] UKHL 11, [2007] 2 AC 167.

<sup>599</sup> <https://judicialpowerproject.org.uk/>.

<sup>600</sup> <http://judicialpowerproject.org.uk/50-problematic-cases/>.

Therefore, while political constitutionalism recognises that there are constraints on legislative power in the loose sense, it also demands that those constraints will give way to political will as expressed through law. The enforcement of legal principles determined foremostly by the Judiciary is something political constitutionalists find difficult to accept. As Kavanagh says, Griffith himself thought for example that “the norms, rules and practices of the constitution are those which are recognised by the key institutions of the State and accepted by them as valid”, that “the courts are political players” and that “Parliament’s law-making power is subject to *political* rather than legal limits”.<sup>601</sup>

### **The Framework in Practice: Legality and Parliamentary Sovereignty**

As I have suggested throughout this thesis, we can conceptualise the nuanced constitution as a spectrum. We can picture Parliamentary Sovereignty on the left end of the spectrum, and legal constitutionalism on the right or vice versa.<sup>602</sup> Cases migrate between these two principled positions; in some cases, elements of the political constitution will be more prominent,<sup>603</sup> in others, aspects of the legal constitution will dominate.<sup>604</sup> If a right is characterised as fundamental or

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<sup>601</sup> Aileen Kavanagh, ‘Recasting the Political Constitution’ (2019) 30(1) King’s Law Journal 43, 49 (emphasis added).

<sup>602</sup> For a discussion on whether the political constitution should be considered as being loosely associated with the political right see Graham Gee, ‘The Political Constitution and the Political Right’ (2019) 30 King’s Law Journal 148.

<sup>603</sup> See for example *R (Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, but see Lord Kerr’s dissenting opinion.

<sup>604</sup> See for example *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin), [2019] 3 WLUK 12 in which the High Court, after noting that we “live in a fair, free and democratic society founded upon the rule of law” found that sections 20-37 of the Immigration Act 2014, ss 20-37 (part of the Government’s ‘hostile environment’ policy) are racially discriminatory and accordingly

constitutional, the powerful interpretative tool of the principle of legality is triggered.<sup>605</sup> Its narrow dimension dictates that legislation will not be held to abrogate a common law constitutional right,<sup>606</sup> pulling a case closer to the legal constitutionalism end of spectrum. However, the right in question becomes completely negligible if Parliament expressly permitted its abrogation or the statutory scheme dictates that the right ought to be abrogated, thereby enforcing the political constitution.

The principle of legality has many virtues that strengthen UK public law adjudication. For instance, it allows the courts to scrutinise a public authority's reasoning for its coherence and the veracity of any facts relied on. This 'probing' dimension was at the centre of the seminal decision in *Simms*<sup>607</sup> itself. There, Lord Hoffmann famously said that "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights [...] *But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost*".<sup>608</sup> Thus, *Simms*, in theory, prevents politicians from abrogating rights they may have committed themselves to publicly (usually reflecting those that are taken for granted by the electorate) without taking

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incompatible with articles 8 and 14 ECHR. Richard Ekins has branded this judgment a 'travesty' in 'The High Court's Right to Rent Decision is a Travesty' (*The Spectator Blog*, 2 March 2019) <https://blogs.spectator.co.uk/2019/03/the-high-courts-right-to-rent-decision-is-a-travesty/> accessed 21 August 2019.

<sup>605</sup> For a formidable overview of the development of the principle of legality in various common law jurisdictions see Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372.

<sup>606</sup> Paul Craig, 'Constitutional and Non-Constitutional Review' (2001) 54(1) *Current Legal Problems* 147, 166; *R (Evans) v Her Majesty's Attorney General* [2015] UKSC 21, [2015] AC 1787 [56]-[59] (Lord Neuberger).

<sup>607</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL).

<sup>608</sup> *ibid* 131E (emphasis added).

responsibility for the abrogation. Any politician or government doing so must do so expressly and “accept the political cost”.<sup>609</sup>

This reinforces accountability; Parliament needs to spell out its reasoning, which is then subject to judicial review, which becomes a forum in which, through the examination of thoroughly reasoned submissions, the veracity and persuasiveness of statements are put to the test. The English common law facilitates this form of engagement and scrutiny - one of the most basic ingredients of our adversarial adjudication system is that arguments are pitted against each other, and that such arguments must be supported by evidence. Legal reasoning is in its essence critical reasoning, and adjudicators are convinced by the strength of the evidence and the internal logical consistency of the reasoning.

Many of the cases discussed in this thesis demonstrate how vital the critical analysis of arguments - of a public policy nature or otherwise - is for a democratic legal order. For example, the Supreme Court took a very ‘probing’ approach to the Attorney General’s arguments in *Evans*,<sup>610</sup> which explicitly referred to the principle of legality citing *Simms* and *AXA General Insurance Ltd v HM Advocate*.<sup>611</sup> In the latter decision, Lord Reed opined that “The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so”.<sup>612</sup> Parliament is presumed not to legislate contrary to the rule of law. On this basis, Lord Neuberger held in *Evans* that section 53 FOIA expressly enables the Executive to overrule a judicial decision only where there are reasonable grounds, and,

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<sup>609</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) 131E.

<sup>610</sup> *R (Evans) v Her Majesty's Attorney General* [2015] UKSC 21, [2015] AC 1787.

<sup>611</sup> [2011] UKSC 46, [2012] 1 AC 868.

<sup>612</sup> *ibid* [152].

“the common law ensures that those grounds are limited so as not to undermine the fundamental principle [that a decision of a judicial body should be final and binding *and* that it should not be capable of being overturned by a member of the executive], or at least to minimise any encroachment onto it”.<sup>613</sup>

Analysing the Attorney General’s certificate in light of the Upper Tribunal’s findings and conclusions, the Court established that the argument that “the ‘advocacy correspondence’ in which the Prince of Wales engaged was ‘part of his preparation for kingship’, or part of an ‘education’ or ‘apprenticeship convention’”,<sup>614</sup> does not stand up to scrutiny. Looking at the facts, it was plainly obvious that “the advocacy correspondence was not prompted by a desire to become more familiar with the business of government and was not addressing what his role would be as king” but rather by “a strong belief that certain action on the part of government was needed”.<sup>615</sup> Further, in expressing that belief, Prince Charles was acting in a manner which was incompatible with his future role as king and in which he recognised that he would have to cease acting when he became king”.<sup>616</sup> Thus, key to this decision was the distinction between a decision that is reasoned and a decision that is reasoned *soundly*.

Yet, we must recognise that while the principle of legality facilitates a structured engagement with legal arguments, and while it invites the protection of constitutional rights and other fundamental principles, it also reinforces Parliamentary Sovereignty. As I argued in Chapter 3, while we may have moved on from regarding free speech and open justice as mere residual liberties, we should recognise that this does not mean common law constitutional rights operate

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<sup>613</sup> *R (Evans) v Her Majesty’s Attorney General* [2015] UKSC 21, [2015] AC 1787 [115].

<sup>614</sup> *ibid* [132].

<sup>615</sup> *ibid* [134].

<sup>616</sup> *ibid* [134].

as “trumps”<sup>617</sup>; indeed, they remain to some extent conditional upon non-interference. What has changed - and this is indeed a significant change - is that the test has become stricter. Common law constitutional rights have become more resilient as they are conceptualised,

“as a fundamental right, for which a clear legal basis is required to override, rather than an equitable right that gives way to the public interest, with deference to statutory power as demonstrating where the public interest lies”.<sup>618</sup>

However, ultimately there is a barrier in place. What on the face of it looks like a strong commitment to constitutional rights - we can only interfere with constitutional rights on the basis of express legal authority - is in fact a manifestation of the latter’s vulnerability.<sup>619</sup>

This allows us to put Lord Reed’s seemingly powerful judgment in *UNISON* into perspective.<sup>620</sup> Taking an equally probing approach to the evidence presented to him by the government as Lord Neuberger took in *Evans*,<sup>621</sup> Lord Reed relied partially on “elementary economics”. He scrutinised a range of different sources, including tribunal statistics and hypothetical scenarios to reject the claim put

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<sup>617</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977).

<sup>618</sup> Oliver Michael Butler, ‘Confidentiality and public authorities: fundamental rights, legality and disclosure for statutory functions’ (2017) 76(2) Cambridge Law Journal 253 (note), 255-256.

<sup>619</sup> The same vulnerability is inherent in other legal principles facilitating the enforcement of common law constitutional rights. For example, the scope of the inherent jurisdiction of the senior courts is infinite, unless Parliament has expressly curtailed it, see *Re E (SA) (A Minor) (Wardship)* (n 379).

<sup>620</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>621</sup> *R (Evans) v Her Majesty's Attorney General* [2015] UKSC 21, [2015] AC 1787.



forward by the Government that the tribunal fees would not have the effect of preventing access to the courts. However, “Lord Reed’s detailed marshalling of evidence, which grounds the Supreme Court’s unanimous ruling against the Lord Chancellor”,<sup>622</sup> happened in a context where there was no primary statutory language to the contrary. Thus, had Parliament authorised the introduction of Employment tribunal fees more explicitly, including an acknowledgment of the detrimental impact on constitutional rights, it is likely Lord Reed would have considered himself as having no choice but to enforce this statutory infringement of the right of access to justice.

Thus, as Elliot astutely observes,

“the legal violability of common-law constitutional rights may, at least in some circumstances, obscure their political inviolability - or at least overstate the extent to which they are in practice vulnerable to legislative disturbance. In this way, the doctrine of common-law constitutional rights may serve to erode the distinction between political and legal forms of constitutional constraint by erecting a legal barrier to interference with rights - in the form of an explicitness requirement - that is politically, albeit not legally, insuperable”.<sup>623</sup>

Legally, Parliament retains unlimited power to develop the law (substance) provided it expresses itself in the appropriate way (form). Thus, judges may be required - in cases where statutory language is ambiguous - to “pull of the trick of

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<sup>622</sup> Richard Rawlings, ‘The UNISON Case: A New High-Water Mark’ (2018)29 Public Law Review 190, 190.

<sup>623</sup> Mark Elliott, ‘Legislative Supremacy in a Multidimensional Constitution’ in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press 2015) 78-79.

being positive law servants and natural law masters at one and the same time”.<sup>624</sup> In those cases, the legal constitutionalism end of the spectrum navigated by the principle of legality comes to the fore. This is one of the reasons that we can argue that Parliamentary Sovereignty has been qualified; one can regularly observe that the reliance on normative principles facilitates a significant departure from legislative intent. However, in cases where Parliament has given express authorisation for the Executive to abrogate rights, the courts generally seem to consider themselves as having no option but to accept Parliament having played the joker card.

### **3. The English Common Law: Simultaneous Facilitator and Impediment**

A third factor contributing to the unprincipled and ineffective development of common law constitutional rights is the English common law. This is the third implication of the nuanced constitution. Despite the common law’s positive contribution to the development of constitutional rights and other fundamental constitutional principles, it has not “placed substantive limitations on the legislative capacity of Parliament through the subjection of legal sovereignty to superior immutable values”.<sup>625</sup> Under the nuanced constitution, there are, subject to some of the obiter dicta in *Privacy International*,<sup>626</sup> no immutable values.

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<sup>624</sup> Conor Gearty *Principles of Human Rights Adjudication* (Oxford University Press 2005) 25.

<sup>625</sup> Michael Gordon, ‘The conceptual foundations of parliamentary sovereignty: reconsidering Jennings and Wade’ [2009] Public Law 519, 521-522, referencing Thomas Poole, ‘Back to the Future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23(3) Oxford Journal of Legal Studies 435, 453.

<sup>626</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219.

Further, the English common law is not a suitable “spirit of the whole system of valid rules”<sup>627</sup> for this would ascribe to the latter inherent qualities that are simply not borne out in practice. First, the development of a principled constitutional rights framework is hampered by the common law’s strong affiliation with the past. Caenegem shows that from the very beginning of the life of the common law, and particularly after the loss of Normandy to France in 1204, one of the common law’s main functions was to hold the legal system together, and to resolve disputes between different local laws, people and entities, e.g. Englishmen and Normans, by fusing them into one.<sup>628</sup> This basic understanding of a constant recycling, adapting and refining of a core body of law has survived the centuries. Encapsulated in the relatively recent doctrine of stare decisis,<sup>629</sup> we can say that a key ingredient of common law reasoning is ‘tradition’. As Blackstone put it, to show that something is a rule of the common law is to show that “it hath been always the custom to observe it”.<sup>630</sup>

Tradition still plays a vital role in common law adjudication today. We may not quite trace the law back to “the Year Books, and perhaps beyond them to the customs of the Salian Franks” to “find out the practical motive for what now best is justified

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<sup>627</sup> As implied by Allan when discussing the works of Hayek in *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press 2013) 99.

<sup>628</sup> Raoul Charles Van Caenegem, *The Birth of the English Common Law* (Cambridge University Press 1988). Note however, that despite being ‘common’, i.e. covering the whole of the kingdom rather than applying locally, it did not cover all matters of law, and the division of the court system into common law courts, ecclesiastical courts, admiralty courts and courts of equity under the Chancellor was only abolished in 1871.

<sup>629</sup> The system of precedent, under which like case are supposed to be treated alike, is comparatively young, only cementing itself in the 19th century, see Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press 2008) 53–57.

<sup>630</sup> William Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765–69) i.17.

by the mere fact of its acceptance and that men are accustomed to it”.<sup>631</sup> Further, while the “English common law to this day treats the coronation of Richard I as the date distinguishing time beyond from time within legal memory”,<sup>632</sup> in practice judgments rarely go that far back.<sup>633</sup> Finally, as the above discussion of the development of the right to equality shows, new ideas can be integrated into the legal system. However, the adherence to ‘judicial custom’ through the concept of precedent means that the common law is not “a structured set of authoritatively posited, explicit directives, but of rules and ways implicit in a body of practices and patterns of practical thinking ‘handed down by tradition, use, [and] experience’”.<sup>634</sup> Combined with the English common law’s traditional affinity for procedure,<sup>635</sup> remedies and questions of jurisdiction<sup>636</sup> rather than substance, the preoccupation with ‘tradition’ is one factor that stifles the development of a principled, clearly reasoned constitutional rights framework.

The 1868 decision in *Chorlton v Lings* is instructive.<sup>637</sup> The Claimant, Mary Abbott sought to challenge the contention that the Representation of the People Act 1867 excluded women from voting in Parliamentary elections. Counsel had argued that women had “a right to the franchise at common law, that nothing had taken it away

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<sup>631</sup> Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 Harvard Law Review 457, 458.

<sup>632</sup> Neil Duxbury, ‘Custom as law in English law’ (2017) 76(2) The Cambridge Law Journal 337, 348.

<sup>633</sup> But see for example *R v Jogee* [2016] UKSC 8, [2017] AC 387 in which the Supreme Court looked at over 500 years of case law in order to determine whether the House of Lords had taken a wrong turn in *Chan Wing-Siu v The Queen* [1985] 1 AC 168 (UKPC).

<sup>634</sup> William Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765–69) vol 1, 68.

<sup>635</sup> Michael Lobban, *The Common Law and English Jurisprudence, 1760 - 1850* (Clarendon Press 1991) 16.

<sup>636</sup> H Patrick Glenn, *On Common Laws* (Oxford University Press 2007).

<sup>637</sup> *Chorlton v Lings* (1868-69) LR 4 CP 374 (Court of Common Pleas).

from them, and that they were therefore not incapacitated from voting” which should mean that “women are now entitled to the franchise as a common-law right”.<sup>638</sup> Saying that their decision had nothing to do with any “underrating of the sex either in point of intellect or worth” (which would be “quite inconsistent with one of the glories of our civilisation, - the respect and honour in which women are held”),<sup>639</sup> the Bench noted that the main obstacle to enforcing the right to vote was that over the past centuries not one single example could be found of (a) the assertion of such a right or (b) the exercise of such a right. This was taken as a strong presumption against its legal existence. The above-mentioned Supreme Court judgment in *Moohan*<sup>640</sup> is the modern equivalent of *Chorlton v Lings*. Both cases demonstrate the barriers the common law imposes on normative reasoning, which is essential for the development of a human rights philosophy.

It *is* possible that new rights develop incrementally. The way in which privacy law developed in this jurisdiction and the way in which tort law has been infused with rights thinking is a formidable example of the way in which the common law has evolved under the influence of the HRA. Whereas in *Wainwright*<sup>641</sup> the House of Lords found that there was no general tort of ‘invasion of privacy’, there is now a central cause of action, known as ‘misuse of private information’,<sup>642</sup> which was developed out of the law of confidence, starting with the seminal case of *Campbell v Mirror Group Newspapers Ltd*.<sup>643</sup> However, developments such as these do not

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<sup>638</sup> *Chorlton v Lings* (1868-69) LR 4 CP 374 (Court of Common Pleas) 383.

<sup>639</sup> *ibid* 388 (Willes J).

<sup>640</sup> *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901.

<sup>641</sup> *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.

<sup>642</sup> *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003. Subsequently, the Supreme Court refused Google permission to appeal against this aspect of the Court of Appeal's decision.

<sup>643</sup> [2004] UKHL 22, [2004] 2 AC 457. The most recent examination of the law on privacy occurred in the Supreme Court's decision in *PJS v News Group Newspapers Ltd* [2016]

take away from the verdict that if we look beneath the surface, the characteristics even of the current wave of common law constitutional rights, including *UNISON*, raise doubts as to the ultimate strength and stability of the common law to uphold constitutional fundamentals. Indeed, the true picture emerging of constitutional jurisprudence is one in which both the capabilities and the record of accomplishment of the English common law are often exaggerated. The celebrated decision in *Somerset v Stewart*,<sup>644</sup> which I analysed in Chapter 2, is a key historical example of this phenomenon.

Indeed, despite the resurgence of common law constitutional rights, many examples of the common law failing to uphold essential democratic standards can still be found today. Murkens has very helpfully provided an overview of the common law's poor protection of the right to free speech, one of the constitutive rights of a liberal democracy. The notion, he says, "that free speech is 'bred in the bone of common law'",<sup>645</sup> or that "people are free to say and print what they like"<sup>646</sup> is disputable.<sup>647</sup> Others have been more critical still, arguing that "more people are being jailed or arrested in Britain today for what they think, believe and say than at any time since the eighteenth century".<sup>648</sup> Indeed, the academic verdict is clear: the common law right to free speech is simply "too weak and too

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UKSC 26, [2016] AC 1081 where it was said that the misuse of private information can now be taken to cover both unwanted access to private information and unwanted intrusion into an individual's privacy.

<sup>644</sup> *Somerset v Stewart* (1772) Lofft 1, 98 ER 499.

<sup>645</sup> *R v Central Criminal Court, ex p Bright* [2001] 1 WLR 662, 679 (Judge LJ).

<sup>646</sup> KD Ewing, *The Bonfire of the Liberties* (Oxford University Press 2010) 138.

<sup>647</sup> Jo Eric Khushal Murkens, 'Democracy as the legitimating condition in the UK Constitution' (2018) 38(1) *Legal Studies* 42, 45.

<sup>648</sup> Philip Johnston, *Feel Free to Say It: Threats to Freedom of Speech in Britain Today* (Coronet Books 2013) 7.

indeterminate to adequately protect the public expression of ideas that ‘offend, shock or disturb’ dominant opinion”.<sup>649</sup>

Moreover, the English common law is not naturally prone to providing the theoretical foundation to the effective enforcement of constitutional norms, as is claimed by Allan. For example, it was the Judiciary, which made itself bound by their own precedents; it took a Practice Statement in 1966 to free the Law Lords from themselves. Further, as Lester points out, the adoption of literal rules of interpretation was not compelled by any element of the British constitution.<sup>650</sup> A much more accurate description recognises the traditional conservatism and stagnation of the common law. For instance, it took the courts over 250 years to outlaw marital rape. Allan’s overestimation of the virtue and strength of the common law is mirrored by his claim that there is a “very substantial overlap” between the ECHR and the rights protected by the English common law.<sup>651</sup> Elliot provides a more accurate comparison when he suggests that,

“The differences between the regimes are such that one cannot simply stand in for the other. The normative reach of the common law traditionally was - and probably still is - more modest than that of the Convention. The rigour of the protective techniques available under the Act has not always been imitated at common law. And Convention rights [...] have a degree of constitutional resilience that their common-law counterparts do not [...] enjoy. The courts’ protective commitment to [...] rights lying at or near the common law’s normative core may confer upon those rights a degree of

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<sup>649</sup> James Weinstein, ‘Extreme Speech, Public Order, and Democracy: Lessons from The Masses’ in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009) 37.

<sup>650</sup> Lord Lester, ‘Judges and Ministers’ (1996) 18(8) *London Review of Books* 10.

<sup>651</sup> TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press 2013) 38.

legal security approximating to that which is associated with Convention rights under the HRA; but the same cannot plausibly be claimed of the whole range of rights (and values) acknowledged at common law".<sup>652</sup>

In sum, the English common law has not developed into a comprehensive and effective system of constitutional rights protection and remedies. It has developed strong process rights, such as the right to procedural fairness and open justice. However, even those rights that are fairly established suffer from the absence of a justificatory basis and they are, based on current judicial practice, unlikely to be considered sufficiently insulated from clear statutory language. Accordingly, we therefore must recognise that overall common law constitutional rights provide insufficient protection.

#### **4. A Snapshot of the Rights Recognised under the Nuanced Constitution**

This chapter has argued that there are various characteristics of the nuanced constitution that have led to an underdeveloped constitutional rights framework. First, I have argued that there is no systematic engagement with the normative properties of a constitutional right or their importance for the legal system as a whole. Second, I suggested that their enforcement is often vulnerable to factors such as the statutory framework, and specifically the presence of clear statutory language. Third, some of the characteristics and workings of the English common law have stifled the development of a comprehensive constitutional rights regime. What follows is an overview of some of the common law constitutional rights that have been recognised in this jurisdiction. Taking a closer look at these reinforces the points made above.

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<sup>652</sup> Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68(1) *Current Legal Problems* 85, 115-116.



## An Overview

True to its nature, “the common law does not recognize a catalogue of human rights, or of constitutional rights, as such”.<sup>653</sup> That being said, the courts have acknowledged and protected common law constitutional rights across a wide range, which can be captured in the following non-exhaustive enumeration:

- the right to access to the court,<sup>654</sup>
- the right to property,<sup>655</sup>
- the right to privacy,<sup>656</sup>
- the right to self-determination,<sup>657</sup>
- the right to legal professional privilege,<sup>658</sup>

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<sup>653</sup> Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 33.

<sup>654</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409; *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52, [2013] 1 AC 484 [59]; *Raymond v Honey* [1983] 1 AC 1 (HL); *Chester v Bateson* [1920] 1 KB 829 (KB); *Bremer Vulkan Schiffsbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909 (HL); *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB).

<sup>655</sup> *Chesterfield Propertie de Walden Estates s Plc v Secretary of State for the Environment* [1997] 7 WLUK 491 (QB); *Attorney-General v Blake* [2001] 1 AC 268 (HL).

<sup>656</sup> *Douglas v Hello! Ltd (No. 6)* [2005] EWCA Civ 595, [2006] QB 125. See also the right to privacy of the home:

*Morris v Beardmore* [1981] AC 446 (HL); *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081.

<sup>657</sup> *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430; *R v Secretary of State for the Home Department, ex p Robb* [1995] Fam 127 (Fam).

<sup>658</sup> *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185.

- the right to open justice,<sup>659</sup>
- the right to free speech,<sup>660</sup>
- the right to a fair hearing before an unbiased court or tribunal,<sup>661</sup>
- the right to a fair trial/procedural fairness,<sup>662</sup>
- the right to procedural fairness,<sup>663</sup>
- the right of a British citizen to come to and remain within the jurisdiction,<sup>664</sup>
- the right against arbitrary detention/ right to liberty,<sup>665</sup>

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<sup>659</sup> *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8, [2012] 2 AC 115; *R (C) v Secretary of State for Justice* [2016] UKSC 2, [2016] 1 WLR 444; *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618; *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455; *A v BBC* [2014] UKSC 25, [2015] AC 588.

<sup>660</sup> *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247; *Rushbridger v Attorney-General* [2003] UKHL 38, [2004] 1 AC 357; *Derbyshire CC v Times Newspaper Ltd* [1993] AC 534 (HL). For an example of a constitutional rights with horizontal dimensions see *Rhodes v OPO* [2015] UKSC 32, [2016] AC 219.

<sup>661</sup> *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531; *R (Sky Broadcasting Ltd) v Central Criminal Court* [2011] EWHC 3451 (Admin), [2011] EWHC 3451; *A v Her Majesty's Treasury* [2008] EWHC 869 (Admin), [2008] 3 All ER 361; *R v Gough* [1993] AC 646 (HL).

<sup>662</sup> *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531; *Jude v Her Majesty's Advocate* [2011] UKSC 55, 2012 SLT 75.

<sup>663</sup> *R (Barclay and another) v Secretary of State for Justice and the Lord Chancellor and others* [2014] UKSC 54, [2015] AC 276; *R (Bourgass and another) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384; *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>664</sup> *R (Halligen) v Secretary of State for the Home Department* [2012] UKSC 20, [2012] 1 WLR 1604 [31]; *In the matter of D (A Child)* [2017] EWCA Civ 1695, [2017] 10 WLUK 723.

<sup>665</sup> *In Re S-C (Mental patient: habeas corpus)* [1996] QB 599 (CA) 603; *R v SSHD* [2007] EWCA Civ 1363, [2007] 11 WLUK 566; *R (Kambadzi) v Secretary of State for the Home*

- the right not to be tortured,<sup>666</sup>
- the privilege against self-incrimination,<sup>667</sup>
- the right to non-discrimination,<sup>668</sup>
- and the right to life.<sup>669</sup>

### Contrasting Traditional and ‘Modern’ Rights

As becomes apparent from this selection, there is a wide range of rights touching upon various aspects of an individual’s interests. It is thus inaccurate to say that these rights are predominantly about political participation<sup>670</sup> or exclusively process-oriented. However, it is apparent, from this list as well as the case law, that process rights are particularly well protected. Indeed, rights cases such as *Osborn*<sup>671</sup> and *UNISON*<sup>672</sup> have set remarkable precedents for the respective rights they protect: the right of access to the courts and the right to procedural

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*Department* [2011] UKSC 23, [2011] 1 WLR 1299; *R (Mighty) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 [53].

<sup>666</sup> *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221 [11]-[12]; *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No1)* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579; *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [2016] AC 1457.

<sup>667</sup> *Beghal v DPP* [2015] UKSC 49, [2016] AC 88.

<sup>668</sup> Old authorities include *Kruse v Johnson* [1898] 2 QB 91 (QB).

<sup>669</sup> *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653.

<sup>670</sup> As suggested in Keith D Ewing and Conor Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (Oxford University Press 2000).

<sup>671</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>672</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

fairness. Both have had significant implications at the policy level,<sup>673</sup> and it will take skilled Parliamentary draftsmen to devise a statutory formula that could successfully limit either right. Notably, process rights have historically enjoyed wide judicial acceptance, and the ability of the courts to resort to prominent authorities bolsters the authority of these rights. This reinforces the importance of historical adherence to a right, which I alluded to above.

Indeed, this phenomenon becomes clearer if we contrast the right to procedural fairness and the right to access to justice with, for instance, the more 'modern' right to non-discrimination. The development of anti-discrimination law and the right to equality in the employment context was for a long time stifled "in part by concerns that discrimination law posed a risk to individual autonomy, and in particular to the extensive freedom historically enjoyed by employers and service providers under the common law to conduct their business as they see fit".<sup>674</sup> According to O'Conneide, one of the "drag factors" contributing to the slow development of domestic anti-discrimination law was that "non-discrimination was not acknowledged to be a core common law value" fuelling "an underlying perception that discrimination law represented a useful but alien transplant into the stable ecosystem of UK law, whose growth had to be contained and limited".<sup>675</sup>

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<sup>673</sup> See for example Parole Board for England and Wales Annual Report and Accounts 2016/17, 24, which states that "there has been a dramatic move away from paper-based panels to oral hearings over the last decade; and this accelerated following the Osborn judgment".

<sup>674</sup> Colm O'Conneide, 'Values, rights and Brexit - Lessons to be learnt from the slow evolution of United Kingdom discrimination law' (2017) 30 Australian Journal of Labour Law 1, 5. Note that O'Conneide says that such reserved attitudes were not confined to the Judiciary.

<sup>675</sup> Colm O'Conneide, 'Values, rights and Brexit - Lessons to be learnt from the slow evolution of United Kingdom discrimination law' (2017) 30 Australian Journal of Labour Law 1, 6.

Things have changed. The common law has certainly moved on from Lord Denning's opinion that differential treatment of men and women in the workplace "is not discrimination" but rather a manifestation of "the courtesy and chivalry which we have been taught to believe is right conduct in our society".<sup>676</sup> Yet, it was only a few years ago that the Equality Act 2010 abolished the common law principle that a husband must maintain his wife,<sup>677</sup> and "the exact status, scope and substance" of the common law principle of equality remains unclear.<sup>678</sup>

Thus, rights with a stronger claim to autochthony, i.e. those that have stronger domestic roots, are typically better placed to carry their own weight in a judgment. Indeed, there is an inherent bias in the common law, subject to exceptions,<sup>679</sup> to historical continuity. This in turn hampers the development of fully-fledged common law constitutional rights of the more 'modern' kind, some of which, such as equality, are indispensable in a liberal democracy.

### **Non-Recognition and Underdevelopment**

Relatedly, some rights, which are commonly protected in international treaties or domestic constitutions are noticeably absent from the above 'list'. For instance, I

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<sup>676</sup> *Peake v Automotive Products Ltd* [1978] QB 233 (CA) 238.

<sup>677</sup> Equality Act 2010, s 198.

<sup>678</sup> Colm O'Conneide, 'Values, rights and Brexit - Lessons to be learnt from the slow evolution of United Kingdom discrimination law' (2017) 30 *Australian Journal of Labour Law* 1, 8 citing Scott Baker J's opinion in *Association of British Civilian Internees Far East Region v Secretary of State for Defence* [2002] EWHC 2119 (Admin), [2002] 10 WLUK 534 [53]-[54].

<sup>679</sup> See Paula Giliker, 'A common law tort of privacy? The Challenges of Developing a Human Rights Tort' (2015) 27 *Singapore Academy of Law Journal* 761 which analyses the developments following *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 and *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457.

have been unable to detect any authorities suggesting that the common law recognises a right to freedom of religion.<sup>680</sup> Additionally, the scope of many of these rights - and indeed their importance beyond pleasing rhetoric - is unclear. For example, in *R (Amin) v Secretary of State for the Home Department* the House of Lords stated that “a profound respect for the sanctity of human life underpins the common law”<sup>681</sup> whereas in *R (BA) v Secretary of State for Health*<sup>682</sup> the Administrative Court held that the common law right to life did not include a right to receive medical treatment.

Yet other rights exist only in a very basic form, and thus would feature on this ‘list’, but in practice their content is too restricted or underdeveloped in the face of statutory occupation of the field to grant the relief sought by the individual in a particular case. To illustrate the latter, the UK Supreme Court judgment in *Moohan*<sup>683</sup> is instructive. The case concerned applications for judicial review of the Scottish Independence Referendum Act 2013. The Appellants, two convicted criminals in detention, sought to establish their right to vote in the Scottish Independence Referendum in September 2014. Counsel for the Appellants had sought to establish that the blanket disenfranchisement of convicted prisoners in relation to the independence referendum was ultra vires based on alternative submissions including A3P1 of the ECHR, EU Law, the International Covenant on Civil and Political Rights, and, crucially, “the basic democratic principles of the common law constitution, namely the principle of universal suffrage and the

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<sup>680</sup> See for example *Lee v Ashers Baking Co Ltd and others* [2018] UKSC 49, [2018] 3 WLR 1294, which reviewed the case law in this area extensively. See also Karon Monaghan, ‘Religious Freedom and Equal Treatment: A United Kingdom Perspective’ (2014) 22(2) *Journal of Law and Policy* 673.

<sup>681</sup> *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653 [30].

<sup>682</sup> [2017] EWHC 2815 (Admin), [2018] 4 WLR 2.

<sup>683</sup> *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901.

concomitant fundamental right to vote”.<sup>684</sup> Whilst Lord Hodge had no difficulty in recognising the right to vote as a basic or constitutional right, referring to the decision in *Watkins*,<sup>685</sup> he did not think that “the common law has been developed so as to recognise a right of universal and equal suffrage from which any derogation must be provided for by law and must be proportionate”.<sup>686</sup> Meanwhile, Lady Hale pointed out that “it makes no more sense to say that sentenced prisoners have a common law right to vote than it makes to say that women have a common law right to vote, which is clearly absurd”.<sup>687</sup>

### **Revisiting the Vulnerability of Common Law Constitutional Rights**

Finally, some examples on the above non-exhaustive ‘list’ show that rights may be abrogated under the wider limb of the principle of legality. I have already discussed aspects of the Supreme Court’s decision in *Beghal*<sup>688</sup> in Chapter 3, noting that the case is a prime example of institutional legitimacy concerns taking precedence over the substantive development of rights. To reiterate, the Court emphasised that Parliament can abrogate the privilege against self-incrimination expressly or by implication.

*Beghal* is no exception - the privilege had previously been increasingly subjected to implied abrogation “since otherwise the obvious purpose of the statute would be stultified”<sup>689</sup> or the statute would as a whole “be largely ineffective”.<sup>690</sup> Both in

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<sup>684</sup> *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901 [5].

<sup>685</sup> *ibid* [33].

<sup>686</sup> *ibid* [34].

<sup>687</sup> *ibid* [56].

<sup>688</sup> *Beghal v DPP* [2015] UKSC 49, [2016] AC 88.

<sup>689</sup> *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1 (CA) [17].

<sup>690</sup> *R v Hertfordshire CC, ex p Green Environmental Industries* [2000] 2 AC 412 (HL) (Lord Hoffman).

*In re London United Investments Plc*<sup>691</sup> and in *Bank of England v Riley*<sup>692</sup> the essence of the decision was that if Parliament, acting in the public interest, set up by statute special procedures to determine fraudulent conduct in companies to facilitate the protection of members of the public making deposits, it could not have intended for the privilege against self-incrimination to be applicable. Similarly, in *Bishopsgate*,<sup>693</sup> sections 235 and 236 of the Insolvency Act 1986 were construed as enabling a liquidator to obtain potentially incriminating information if this was in the public interest. If the person required to give information could refuse to answer on the basis of the privilege against self-incrimination, the purpose of the Act would be nullified. Dillon LJ and Stuart-Smith LJ reasoned that bankruptcy legislation and corporate insolvency legislation had developed in line with each other so that Parliament must have intended for them to be interpreted in the same way as well. This in consequence meant that Parliament had to have intended that the privilege against self-incrimination be abrogated in the latter context, as bankruptcy legislation had already abrogated it by the time the Act was passed. Finally, In *R v Seeling* it was held that the privilege was removed because of “the public importance which Parliament attaches to the investigation and punishment of company fraud, and the importance that it attaches to getting the truth in such matters”.<sup>694</sup>

Cumulatively, these cases suggest that while some judgments contain an explicit recognition that the common law protects basic human rights,<sup>695</sup> and while the above compilation of rights may at first glance strike us as inspiring, we must not forget that being able to identify these rights does not amount to an effective

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<sup>691</sup> *In Re London United Investments Plc* [1992] Ch 578 (CA).

<sup>692</sup> [1992] Ch 475 (CA).

<sup>693</sup> *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1 (CA) [17].

<sup>694</sup> [1992] 1 WLR 148 (CA) [161].

<sup>695</sup> *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430 [43] (Lord Kerr and Lord Reed); see also [80].



constitutional rights system. Common law constitutional rights have developed in a haphazard way, they remain in most cases firmly in the shadow of the European Convention on Human Rights and, in any case, all of them are vulnerable to express statutory language.

## **5. The Constitutional Legacy of *UNISON* and *Privacy International***

The UK constitution has been characterised as being “in the process of being legalized, such that law increasingly encroaches upon, and perhaps diminishes, legislative authority”.<sup>696</sup> The seminal decisions in *UNISON*<sup>697</sup> and *Privacy International*<sup>698</sup> offer convincing support for this contention. However, as I argue in this final section, they have not changed the nature of the UK constitution to the extent that it should now be referred to as a legal or common law constitution. It remains a constitution that is nuanced in nature, and that continues to be strongly influenced by political constitutionalist thinking. Indeed, even the strong obiter dicta in *UNISON* and *Privacy International* do not change the conclusions reached in this chapter.

It is certainly the case that one cannot stress enough how vital Lord Reed’s judgment in *UNISON* was as a general reminder of the constitutional role of the courts,<sup>699</sup> the impact it will have on individuals seeking legal redress for

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<sup>696</sup> Mark Elliott, ‘Legislative Supremacy in a Multidimensional Constitution’ in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press 2015) 75.

<sup>697</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>698</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219.

<sup>699</sup> Mark Elliott, ‘The Rule of Law and Access to Justice: Some Home Truths’ (2018) 77(1) *Cambridge Law Journal* 5, 5-6.

employment related disputes,<sup>700</sup> and how much of a milestone the judgment is for common law constitutional rights jurisprudence. Indeed, as I have written elsewhere, the *UNISON* judgment goes further than previous common law constitutional rights cases. For example,

“In contrast to *Osborn*, it not only puts the common law *centre-stage* by making it the starting point of the legal analysis but also implies, in the context of this right at least, the *sufficiency* of the common law [...] Furthermore, in contrast to *A v BBC*, this judgement is more consistent as both the law and the application of the law to the facts is common law based rather than ECHR or EU law based [...] Finally, citing *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198 and *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, Lord Reed says that ‘even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation’, thereby bolstering the *authority of the common law* and the *discretion of the courts* in the face of *explicit* statutory human rights abrogation [...] This last point is closely connected to the court’s commitment to a rich notion of the rule of law”.<sup>701</sup>

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<sup>700</sup> According to Government figures, annually about 14,000 claimants did not commence proceedings due to the fees, see Review of Introduction of Fees in the Employment Tribunal: Consultation on Proposals for Reform (January 2017), Annex F [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf) accessed 20 August 2019, and there was a drastic increase in claims following the handing down of the judgment:

<sup>701</sup> Christina Lienen, ‘Unison v Lord Chancellor: the things that landmark constitutional cases are made of’ (*UCL Constitution Unit Blog*, 28 July 2017) <https://constitution-unit.com/2017/07/28/unison-v-lord-chancellor-the-things-that-landmark-constitutional-cases-are-made-of/> accessed 21 August 2019.

Hence, as Ford noted, “for once the extravagant acclamations [by commentators about a judgment] were not hyperbolic”.<sup>702</sup> The judgment’s rich legal analysis features many aspects that have far-reaching implications for our understanding of the UK constitution, and which warrant separate academic attention. One of these is the Supreme Court’s explicit endorsement of ‘rights language’. Another one is the endorsement of statements on rights and justice put forward by both Edward Coke and William Blackstone whose views on jurisprudence were deeply anchored in natural law theory, which regarded adjudication as the altering of positive law through judgments with the intention to honour the law’s purpose.<sup>703</sup> A third is that the legal analysis in this case is “intimately bound up with its assessment of the normative value of the right of access to justice”.<sup>704</sup>

However, *UNISON* ought to be viewed within its context. First, the case concerned the right of access to justice/the courts, a right so well established that there was no difficulty locating precedent supportive of the legal outcome in this instance. As I noted above, there are many other constitutional rights that are constitutive of a liberal democracy that are much less historically recognised, and it will - due to how the common law works - be more unrealistic for them to be employed with the same strength, if at all. Second, we must not lose sight of the fact that the constitutional right in question is in essence a ‘process of justice’ right. It concerns the role of the courts as much as it concerns individuals. Much of the substance of this right and other rights falling into this category relates to the separation of powers and the sound administration of the state. As such, the courts have a special interest - and stake - in them, and given the UK constitution’s focus on the

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<sup>702</sup> Michael Ford, ‘Employment Tribunal Fees and the Rule of Law: *R (Unison) v Lord Chancellor* in the Supreme Court’ (2018) 47(1) *Industrial Law Journal* 1, 2.

<sup>703</sup> On this dimension of the common law, see Allan Beever, ‘The Declaratory Theory of Law’ (2013) 33(3) *Oxford Journal of Legal Studies* 421.

<sup>704</sup> Mark Elliott, ‘The Rule of Law and Access to Justice: Some Home Truths’ (2018) 77(1) *Cambridge Law Journal* 5 (note), 7.

state's institutional organisation, judgments enforcing these rights will be viewed with softer criticism.<sup>705</sup>

These observations have implications for our assessment of *UNISON*'s interpretation of the rule of law. While *UNISON* - in many regards - showcases a substantive notion of the rule of law, as far as the substance of this constitutional right is concerned, it is equally compatible with the rule of law's 'thin' conceptualisation. The right to access to justice merely demands that "courts should be accessible",<sup>706</sup> which is an obvious prerequisite for any kind of law enforcement, including enforcement of substantively unjust or undemocratic laws. In this sense the right of access to justice *potentially* enables the enforcement of constitutional rights, however it also enables their neglect. In other words, when Elliott concludes positively that it would be "fallacious to suppose that the absence of a 'written constitution' is antithetical to the possibility of fundamental rights",<sup>707</sup> the key word to focus on is 'possibility'. It is true that *UNISON* protects a vital fundamental right in an unprecedentedly strong way, and the Supreme Court is to be applauded for it. However, the right in question - access to justice - represents the very minimum of what we can expect of a liberal democracy, namely for law to be enforced.

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<sup>705</sup> Although see Sir Stephen Laws, 'Second-Guessing Policy Choices The rule of law after the Supreme Court's *UNISON* judgment' (*Policy Exchange*, 15 March 2018) <https://policyexchange.org.uk/wp-content/uploads/2018/03/Second-guessing-policy-choices-2.pdf> accessed 20 August 2019.

<sup>706</sup> Joseph Raz, *The authority of law: Essays on law and morality* (Oxford University Press 1979) 217.

<sup>707</sup> Mark Elliott, 'The Rule of Law and Access to Justice: Some Home Truths' (2018) 77(1) *Cambridge Law Journal* 5 (note), 8.

Thus, while *UNISON* may indeed be “an exemplar of common law constitutionalism”,<sup>708</sup> it is also compatible with a more limited reading, particularly in light of my aforementioned point regarding the absence of clear statutory wording. While it may pull the constitution closer to one end of the spectrum, it has not - given the rich complexities of UK public law and the divergent opinions of senior judges on these intricacies - changed the nature of the constitution altogether.

This brings me to the more recent judgment in *Privacy International*. As I stated in Chapter 4, in what, in parts, reads very much like an open endorsement of common law constitutionalism, Lord Carnwath’s opinion suggested that it was ultimately for the courts, not the legislature, to determine the limits set by the rule of law. Like *UNISON*, this judgment is a constitutional landmark case, however we must not overestimate its implications. Specifically, *Privacy International* is unlikely to lead to a more principled, rigorous protection of constitutional rights or engender a fundamental change in the nature of the UK constitution.

I want to focus in particular on one argument in making this point. Lord Carnwath remarked that the Judiciary could refuse to give binding legal effect to a statute in one specific scenario, namely Parliament wholly excluding judicial review or abolishing the ordinary role of the courts. However, first, no majority was established for this contention; Lord Lloyd-Jones in his concurring judgment did not engage with the second - hypothetical - issue. Second, the judgment protects an aspect of constitutional/institutional design that is so basic it ought to be considered a prerequisite that enables the protection of other constitutional rights. Third, the judgment does not guarantee that substantive rights independent of the ‘administration of justice’ will be recognised or enforced in the face of contradicting primary or secondary legislation. The abolition of judicial review would be the end

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<sup>708</sup> Alan Bogg, ‘The Common Law Constitution at Work: *R (on the application of UNISON) v Lord Chancellor*’ (2018) 81(3) *Modern Law Review* 509, 513.

of democracy as we know it. Accordingly, the suggestion that a court might not recognise the legally binding effect of such an attempt - which was endorsed by a thin majority - does not equate to a robust system in which the protection of constitutional rights can be guaranteed.

Put succinctly, *UNISON* and *Privacy International* protect one of many rights that are essential in a liberal democracy. The right of access to the courts - which both judgments addressed albeit from different angles - is a necessary condition in a liberal democracy. However, the recognition of this right is not a sufficient condition. Furthermore, while both judgments give a boost to the legal constitutionalist end of the nuanced constitution's spectrum, they do not change the nature of the UK constitution more broadly. The latter will continue to be characterised by complex qualities, which operate in an environment of delicate shading.

## **6. Conclusion**

Guided by an absolutist conceptual starting point originating in the 19<sup>th</sup> century, the UK's constitution has traditionally treated legality as synonymous with legislative intent. Against this background, constitutional law has largely been framed as an incessant power struggle between Parliament and the Executive on the one hand, and the Judiciary on the other.<sup>709</sup>

Issues of substance - such as the content of constitutional rights - have played second fiddle as a result, both in the case law and in academic writings. This does not mean that substance is merely of marginal concern in contemporary public law adjudication. Indeed, as the growing importance of common law constitutional

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<sup>709</sup> See Lord Sumption's remarks in The Reith Lectures as a latest example of this.

rights - evidenced in particular in the judgments in *UNISON*<sup>710</sup> and *Osborn*<sup>711</sup> - and other constitutional law cases such as *Jackson*<sup>712</sup> and *Privacy International*<sup>713</sup> show, there is an increasingly strong parallel emphasis on the law's substantive qualities. However, against the background of a firmly embedded conceptual framework that focuses on Parliament's unlimited law-making powers even in the face of fundamental rights, this growing engagement with substantive values - enabled and sustained by both European and domestic developments - has been unduly limited and largely unprincipled.

Within the framework described in this chapter, we find that common law constitutional rights are inherently vulnerable. Their recognition and enforcement depend disproportionately on 'externalities'. By this I mean that no matter how normatively essential a right, its importance for the UK's political-legal order theoretically gives way to legal precedent and/or the statutory context. This means that despite the Judiciary's express recognition that certain common law rights are "important",<sup>714</sup> "fundamental",<sup>715</sup> "basic",<sup>716</sup> "near to [...] absolute",<sup>717</sup> and "inherent [...] to democratic civilised society",<sup>718</sup> it is far from certain that an

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<sup>710</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>711</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

<sup>712</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

<sup>713</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219.

<sup>714</sup> *R v Secretary of State for the Home Department, ex p Saleem* [2001] 1 WLR 443, [2000] 4 All ER 814, 828 (Lady Hale).

<sup>715</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) [131]-[132] (Lord Hoffmann).

<sup>716</sup> *Her Majesty's Treasury v Mohammed Jabar Ahmed* [2010] UKSC 1, [2010] 2 AC 697 [183] (Lord Rodger, with whom Lady Hale agreed).

<sup>717</sup> *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB) 585 (Laws J).

<sup>718</sup> *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 [30] (Lord Cooke).

appropriate remedy will vindicate the breach of a constitutional right. Indeed, certain fundamental rights may not be recognised in the first place due to the historical trajectory of the English common law. Therefore, though it is true that “the common law has powerful resources on which to draw”,<sup>719</sup> under the realities of the nuanced constitution, those resources are not utilised in the manner and to the degree necessary. Indeed, this chapter argued that the nuanced constitution’s jurisprudential approach towards common law constitutional rights protection is - despite many positive features - unsatisfactory. In response to the shortcomings outlined, the next chapter will offer an alternative, more robust framework for constitutional rights protection.

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<sup>719</sup> TRS Allan, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?’ (2002) 61(1) Cambridge Law Journal 87, 96.



## CHAPTER 6

### **Striving Towards a More Coherent Framework: A Template for Rights Protection in a Liberal Democracy**

This thesis has highlighted the constitutional dynamics underlying public law reasoning with a particular focus on rights cases. It has also challenged commonly held perceptions about what such reasoning represents. Finally, it has criticised the jurisprudence's incoherence and normative deficiencies. In response to the shortcomings I have identified, this final chapter proposes an alternative model for constitutional rights adjudication.

Put briefly, we can make public law adjudication more structured, coherent and normatively sound if we shift our focus from institutional legitimacy to the substantive requirements of a legal order. Such a shift can be realised, first, by abandoning Parliamentary Sovereignty in constitutional rights cases, and, second, by developing a liberal democracy-based justification for public power. As a field, public law would benefit significantly from an investigation into the values that legitimise and sustain our political-legal system. This step, I argue, should precede, or at least accompany, our deliberations on the respective powers of our public institutions.

#### **1. The Skirting of the Justificatory Basis in Legal Scholarship**

McHarg rightly notes that a court concerned with the adjudication of human rights,

“needs to be able to point to a firmer theoretical foundation for its claim to legitimacy than simply the reasonableness of individual decisions, since these are judgments with which observers may or may not agree. If it is to

be durable, the system itself must be able to attract loyalty irrespective of the particular decisions it produces”.<sup>720</sup>

In this chapter, I propose a theoretical foundation that is firmer than the one we currently have. I suggest that the first step towards the development of a more coherent approach towards public law discourse is to acknowledge that constitutional principles and dynamics are attached to a deeper philosophical argument. In other words, there is no constitutional principle that is not a manifestation of certain aspects of political morality. The rule of law demonstrates this phenomenon clearly. Its thin conception is generally understood to require nothing more than for law to be promulgated with proper authority, for it to be sufficiently clear, and for it to operate prospectively rather than retrospectively.<sup>721</sup> In essence, as Raz argues, the rule of law should be understood as entailing merely formal requirements.<sup>722</sup> This perception is a manifestation of political constitutionalism; it simply prescribes that government has to exercise power in accordance with rules that have been set out clearly in advance, leaving questions of substantive justice to the elected branches of state. The content of law is not determined by substantive values but through the competition of ideas in public debates, hence the ‘thin’ notion of the rule of law.

In contrast, Allan suggests that the rule of law “imposes those requirements of procedural fairness and substantive justice that follow from a persuasive account

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<sup>720</sup> Aileen McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62(5) *Modern Law Review* 671, 696.

<sup>721</sup> Paul Craig, ‘Formal and substantive conceptions of the rule of law: an analytical framework’ [1997] *Public Law* 467, 467.

<sup>722</sup> See Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195.

of what it means to enjoy government according to law.<sup>723</sup> Allan explicitly recognises that the conceptualisation of the rule of law depends on an underpinning theory of government, which in his book is legally limited.<sup>724</sup> Between these two conceptualisations sits Bingham, who proposed a semi-substantive notion of the rule of law, suggesting that the latter “must afford adequate protection of fundamental human rights”.<sup>725</sup> However, differently from Allan, he does not reach the necessary conclusion that in order to guarantee fundamental rights Parliament’s law-making ability needs to be limited other than by convention or political considerations. He recognised in some of his works that Parliamentary Sovereignty is perhaps the biggest threat to the operation of the rule of law in the UK, however, ultimately his view is that “the courts have no inherent powers to invalidate, strike down, supersede or disregard the provisions of an unambiguous statute duly enacted by the Queen in Parliament”.<sup>726</sup>

I discuss towards the end of this chapter why this ‘mixed’ approach - the unprincipled position one finds oneself in when endorsing a legally unlimited law-making power at the same time as committing oneself to the protection of basic human rights - is problematic. Here, I want to focus on what the various conceptualisations of the rule of law demonstrate more broadly about our approach towards public law discourse.

One of the reasons Raz supports the thin notion of the rule of law is that he thinks the term would otherwise simply be another way of referring to a particular political

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<sup>723</sup> TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and the Common Law* (Oxford University Press 2013) 88 (emphasis added).

<sup>724</sup> TRS Allan, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?’ (2002) 61(1) *Cambridge Law Journal* 87, 96.

<sup>725</sup> Lord Bingham, ‘The Rule of Law’ (2007) 66(1) *Cambridge Law Journal* 67, 75.

<sup>726</sup> Lord Bingham, ‘The Rule of Law and the Sovereignty of Parliament?’ (2008) 19(2) *King’s Law Journal* 223, 227.

theory, making the use of the phrase superfluous. As Craig puts it, “nothing would be gained by cloaking whatever conclusion you reach in the mantle of the rule of law” as this would only reflect “the conclusion which has already been arrived at through the relevant political theory”.<sup>727</sup> However, the same reasoning must be equally true for the thin notion of the rule of law, which also represents certain political ideals; it simply expresses the case for the absence of substantive conditions for legitimate law-making.

Once we see that every concept we employ to devise arguments about public power and individual rights is ultimately a manifestation of a deeper-seated philosophy about our legal system, we appreciate that to comment meaningfully on public law issues in a normative way, we must critically engage with the political theory that informs our arguments. Otherwise our commentary on the desirability and legitimacy of our constitutional arrangements is likely to underdeliver; we risk mirroring Griffith’s account in remaining an “underdeveloped exposition”.<sup>728</sup>

Indeed, we can see that legal scholarship often replicates and reinforces the judicial lack of engagement with underlying notions of political morality. In other words, academic writings tend to repeat and exasperates the mistakes of judicial practice. There are many examples in the literature of a self-embracing type of reasoning, which inevitably occurs when there is no engagement with foundational arguments. For example, Gee and Ekins have criticised the *Miller* litigation saying that the Supreme Court “does not have authority to enforce constitutional principle

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<sup>727</sup> Paul Craig, ‘Formal and substantive conceptions of the rule of law: an analytical framework’ [1997] Public Law 467, 469.

<sup>728</sup> Thomas Poole, ‘Tilting at Windmills? Truth and Illusion in ‘The Political Constitution’ (2007) 70(2) Modern Law Review 250, 262.

writ large. Its authority is confined to law”.<sup>729</sup> Arguing that the judgment “conflates constitutional propriety [...] with constitutional law, and in so doing departs from the rule of law and, finally and in consequence, misconstrues the ECA”,<sup>730</sup> they conclude that “parliamentary control is not for judges to secure. The Supreme Court is not the guardian of the constitution, somehow charged with spurring the political authorities to do their constitutional duty. The Court betrays its own responsibility when its acts in such a way”.<sup>731</sup> Yet, they do not substantiate these remarks by reference to principled observations about the nature of law or the legitimacy of law-making. This is not to say the authors’ affection for the political constitutionalism school of thought does not clearly come to light. For example, they argue that,

“misunderstanding of and lack of respect for the political constitution is at the heart of *Miller*. If judges and others fail to recognise these shortcomings we may be doomed to witness further attempts to misuse the law to gain advantage in the political process”.<sup>732</sup>

However, these remarks amount to no more than an open endorsement of the political constitution, which becomes a self-fulfilling standard against which constitutional practice is assessed and, in this case, condemned. This is not the same as providing normative reasons.

Other works of these co-authors are equally silent on the question of the legitimating conditions underlying the UK constitution. Ekin’s book on the nature

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<sup>729</sup> Richard Ekins and Graham Gee, ‘Miller, Constitutional Realism and the Politics of Brexit’ in Mark Elliott, Jack Williams and Alison L Young, *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) 266.

<sup>730</sup> *ibid* 267.

<sup>731</sup> *ibid*.

<sup>732</sup> *ibid* 275.

of legislative intent only deals with it tangentially,<sup>733</sup> and his article 'Restoring Parliamentary Democracy' merely claims, without further substantiating it, that "any good constitution is a framework for reasoned self-government, making it possible for citizens jointly to reason and act to secure their common good".<sup>734</sup> Some of his other works introduce philosophical concepts designed to underpin the desirability of the political constitution.<sup>735</sup> However, given their angle and breadth, they only scratch the surface of political morality. They do not engage with the key arguments levelled against political constitutionalism such as Wollheim's Paradox, which exposes the loss of autonomy that occurs when submitting one's judgment to somebody else's will (for example when losing a vote in Parliament).<sup>736</sup> They also fail to engage with the concept of epistemic democracy, which raises powerful arguments concerning the needed knowledge of the decision-maker and the quality of government.<sup>737</sup>

Ekin's co-author, Graham Gee, in his works discusses the normative claims made by political constitutionalists Adam Tomkins and Richard Bellamy, both of whom look to republican theory to address questions of legitimacy.<sup>738</sup> However, as Gee and Webber state, while their contributions are a welcome shift from Griffith's

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<sup>733</sup> Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press 2012)

<sup>734</sup> Richard Ekins, 'Restoring Parliamentary Democracy' (2018) 39 *Cardozo Law Review* 101, 101.

<sup>735</sup> See for example Richard Ekins, 'How to Be a Free People' (2013) 58(2) *The American Journal of Jurisprudence* 163.

<sup>736</sup> See Eerik *Lagerspetz*, 'Democracy' in Ruth Chadwick (ed), *Encyclopedia of Applied Ethics* (2<sup>nd</sup> edn, Elsevier 2012).

<sup>737</sup> Bo Rothstein, 'Epistemic democracy and the quality of government' (2019) 20(1) *European Politics and Society* 16.

<sup>738</sup> Graham Gee and Gregoire CN Webber, 'What is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273. See also Graham Gee and Gregoire CN Webber, 'A Conservative Disposition and Constitutional Change' (2019) 39(3) *Oxford Journal of Legal Studies* 526, in which the authors seek to "make sense of" the UK constitution.

account due to their development of more normative arguments (branded the “normative turn”),<sup>739</sup> “the normativity of a political constitution is [ultimately] indistinct and ill-defined”.<sup>740</sup>

I will return to Tomkins’ and Bellamy’s writings in the later parts of this chapter. Here, I highlight the challenge public lawyers face when they seek to normatively assess the workings of the UK constitution and constitutional adjudication. As Allan points out, “the propriety of judicial decisions in particular cases depends on the basis and legitimacy of judicial review as a whole”.<sup>741</sup> Indeed, we cannot make a meaningful normative argument without critically engaging with, for example, what we claim is the basis for democratic decision-making, or judicial review and so on.

UK public law scholarship has neglected some foundational questions. This may be especially pertinent in writings about the political constitution, which historically decided to do without elaborate normative reasoning, relying on the presumption that Parliamentary Sovereignty was simply a fact that did not have to be second-guessed. However, similarly to the political constitutionalists’ analyses above, many less Parliamentary-centric accounts also fall one step short of actually providing a persuasive basis for their claims. For example, Masterman and Murkens base the foundation of the Supreme Court’s constitutional authority on a “re-conceived concept of the rule of law which [...] must exist in a modern and

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<sup>739</sup> Graham Gee and Gregoire CN Webber, ‘What is a Political Constitution?’ (2010) 30(2) *Oxford Journal of Legal Studies* 273, 281.

<sup>740</sup> *ibid* 281.

<sup>741</sup> TRS Allan, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?’ (2002) 61(1) *Cambridge Law Journal* 87, 87.

democratic society based on the separation of powers”.<sup>742</sup> Theirs is the substantive notion of the rule of law, as is clear from the statement that the latter is designed to uphold individual rights and “enhance two judicial traits that are virtues in a democracy: courage and integrity”.<sup>743</sup> Without providing any further insights as to the normative basis for their claims, they merely conclude that the rule of law is the constitution’s “ultimate controlling factor”,<sup>744</sup> and that it “may well be necessary for democracy itself”.<sup>745</sup> We are not told whether it *is* indeed necessary for democracy itself and if so, why. There is no normative exploration of the foundation of public power. This renders their arguments weak because one could simply counter that majority opinion is the constitution’s ultimate controlling factor, a claim, which would have the same depth (it would essentially only be an opinion). If constitutional debate is conducted on this level, we are simply talking past each other and going round in circles.

The skirting of the justification for public power is further evident in Masterman and Murkens’ treatment of the rule of law. They merely recognise that there are divergent interpretations of what the rule of law means, but then casually brush this aside, saying that “there is general agreement that it is an ideal for both

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<sup>742</sup> Roger Masterman and Jo Eric Khushal Murkens, ‘Skirting supremacy and subordination: the constitutional authority of the United Kingdom Supreme Court’ [2013] Public Law 800, 812.

<sup>743</sup> *ibid* 813-814.

<sup>744</sup> *ibid* 814, citing Lord Hope in *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [107].

<sup>745</sup> Roger Masterman and Jo Eric Khushal Murkens, ‘Skirting supremacy and subordination: the constitutional authority of the United Kingdom Supreme Court’ [2013] Public Law 800,814, citing Friedrich von Hayek, *The Constitution of Liberty: The Definite Edition* (Ronald Hamowy ed, Routledge 2013) 60.



Parliament and the courts”.<sup>746</sup> As we saw above, the rule of law is predominantly a vessel through which ideas about political morality are expressed. Accordingly, this statement amounts to nothing more than to say that there is general agreement that there are constitutional principles. It does not add any insights in terms of their legal or political status, scope or constitutional rigour. Equally, saying that the courts’ review function is enabled and demanded by the rule of law amounts, at face value, to nothing more than to say that the courts’ reviewing function is enabled and demanded by some undefined argument of political theory.

What I hope crystallises from these examples is that the ultimate persuasiveness of either school of thought - political and legal constitutionalism - lies in the engagement with the values and the logic informing our perceptions of the conditions of a democratic state. Without a link between our conclusions and the reasons that inform our conclusions, our assessment of the desirability and legitimacy of UK public law could be insightful, but it would ultimately remain unsubstantiated and shallow. One negative side effect of the low levels of engagement with the justificatory basis of public power, i.e. our inhibition to engage with the philosophical substance behind our claims, is that we tend to resort to constitutional practice as a substitute.

Arguably, this is why we often see a tendency to conflate constitutional practice with constitutional theory in mainstream scholarship. For example, according to Allan,

“although the British constitution apparently confers the widest amplitude of legislative power, it is none the less a cardinal feature of the rule of law that the

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<sup>746</sup> Roger Masterman and Jo Eric Khushal Murkens, ‘Skirting supremacy and subordination: the constitutional authority of the United Kingdom Supreme Court’ [2013] Public Law 800, 813.

meaning of an enactment - and therefore its concrete effect in any particular case - is always a matter of judicial interpretation".<sup>747</sup>

His use of the words 'British constitution' has both descriptive and normative connotations, and it is equally unclear whether his claim that "judicial interpretation is a cardinal feature of the rule of law" is an observation or a suggestion. Similarly, Laws states, "the superior courts in England are not constituted on any such basis [jurisdiction]. They have, in the last analysis, the power they say they have".<sup>748</sup> As Elliot points out, "the essence of this argument is that the constitution prescribes no limits to judicial power, and that the only true limits on the powers of the other branches of government are those which the courts choose to recognise".<sup>749</sup>

## **2. Rejecting the Normative Force of Parliamentary Sovereignty**

The above examples show that UK public law debate would benefit from a reevaluation of the basics. Too often, we accept conceptual starting points as inevitably true or logically sound without examining their underlying philosophical complexities and real-life manifestations. In particular, in relation to the concept of Parliamentary Sovereignty, the question of legitimacy has largely been "brushed off as a non-issue".<sup>750</sup> As Murkens notes, "the debates based on the model of the political constitution still revolve around a static and immutable understanding of

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<sup>747</sup> TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2003) 201-202.

<sup>748</sup> Sir John Laws, 'Illegality: The Problem of Jurisdiction' in Michael Supperstone and James Goudie (eds), *Judicial Review* (1991) 69-70.

<sup>749</sup> Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative law' (1999) 58(1) *Cambridge Law Journal* 129, 132.

<sup>750</sup> Jo Eric Khushal Murkens, 'Democracy as the legitimating condition in the UK Constitution' (2018) 38(1) *Legal Studies* 42, 49.

parliamentary sovereignty and a subordinate role for the courts”.<sup>751</sup> Electoral accountability justifies any substantive outcome.<sup>752</sup> Political constitutionalism prioritises “the source of the decision and presume[s] the legitimacy of majoritarian decision making”.<sup>753</sup> What speaks for the political constitution is its simplicity and internal (albeit superficial) logic. However, these attributes do not render it normatively persuasive. Indeed, political constitutionalism, with Parliamentary Sovereignty at its helm, cannot be defended normatively, predominantly as its institutional legitimacy basis is flawed.

### **Debunking Conceptual Arguments**

There have been rightly in my view attempts to discredit the main conceptual arguments that have traditionally been invoked to justify and defend Parliamentary Sovereignty. Chiefly among these is Lakin’s work. To summarise, Lakin’s first argument to “debunk” Parliamentary Sovereignty relates to what he calls the “structural claim”, i.e. the argument that there must be in every state an ultimate sovereign. He argues that the Austinian view according to which “wherever there is law, there must be a sovereign whom others habitually obey but who is not in the habit of obeying any other”, provides the foundation for the Diceyan view that Parliament has the right to “make or unmake any law” and that law thus

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<sup>751</sup> Jo Eric Khushal Murkens, ‘Democracy as the legitimating condition in the UK Constitution’ (2018) 38(1) *Legal Studies* 42, 47, referencing Anthony Bradley, ‘The sovereignty of parliament - form or substance?’ in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7<sup>th</sup> edn, Oxford University Press 2011) 67–68.

<sup>752</sup> See for example Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

<sup>753</sup> Jo Eric Khushal Murkens, ‘Democracy as the legitimating condition in the UK Constitution’ (2018) 38(1) *Legal Studies* 42, 49.

promulgated cannot be overridden or set aside by any other body.<sup>754</sup> The essence of both statements, the view that the sovereign can make or unmake any law, is so deeply entrenched in UK constitutional thought, that Parliament may, under the political constitution, “suspend or abrogate even so-called ‘constitutional’ or ‘fundamental’ rights by sufficiently clear and unequivocal language”.<sup>755</sup>

Lakin does not spend much time on the structural claim, noting merely that it is a view that is heavily outdated, having suffered a “devastating assault” by Hart.<sup>756</sup> Indeed, others have contributed to the identification of so many fundamental weaknesses in the Austinian theory that it is considered abandoned today.<sup>757</sup> His focus is on the second - and main - basis on which Parliamentary Sovereignty is typically defended: the empirical claim. Parliamentary Sovereignty, so the argument goes, is a fact - “suggested by the position of the English Parliament”<sup>758</sup> - to which we are simply accustomed. Certain institutions “happen to exercise power”.<sup>759</sup> In other words, it is an accidental reality rather than a normative

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<sup>754</sup> Stuart Lakin, ‘Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution’ (2008) 28(4) Oxford Journal of Legal Studies 709, 712-713 referring to John Austin, *The Province of Jurisprudence Determined* (Wilfred E Rumble ed, Cambridge University Press 1832). This is so despite the fact that Dicey himself did not consider his account to be based on abstract jurisprudence.

<sup>755</sup> Stuart Lakin, ‘Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution’ (2008) 28(4) Oxford Journal of Legal Studies 709, 713.

<sup>756</sup> *ibid* 713.

<sup>757</sup> See for example Hans Kelsen, ‘The Pure Theory of Law and Analytical Jurisprudence’ (1941) 55 Harvard Law Review 44, specifically 54-66.

<sup>758</sup> Stuart Lakin, ‘Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution’ (2008) 28(4) Oxford Journal of Legal Studies 709, 719.

<sup>759</sup> This is the empirical claim made by JAG Griffith in ‘The Political Constitution’ (1979) 42 Modern Law Review 1, 16.

argument. By looking at the UK legal system, this argument suggests, we can observe that officials accept that Parliament is sovereign.<sup>760</sup>

On the basis of the House of Lords judgment in *Jackson*,<sup>761</sup> which I discussed in Chapter 4, Lakin argues that the obiter dicta there show that the Law Lords did not conduct a survey-type investigation into what most officials would accept regarding the basis of legal validity and political power. Instead, legality was determined through the employment of normative reasoning. The differences in opinion between the Law Lords cannot be characterised realistically as “a morally neutral, empirical disagreement about what most other judges and officials think”.<sup>762</sup> He concludes that the fact that judges disagree to such a high extent rejects the notion of the rule of recognition. As I showed in Chapter 4, the same stark difference in opinion materialised in *Privacy International*.

However, Lakin concludes, even if judges *did* agree on these fundamental questions, as they do in other cases, the rule of recognition, i.e. the empirical claim, cannot be reconciled with “the principled character of judicial reasoning on

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<sup>760</sup> For more detailed accounts on the Hartian rule of recognition see Julie Dickson, ‘Is the Rule of Recognition Really a Conventional Rule?’ (2007) 27(3) *Oxford Journal of Legal Studies* 373 and Douglas E Edlin, ‘The Rule of Recognition and the Rule of Law: Departmentalism and Constitutional Development in the United States and the United Kingdom’ (2016) 64(2) *American Journal of Comparative Law* 371, 371-374.

<sup>761</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

<sup>762</sup> Stuart Lakin, ‘Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution’ (2008) 28(4) *Oxford Journal of Legal Studies* 709, 723. The same logic applies to the disagreement between Lord Hope and Lord Steyn on the one hand and staunch supporters of the Diceyan concept of Parliamentary Sovereignty on the other.

questions relating to Parliamentary and judicial power”.<sup>763</sup> Normative reasoning determines judicial outcomes, not surveys into what most officials think. Thus, while the rule of recognition may identify “a statute as a source of law” its interpretation is “a separate matter of normative legal theory”.<sup>764</sup> Any case that entails a reconciliation between constitutional principles shows that while there may be a consensus as to which principles apply, there is none on the limits of judicial responsibility and “interpretative creativity”.<sup>765</sup> *Privacy International*, in which Lord Carnwath’s majority opinion was on the opposite end of the spectrum compared to Lord Sumption’s minority opinion, is a formidable example of this phenomenon.

### **Challenging Normative Arguments**

Lakin’s engagements with these conceptual arguments is a valuable starting point to explore the force of Parliamentary Sovereignty. In this thesis, however, I want to go further. I develop a third argument, namely that Parliamentary Sovereignty cannot be defended normatively by reference to the ‘democratic virtues’ commonly invoked in justification of this doctrine.

As I have pointed out above, institutional legitimacy is often proposed as a normative basis for Parliamentary Sovereignty, but there is typically no systematic engagement with this argument. In what follows, I argue that the values generally proposed to legitimise and indeed necessitate Parliamentary Sovereignty do not stand up to scrutiny. In particular, I challenge theoretical arguments by reference

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<sup>763</sup> Stuart Lakin, ‘Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution’ (2008) 28(4) *Oxford Journal of Legal Studies* 709, 727.

<sup>764</sup> TRS Allan, *Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority* (2004) 63(3) *Cambridge Law Journal* 685, 686.

<sup>765</sup> *ibid* 711.

to data that exposes that some of this theory's key arguments are undermined by the realities of the electoral system and the ability of the public to engage meaningfully in the political process. This being the case, we cannot make a convincing argument for Parliamentary Sovereignty. Consequently, short of a complete reevaluation, we have to abandon it.

First, political constitutionalists argue that unlimited law-making powers safeguard autonomy and self-governance.<sup>766</sup> However, to be truly self-governing individuals, Parliament would need to legislate exclusively through unanimous decisions. Yet, this is not the case for ordinary law-making in most liberal democracies, including the UK. Simple majorities pass legislation. This leaves us with the paradox that individuals are supposedly 'self-governing' whilst at the same time submitting themselves to majority will. This diminishes the theory's claim to sustain autonomy and self-governance.

One cannot circumvent this paradox by reasoning that the process of legislating is 'law by the people for the people', i.e. that legislative output is simply the aggregation of the citizens' preferences. First, in the UK context in particular, there is an initial barrier to equating law with the will of the people: the first-past-the-post electoral system. Besides forcing voters into difficult tactical voting dilemmas, first-past-the-post produces significant inequities and distortions. This is apparent from the 2015 General Election in which the UK Independence Party (UKIP) won one seat despite securing almost four million votes, whereas the Scottish National Party (SNP) won 56 seats despite fewer than one and a half million votes cast in their favour. Further, "331 of 650 MPs were elected on under 50% of the vote, and 191 with less than 30% of the electorate",<sup>767</sup> and "votes for the two largest parties

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<sup>766</sup> See for example Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) ch 4.

<sup>767</sup> Electoral Reform Society, 'A system in crisis' (1 June 2015) <https://www.electoral-reform.org.uk/a-system-in-crisis/> accessed 20 August 2019.

came to just 67.3% combined. 36.9% of the electorate voted for the Conservatives, the party subsequently forming the government, and 30.4% voted for Labour”.<sup>768</sup> These disproportionalities are not exceptional but rather “a long-standing feature of the British electoral system”.<sup>769</sup>

Once we grasp the significance of these figures, we appreciate that it is difficult to argue persuasively that legislative output represents the will of the people. Indeed, for this claim to succeed, another electoral system would have to be adopted, such as proportional representation, which is inherently fairer,

“because it is intended to give each party a share of seats more or less equal to its vote share. It also allows for a greater diversity of opinions and interests to be expressed in the legislature and government, as more parties are represented in both”.<sup>770</sup>

However, even this would not remedy low voter participation, which further diminishes the claim that laws adopted by Parliament represent the will of the people. In the 2017 General Election, voter turnout was at 68,8% (up from 66,2% in 2015).<sup>771</sup> This means that even if votes translated directly into law and policy outcomes (and we ignored the above distortion of electoral preferences produced

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<sup>768</sup> Jess Garland and Chris Terry, ‘The 2015 General Election: A voting system in crisis’ (26 July 2015) <https://www.electoral-reform.org.uk/wp-content/uploads/2017/06/2015-UK-General-Election.pdf> 8 accessed 20 August 2019.

<sup>769</sup> Alan Renwick, ‘The Chances of Electoral Reform Revisited’ (*Politics at Reading Blog*, 8 May 2015) <http://blogs.reading.ac.uk/readingpolitics/2015/05/08/the-chances-of-electoral-reform-revisited/> accessed 20 August 2019.

<sup>770</sup> André Blais, *To Keep or To Change First Past The Post?: The Politics of Electoral Reform* (Oxford University Press 2008) 2.

<sup>771</sup> The Electoral Commission, ‘Turnout - UK Parliament general elections: 1922 – 2017’ <https://www.electoralcommission.org.uk/media/1167> accessed 20 August 2019.



by the first-past-the-post) system, the law and policy would only ever represent a maximum of about a  $\frac{3}{4}$  share of the population's preferences.

Finally, we must question to what extent these already compromised 'preferences' can be said to equal meaningful will formation. As Kaye shows, political ignorance in the UK is at a worryingly high level.<sup>772</sup> He cites a recent survey by King's College London and the Royal Statistical Society, which found that 29% of the population believe that the UK spends more on jobseekers allowance than it does on pensions (we spend 15 times more on pensions), 26% of the population believe that foreign aid is among the three highest public bills (it actually makes up 1.1% of the UK's expenditure), and that, on average, the population believes that immigrants make up 31% of the UK population (the official figure is 13%).<sup>773</sup>

These findings pose further challenges for political constitutionalism, chiefly as far as equality and autonomy are concerned. The lack of ability to participate intelligently in politics means that "one cannot use one's votes to advance one's aims nor can one be said to participate in a process of reasoned deliberation among equals".<sup>774</sup> The implications of this go beyond 'bad' voting choices: "ignorant voters may also be more easily misled or manipulated by rhetorically impressive but factually unsound claims" or conspiracy theories, "or fall into

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<sup>772</sup> Simon Kaye, 'On the complex relationship between political ignorance and democracy' (*LSE British Policy and Politics Blog*, 16 March 2015) <https://blogs.lse.ac.uk/politicsandpolicy/what-are-the-implications-of-political-ignorance-for-democracy/> accessed 20 August 2019.

<sup>773</sup> King's College London, Ipsos MORI and Royal Statistical Society, 'Perils of Perception Topline Results Fieldwork: 14<sup>th</sup>-18th June 2013' <https://www.ipsos.com/sites/default/files/migrations/en-uk/files/Assets/Docs/Polls/ipsos-mori-rss-kings-perils-of-perception-topline.pdf> accessed 20 August 2019.

<sup>774</sup> Tom Christiano, 'Democracy' (2018) *The Stanford Encyclopedia of Philosophy*, section 3 <https://plato.stanford.edu/entries/democracy/> accessed 20 August 2019.

patterns where they accept overly dichotomous or extremely simplified versions of reality”.<sup>775</sup> Why, one can therefore ask, “should fundamental decisions - say, over the best political party for the management of immigration - be entrusted to a public that is generally mistaken about the fundamental facts of immigration and demography in the UK?”<sup>776</sup>

### 3. Determining the Conditions Constitutive of a Liberal Democracy

The political constitution further claims that it aims to “foster political opportunities for individuals on formally equal terms through the processes of representation and effective participation with the purpose of promoting sound governmental decisions”.<sup>777</sup> Goldsworthy goes as far as saying that “one of the most fundamental of all rights is that of ordinary people to participate, on equal terms, in the political decision-making that affects their lives as much as anyone else’s”.<sup>778</sup> However, we have seen above that this is not achievable under the current electoral system, and other factors such as the “concentrated media, access by wealthy elites, [...] majoritarian bias and misinformation”<sup>779</sup> further distort the ideal of formal equality under the political constitution.

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<sup>775</sup> Simon Kaye, ‘On the complex relationship between political ignorance and democracy’ (*LSE British Policy and Politics Blog*, 16 March 2015) <https://blogs.lse.ac.uk/politicsandpolicy/what-are-the-implications-of-political-ignorance-for-democracy/> accessed 20 August 2019.

<sup>776</sup> *ibid.*

<sup>777</sup> Jo Eric Khushal Murkens, ‘Democracy as the legitimating condition in the UK Constitution’ (2018) 38(1) *Legal Studies* 42, 48.

<sup>778</sup> Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press 2001) 263.

<sup>779</sup> Jeff King ‘Three Wrong Turns in Lord Sumption’s Conception of Law and Democracy’ in Richard Ekins, Paul Yowell and NW Barber (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 143, 148.

One of the problems with political constitutionalism is that it, “simultaneously under-theorises democracy, by reducing it to an electoral condition or majoritarian procedure, and overextends it by treating popular and parliamentary sovereignty as legally limitless”.<sup>780</sup> Consequently, both formal and substantive equality are threatened. If “Parliament may do many things which undermine the democratic element of our constitution’ including conferring power on a dictator”,<sup>781</sup> it can also abolish formal voting equality (which the political constitution initially thought did not include women). That this is a possibility seems illogical. If Parliament’s status and powers are justified by reference to the democratic principle and democracy is understood as giving an equal opportunity to all members of society, it has to follow that Parliament may not act in a way that seriously undermines equality. Otherwise, it undercuts the premise it is based on.

This also means that equality cannot be understood as simply ‘formal’ or ‘procedural’ - the state must create such conditions for individuals that allow them to pursue substantive equality as well. Formal equality is meaningless if substantive law systematically discriminates against one gender to the effect that said gender would never be in a financial or social position to run for office (thereby preventing others from electing somebody whom they regard able and suitable to voice their views, which undermines autonomy and self-governance). Thus, formal voting equality is merely one aspect of equality; substantive law that does not undermine equality is another.

Having established that even the limited notion of democracy advocated by the political constitution is dependent on equality shows that there are conditions that are indispensable in our political-legal order. There are values that are logically

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<sup>780</sup> Jo Eric Khushal Murkens, ‘Democracy as the legitimating condition in the UK Constitution’ (2018) 38(1) *Legal Studies* 42, 53.

<sup>781</sup> Lord Sumption, ‘Judicial and Political Decision-making: The Uncertain Boundary’ (2011) 16(4) *Judicial Review* 301, 314.

presupposed to public authority and, accordingly, that “must lie beyond majoritarian politics”.<sup>782</sup> Equality - formal and substantive - is one of these conditions because it enables democracy. We can therefore imagine democracy as a conceptual foundation which rests on various constitutive rights, with equality as one of its many integral constituents. In the UK, the conceptual starting point would be the idea of a liberal democracy.<sup>783</sup> In the context of UK public law theory, this has the added advantage that both political and legal constitutionalists would agree with this description of the system we inhabit or aspire to.<sup>784</sup>

This approach is an alternative to the customary institution-centric approach, which I argue puts the cart before the horse. Rather than thinking about our legal system and constitutional law from that angle, the starting point should be a focus on the core ingredients and enabling conditions of a liberal democracy. Concisely, the argument I am presenting is that a liberal democracy, properly understood, is a concept that is dependent on certain non-negotiable features. Only once we have determined the underlying core values of our political system can we turn our attention to questions about institutional power.

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<sup>782</sup> Jo Eric Khushal Murkens, ‘Democracy as the legitimating condition in the UK Constitution’ (2018) 38(1) *Legal Studies* 42, 57.

<sup>783</sup> Compare Jo Eric Khushal Murkens who refers to democracy as the ‘legitimating condition’ in ‘Democracy as the legitimating condition in the UK Constitution’ (2018) 38(1) *Legal Studies* 42.

<sup>784</sup> Compare TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press 2013) 168,268 and Sir Philip Sales, ‘Partnership and challenge: the courts’ role in managing the integration of right and democracy’ [2018] *Public Law* 456, 456.

## A Constitutional Rights Template

What then, we may continue to ask, are the constitutive conditions of our liberal democratic order? Paine's distinction between natural rights, which "appertain to man in right of his existence", and civil rights, which "appertain to man in right of his being a member of society",<sup>785</sup> provides a helpful starting point and organisational tool for thinking about the rights that ought to be protected in a liberal democracy.<sup>786</sup>

The first point to note is that civil rights under this definition are much easier to define and defend than human rights. This is the case because civil rights are, as Gearty puts it, "essential to the maintenance and fostering of the representative system of government".<sup>787</sup> They are "defined by reference to an underlying political philosophy rooted in representative democracy", and this single "intellectual swoop" means they can,

"rise above the endless debates provoked by rights talk, about when this kind of reckless speech should be allowed and when not, about why this assembly should be restricted and this other not: human rights law has no coherent way of answering these questions without drawing on some

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<sup>785</sup> Thomas Paine, *The Rights of Man* (1971).

<sup>786</sup> For other approaches, see Carl Wellman, *The Moral Dimensions of Human Rights* (Oxford University Press 2010).

<sup>787</sup> Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press 2005) 33. He uses the expression 'civil liberties', however the same logic applies to civil rights as the distinction between the two concepts is mainly about their respective force and legal protection, not about their philosophical source.

deeper set of principles. Civil liberties law, in contrast, has the benchmark of democratic necessity readily to hand”.<sup>788</sup>

Accordingly, the notion of a liberal democracy provides us with a way of developing ideas about which civil rights we ought to protect by law: those rights that ensure one's entitlement to participate fully in the civil and political life of the state. However, contrary to Rousseau's theory, which supposed that natural rights are distinguished once individuals have transitioned into a collective political order, in a liberal democracy we must find both components; civil rights and other human rights co-exist. Another way of putting the case is to say that there are constitutive values that go beyond civil rights. There are interests and rights that are separate from the requirements of democracy's institutional dimension. They are not constitutive of government in the strict sense but nonetheless constitutive by virtue of the first component of a liberal democracy, liberty. In sum, a political-legal order is “democratic insofar as it involves government by popular, competitive election thereby providing legitimation to the polity” and “liberal in that it limits governmental authority and protects individual rights, constructing dikes, as it were, against the supposedly sovereign people”.<sup>789</sup>

I argue that what legal scholarship conceptualises as ‘rights’ can be derived from the requirements of democracy, liberalism or both. For instance, while the right to vote for a legislative assembly is linked to the workings of the political order, the right to freedom of religion is less so. The former is “constitutive of the office of government”<sup>790</sup> and therefore of democracy in the strict sense, while the latter has both ‘public’ and ‘private’ aspects. The ability to practise one's faith predominantly

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<sup>788</sup> Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press 2005) 35.

<sup>789</sup> John Peeler, *Building Democracy in Latin America* (3<sup>rd</sup> edn, Lynne Rienner Publishers 2009).

<sup>790</sup> Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 346.

concerns the life a person chooses to live in their private sphere, however it still has a public life dimension and can therefore be captured by 'democracy' in the loose sense. For instance, if a person is not allowed to practise or openly adhere to their religion, such as through the wearing of religious symbols in public, they will by extension be excluded - or at least seriously discouraged - from running for political office. This would undermine the democratic order, which is fundamentally based on the assumption that the members of its society have an equal stake in - and opportunity to shape - the rules and regulations of the state. As I explained above in the gender discrimination example, it would also prevent others of the same group to express their policy preferences through democratic deliberation. Other rights may only have a liberty component, meaning they protect one's freedom to live life in a way one deems worth pursuing, subject to this way of life not infringing on the liberty of others. The right to die and the right to have sexual relations in private as one pleases, for example, would fall under this component.<sup>791</sup>

Collectively, I will refer to these rights - human and civil - as constitutional rights: rights that the constitutional law of a liberal democracy needs to guarantee. Constitutional rights are not dependent on majority will. Rather, they "establish the boundaries of the office of government".<sup>792</sup> What this conceptualisation suggests is that, due to the limits on what government can do, law is not solely an outcome of the exercise of will - it is at least partially, i.e. as far as liberal democracy-constitutive rights are concerned, "an elaboration of reason".<sup>793</sup> Perceived this way, contrary to what the political constitution suggests, "constitutionalism and

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<sup>791</sup> Famously considered to be illegal in *R v Brown* [1993] UKHL 19, [1994] 1 AC 212.

<sup>792</sup> Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 368.

<sup>793</sup> *ibid* 369.

democracy are not antithetical principles, but rather mutually presuppose each other”.<sup>794</sup> They provide “a package view of legitimacy”.<sup>795</sup>

This template, i.e. the thought process of thinking about what a liberal democracy requires to function before proceeding to determining the limits of legislative authority, enables the elaboration of a succinct basic rights philosophy which largely avoids the difficulties that arise under broader approaches. Thus, as opposed to, for example, human rights conceptualisations that are based on the concept of human dignity,<sup>796</sup> the focus on liberty and democracy is not “so lacking in substantial and determinate content as to be unhelpful as a guide to judicial decision-making”.<sup>797</sup>

There is promise in the gradual development of a framework that protects those values that are indispensable for the polity we say we belong to, and which we cherish. This is a question of morality as much as it is one of integrity. We must close the gap “between constitutional image and reality”.<sup>798</sup> It is relatively meaningless to refer to the UK as a liberal democracy if the conditions enabling the very notion of a liberal democracy are in a perpetual state of danger.

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<sup>794</sup> Christopher F Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press 2007) 1.

<sup>795</sup> Christopher F Zurn, ‘The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy’ (2010) 16(3) *Legal Theory* 191, 191.

<sup>796</sup> For a recent theory built on this concept, see Pablo Gilabert, *Human Dignity and Human Rights* (Oxford University Press 2018).

<sup>797</sup> David Feldman, ‘Human Dignity as a Legal Value’ [1999] *Public Law* 682, 698.

<sup>798</sup> Colm O’Cinneide, ‘Human rights and the UK constitution’ in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide, *The Changing Constitution* (8<sup>th</sup> edn, Oxford University Press 2015) 71.



## System Rather Than Chance

The political constitution is based on the overly optimistic premise that the worst will not happen because we have reached some level of enlightenment (a premise the current socio-political environment arguably undermines). However, a legitimate liberal democratic order should not leave the protection of constitutional rights to chance. It must ensure that the worst *cannot* happen in the first place, even if the majority tried. The proposed constitutional order views the worst case scenario as one end on a spectrum of unlawful infringements of constitutional rights. It recognises that a liberal democracy is not merely endangered if a state has complete disregard for human life, as in the often referenced killing all blue-eyed baby example.<sup>799</sup> Democratic decision-making is also unlawful when it leads to homosexuals being banned from serving in public institution<sup>800</sup> and when citizens with income below a certain threshold are prevented from living together with their third country national spouses.<sup>801</sup> State authority is only lawful if it does not violate democracy and liberty. After all, this is what people have come to accept and expect.

Under a scheme without these safeguards, minority rights or rights affecting marginalised or disadvantaged members of society are likely to be violated. King has shown that in the overwhelming majority of cases in which a violation of the European Convention of Human Rights was found, the claimants belonged to marginalised groups of society due to their sexual orientation, mental capacity,

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<sup>799</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> edn, Macmillan 1959) 79. See also Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2008) 2–15, 32–33.

<sup>800</sup> *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA), which was held to have violated the ECHR in *Smith v United Kingdom* (1999) 29 EHRR 493.

<sup>801</sup> *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10, [2017] 1 WLR 771.

ethnicity and nationality or criminal behaviour.<sup>802</sup> This shows that there is a real danger that the majority might erode minority rights, which would jeopardise equality. However, this is not simply an issue of minority protection. The legislative majority can adopt measures that affect the wider polity in an undemocratic way. Real-life examples of this kind include legislation passed to enable mass surveillance<sup>803</sup> and restrictions on the freedom of expression.<sup>804</sup>

The political constitution does not provide any safeguards against such constitutional rights infringements. The inherent violability of constitutional rights under the political constitution undermines the political constitution itself. Meanwhile, this Chapter showed that some of the basic assumptions the theory is based on, e.g. that legislatures represent the will of the people thereby promoting self-governance, is largely theoretical, and in part simply misconceived. Accordingly, the principle of Parliamentary Sovereignty should be abandoned.<sup>805</sup>

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<sup>802</sup> Jeff King, 'Three Wrong Turns in Lord Sumption's Conception of Law and Democracy' in Richard Ekins, Paul Yowell and NW Barber (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 143, 149.

<sup>803</sup> Note the controversy surrounding the Investigatory Powers Act 2016, which Liberty has called 'the most intrusive surveillance law ever introduced in a democratic country' <https://www.libertyhumanrights.org.uk/our-campaigns/reject-mass-surveillance> accessed 20 August 2019.

<sup>804</sup> See for example the Terrorism Act 2006 whose language is so wide that offences include unintentional encouragement through speech.

<sup>805</sup> For opposing but unpersuasive arguments see Martin Loughlin, 'Why Sovereignty' in Richard Rawlings, Peter Leyland and Alison L Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 36. See also Nick W Barber, 'The afterlife of Parliamentary Sovereignty' (2011) 9(1) *International Journal of Constitutional Law* 144, who argues that Parliamentary Sovereignty has, as a matter of constitutional practice, been abandoned already.

#### 4. From Substance to Institutional Design

Having determined the lines that the legislature cannot cross, we can now determine institutional questions. What powers do we vest in those institutions that produce legally binding output, and what mechanisms are the most conducive to facilitating the protection of the liberal democratic constitutive values identified?

We have started to do so by stipulating that there are certain things Parliament cannot do, namely to legislate in a way that infringes constitutional rights that reflect liberal democracy-constitutive values. What does the above scheme tell us about the respective functions and powers of Parliament and the courts beyond that? How can we protect and safeguard constitutional rights in a meaningful way? The way UK public lawyers often perceive of the judicial role is ultimately, given Parliament's unchallenged constitutional status, one of a subordinate player. This needs to change, as it suggests that there is a sense of rivalry between the two. As Murkens points out, "the courts and Parliament are not rival institutions but, in their own ways, both engaged with what Rawls calls 'the idea of public reason', namely the idea of a stable constitutional democratic society".<sup>806</sup> Under the scheme outlined above this means that "the role of the court is not limited to checking the process of legislating, but should also ensure substantive compliance with democratic values".<sup>807</sup>

This account does not shift sovereignty from one institution (Parliament) to another (the Judiciary). I agree with Kavanagh that pitting the two against each other

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<sup>806</sup> Joe Eric Khushal Murkens, 'Judicious Review: The Constitutional Practice of the UK Supreme Court' (2018) 77(2) Cambridge Law Journal 349, 352.

<sup>807</sup> Joe Eric K Murkens, 'Judicious Review: The Constitutional Practice of the UK Supreme Court' (2018) 77(2) Cambridge Law Journal 349, 352 citing John Rawls, *Political Liberalism* (Columbia University Press 1993) and DAJ Richards, *Toleration and the Constitution* (Oxford University Press 1986).

“creates an unduly polarised, dichotomised and reductivist picture of constitutional governance, which threatens to distort our understanding” of the UK constitution.<sup>808</sup> Thus, there is no ‘sovereignty trade-off’ or zero-sum game. My account merely suggests that the different branches of state have different constitutional functions and responsibilities, and that one of the functions and responsibilities of the Judiciary is to guarantee the protection of constitutive values. This is based on the understanding that “it is possible to accept that the legislature and the executive have the primary law-making role in the British constitution, whilst simultaneously accepting a robust role for judges upholding rights”<sup>809</sup> as well as protecting other constitutional fundamentals. In other words, the “bipolar contest”<sup>810</sup> can be resolved by making a rather modest claim: Parliament is not omnipotent when it comes to liberal democracy-constitutive rights.

Thus, there is no transfer of sovereign power; the proposed model does not undermine “the right of all of us to participate as equals in the policy-making institutions of government”.<sup>811</sup> It merely conditions it in limited circumstances because without this restriction our participation as equals and other liberal democracy-constitutive values cannot be secured in the first place. To adopt a principled approach we must accept that this means that the courts’ ‘robust role’ entails the power to review primary legislation should constitutional rights be at stake. This does not undermine the role of Parliament - it enhances it.

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<sup>808</sup> Aileen Kavanagh, ‘Recasting the Political Constitution’ (2019) 30(1) *King’s Law Journal* 43, 57.

<sup>809</sup> *ibid* 57.

<sup>810</sup> Aileen McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’ (2008) 71(6) *Modern Law Review* 853, 853.

<sup>811</sup> Keith D Ewing, Conor Gearty and BA Hepple (eds), *Human Rights and Labour Law: Essays for Paul O’Higgins* (Mansell 1994) 149. To the extent that this is not undermined in the first place by the reasons given in the section above.

## A Checking Function

There is no need for those sympathetic to a fundamental constitutional status of Parliament to despair. Within the aforementioned legal constraints prescribed, there are many different valid arrangements between which Parliament and the government can choose. This thesis, despite the weaknesses outlined above, retains the centrality of Parliamentary output, however it imposes minimum safeguards in the form of basic rights. The procedural conditions of periodic and competitive elections and effective, equal and universal participation may be necessary, but they are not “*sufficient* conditions of democracy”;<sup>812</sup> “formal voting equality is a logical starting point [...] not the end point”.<sup>813</sup> Rather, there is a natural and necessary integration of the courts’ duty to apply legislation with an overarching responsibility to protect fundamental rights.<sup>814</sup> The courts are *not* tasked with formulating new legal rules from the start, but rather they have a checking function. Theirs is the duty to check whether the output generated by the elected branches of government transgress constitutional rights. In other words,

“the democratic ideal has two strands. The first premise is that the people entrust power to the government to carry on its business in accordance with the principle of majority rule. The second premise of the democratic ideal is

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<sup>812</sup> Jo Eric Khushal Murkens, ‘Democracy as the legitimating condition in the UK Constitution’ (2018) 38(1) *Legal Studies* 42.

<sup>813</sup> Richard Ekins, Paul Yowell and NW Barber (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 143, 147.

<sup>814</sup> Compare the slightly different wording in TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common law* (Oxford University Press 2013) 132.

that the basic values of liberty and justice for all and respect for human rights and fundamental freedoms must be guaranteed”.<sup>815</sup>

Through the proposed checking function, the courts contribute to the development and maintenance of constitutional authority. They guarantee that liberal democracy-constitutive rights are protected by asking whether “the scales have been unfairly tilted against the individual”.<sup>816</sup> In doing so, they should not adhere to a minimalist ideal. As O’Cinneide has argued, domestically as well as internationally human rights protection has been framed as “mission creep”. The courts, it is argued, have gone beyond “blatant rights abuses”.<sup>817</sup> However, this argument can only succeed if we accept that the starting point should indeed be a minimalist one - a notion that is undoubtedly closely connected to the institutional focus under which any limitation on legislative freedom is automatically viewed with suspicion. If, as I suggested above, we focus on the value at stake instead, and only as a secondary concern address how a value can be protected, this takes some force out of the mission creep argument. If we put substance first, it is much less apparent why a violation should only be undercut where the consequences otherwise would be severe, which would also be difficult to define. Relatedly, as O’Cinneide further notes by reference to Williams’ work, “the operation of law often helps to refine unexamined moral beliefs and challenge embedded assumptions” and “the expansion of human rights law has often been driven in this way by the process of legal reasoning clarifying what exactly should qualify as ‘torture’, or a

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<sup>815</sup> Johan Steyn, ‘Dynamic Interpretation Amidst an Orgy of Statutes’ (Brian Dickson Memorial Lecture 2003) as recently published in Johan Steyn, *Democracy Through Law: Selected Speeches and Judgments* (Routledge 2018).

<sup>816</sup> Colm O’Cinneide, ‘Rights under Pressure’ (2017) *European Human Rights Law Review* 43, 48.

<sup>817</sup> *ibid* 45.

disproportionate interference with free speech”.<sup>818</sup> Thus, we should perceive of it as an unfolding process in which we deepen our understanding of the nuances of certain rights.

The courts offer the right forum to deepen this understanding and to enforce constitutional rights accordingly. As is clear from this chapter, the risk that voters may not be able to participate intelligently in the election process may influence the quality of the decision-making body elected. Accordingly, we should not assume that the legislator is a “rational agent”.<sup>819</sup> There is in election campaigns not much scrutiny of the candidates’ ability to engage in critical reasoning, or their ability to govern.<sup>820</sup> Further, “just as there would be a risk that individuals would make biased and self-interested decisions on matters of principle if entrusted with such decisions, so there is a risk that elected representatives would do the same”.<sup>821</sup> This risk is exasperated under the party whip system.<sup>822</sup>

Thus, we have to view with heavy suspicion Waldron’s claim that judges are not better equipped to engage in (moral) reasoning than legislators or ordinary citizens.<sup>823</sup> A judge’s educational level, training and professional experience all

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<sup>818</sup> Colm O’Cinneide, ‘Rights under Pressure’ (2007) *European Human Rights Law Review* 43, 47.

<sup>819</sup> Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press 2012) 140.

<sup>820</sup> Compare Plato’s view that most people “do not have the kinds of talents that enable them to think well about the difficult issues that politics involves” in *Republic*, Book VI, cited by Tom Christiano, ‘Democracy’ (2018) *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/democracy/> accessed 20 August 2019.

<sup>821</sup> Stuart Lakin, ‘The Moral Reading of the British Constitution’ (PhD Thesis, UCL 2009) 139.

<sup>822</sup> Although see Adam Tomkins, ‘What’s Left of the Political Constitution’ (2013) 14(12) *German Law Journal* 2275, 2277.

<sup>823</sup> Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999) 184.

contribute to the ability to think critically. This ability is further strengthened by a judge's commitment to impartiality. By contrast, political decision-making is by definition not impartial. Commenting on his role in the *Miller* litigation, Sir Philip Sales spelt out clearly one main advantage of the judicial process, namely that "the judge is not taking sides in a political dispute and is not making a political judgment".<sup>824</sup> As Masterman has said, "it is the institutional and individual independence of the judiciary that underpins the ability of judges to adjudicate, impartially, between the parties that appear before them".<sup>825</sup> These characteristics are also highly conducive to the type of reasoning judges are entitled to, and should, engage in to ensure fundamental democratic values are not transgressed.

Adjudication presents a forum in which, through the examination of thoroughly reasoned submissions, the veracity and persuasiveness of statements that have engrained themselves in our collective psyche, and that are taken for granted, are put to the test. Indeed, one of the most basic ingredients of our adversarial adjudication system is that arguments are pitted against each other, and that such arguments have to be supported by evidence. Legal reasoning is in its essence critical reasoning; constitutional rights protection is a task that requires careful, impartial, principled thinking. Given the qualities of the courts compared to the qualities of Parliament, it is by no means "ironical"<sup>826</sup> that judges should be required to make findings of what is necessary in a liberal democracy, even if this entails coming to a different view from Parliament.

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<sup>824</sup> Sir Philip Sales, 'Legalism in Constitutional law: Judging in a Democracy' [2018] Public Law 687, 691.

<sup>825</sup> Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge University Press 2010) 207.

<sup>826</sup> Conor Gearty makes this point in *Principles of Human Rights Adjudication* (Oxford University Press 2005) 10.



## 5. The Need for a Principled Position

Undoubtedly, some would consider this a step too far. However, given the conclusions I reached above, it is difficult - if not impossible - to defend a middle ground. If we conceptualise our legal-political order as being dependent on the protection of certain values, these must be guaranteed. Domestic public law debate has brought out some unprincipled positions that advocate a compromise. Perhaps this is partially motivated by the desire to integrate one's analysis into the current legal practice (rather than create a coherent theoretical framework). This ultimately results in no substantive position being taken.

This thesis argues that we need to make a choice. It is unprincipled to describe a substantive notion of the rule of law and Parliamentary Sovereignty as the “twin fundamentals on which the constitution rests”,<sup>827</sup> or to refer to them as “constitutional equals”.<sup>828</sup> That, given the political constitution's claim to absolutism, is impossible. There is no combination of the variations of these two concepts that allows co-existence as equals under the political constitution. Accordingly, when Masterman and Murkens say that the idea that the rule of law is on par with Parliamentary Sovereignty is reflected in the opinions of “scholars, judges and primary legislation”,<sup>829</sup> they refer to views which are as torn between the orthodox understanding of UK public law and the more modern philosophy thereof as the Supreme Court was in *Privacy International*.<sup>830</sup>

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<sup>827</sup> Roger Masterman and Jo Eric Khushal Murkens, ‘Skirting supremacy and subordination: the constitutional authority of the United Kingdom Supreme Court’ [2013] Public Law 800, 813.

<sup>828</sup> *ibid* 818.

<sup>829</sup> *ibid* 813.

<sup>830</sup> Note that when Masterman and Murkens say that Dicey thought the rule of law “mediated” Parliament's legislative intent, this misunderstands his position as it overstates Dicey's actual argument. In fact, as Craig has shown, the more ambiguously worded

Others reach the same unprincipled position. For example, Sir Philip Sales purports that the courts have,

“[a] classic protective function of individual constitutional rights and liberties. Rights protect a zone within which individuals are able to pursue their own vision of the good, to form their own opinions and make their own choices. They are shielded against the tyranny of the majority. This provides a moral foundation for the legitimacy claims of democratic rule. Political authority in a democracy flows upwards from individuals. It accords primary value to the individual and his or her choices made under conditions of freedom and equality, translated into public policy through the workings of the particular system of democratic representation”.<sup>831</sup>

He then outlines “four core grounds for claims to legitimate rule within a Western liberal democratic polity, and in particular in the UK”.<sup>832</sup> These are collective self-determination, human rights and the liberal rule of law tradition, a functioning public order and safety, and fairness in political and legal decision-making procedures. This shows that he thinks about public power as being only legitimate in a system that protects human rights. However, unless he abandons the concept

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statements in Dicey’s writings which suggest, for example, that ‘the constitution is pervaded by the rule of law’ and that there are judicial decisions ‘determining the rights of private persons’, do not amount to an endorsement of the substantive notion of the rule of law. Rather, they formed the basis for a comparison with the continental legal system, which Dicey misunderstood, see Paul Craig, ‘Formal and substantive conceptions of the rule of law: an analytical framework’ [1997] Public Law 467, 473-474.

<sup>831</sup> Sir Philip Sales, ‘Legalism in Constitutional law: Judging in a Democracy’ [2018] Public Law 687, 693.

<sup>832</sup> *ibid* 701.

of Parliamentary Sovereignty, which - in fact - he explicitly endorses,<sup>833</sup> human rights are at the constant risk of being undermined or abrogated.

Sir John Laws commits the same mistake, rendering his autonomy-based theory flawed. He maintains that justice, freedom and order are the “fons et origo” of the common law, and that the latter must therefore give effect to these aspirations.<sup>834</sup> At the same time, he has no difficulty arguing that, while it is the judge’s duty to uphold constitutional rights, “Parliament may (in the present stage of our constitutional evolution) override them, but can only do so by express, focussed provision”.<sup>835</sup> Equally, Bingham says that “a state which savagely repressed or persecuted sections of its people could not in [his] view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed”.<sup>836</sup> However, in the end, he accepts the “vice at the heart of our constitutional system”, i.e. that Parliament can abrogate fundamental rights.<sup>837</sup>

In essence, this line of reasoning amounts to the standpoint that limited government is fundamental, with a concession that government itself can determine limitations to the limits it faces. This is a convoluted paradox. To gain clarity and think more extensively about the substantive rights that are

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<sup>833</sup> Sir Philip Sales, ‘Rights and Fundamental Rights in English Law’ (2016) 75(1) Cambridge Law Journal 86, 93.

<sup>834</sup> Sir John Laws, ‘Illegality: The Problem of Jurisdiction’ in Michael Supperstone and James Goudie (eds), *Judicial Review* (2<sup>nd</sup> edn, Butterworths 1997) 4.12-13.

<sup>835</sup> *ibid* 4.18-19.

<sup>836</sup> Lord Bingham, ‘The Rule of Law and the Sovereignty of Parliament?’ (2008) 19(2) King’s Law Journal 223, 225.

<sup>837</sup> *ibid* 233.

indispensable in our liberal democracy we have to acknowledge that a meaningful judicial protection of human rights is incompatible with Parliamentary Sovereignty.

## **6. Clarifications on this Chapter's Proposal**

This chapter has argued that the political constitution, of which Parliamentary Sovereignty is the primary principle, can only be defended on the basis of normative arguments. On inspection of those, it became apparent that the theory falls short of providing a persuasive normative framework for our constitutional dynamics and functions. In particular, I noted that one of the key assumptions Parliamentary Sovereignty is based on - equality - cannot be sufficiently safeguarded. Accordingly, we ought to abandon the concept of Parliamentary Sovereignty, which has confused and significantly held back legal practice and academic commentary. I advocated a shift away from the current focus on institutional legitimacy towards a substantive engagement with liberal democracy-constitutive values, which I referred to as constitutional rights. We are indeed “in need of a more developed theory of these background substantive rights and values, and a better account of what it means for individuals to have an equal stake in the way in which they are governed”.<sup>838</sup>

I stress that the arguments presented in this chapter are normative in nature. I do not claim that the UK constitution can currently be considered to *have* a legal constitution, which means I cannot be accused of devising “exaggerated, all-encompassing claims” detached from the “real world constitution”.<sup>839</sup> Indeed, this thesis' core argument is that 'real world constitution' is best described as a nuanced constitution, in which Parliamentary Sovereignty continues to play a

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<sup>838</sup> Stuart Lakin, 'The Moral Reading of the British Constitution' (PhD Thesis, UCL 2009) 124.

<sup>839</sup> A term used in Graham Gee and Gregoire Webber, 'What is a Political Constitution?' (2010) 30(2) Oxford Journal of Legal Studies 273, 293.

significant role. This must be separated from my normative argument that courts ought to review legislation for its compliance with the above-identified constitutive values of a liberal democracy. The discrepancy between the ‘ideal’ suggested in this chapter and the ‘reality’ of constitutional rights protection in the UK is what this chapter - and indeed the thesis as a whole - is about.

Equally, the system I propose in template form should not be confused with the doctrine of common law constitutionalism. Indeed, as previously mentioned, I do not have “faith in the moral vitality [...] of the common law method”,<sup>840</sup> and since I do not subscribe to the view that the common law is “an inherently moral mode of decision-making” that necessarily embodies the fundamental values of society,<sup>841</sup> I cannot endorse a significant share of the claims making up common law constitutionalism.<sup>842</sup> I commend common law constitutionalism, a “uniquely British variant of the legal constitution”,<sup>843</sup> for seeking to answer rather than dismiss as irrelevant the question of legitimacy by inquiring through case law about the limits of legislative supremacy and the limits of the practice of judicial obedience to statute.<sup>844</sup> Furthermore, this thesis’ liberal democracy-based scheme shares the

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<sup>840</sup> Thomas Poole, ‘Back to the Future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23(3) *Oxford Journal of Legal Studies* 435, 454.

<sup>841</sup> *ibid* 442-443, 445.

<sup>842</sup> Indeed, rather than seeing common law constitutionalism as one homogenous school of thought, it may be more useful to analyse its individual arguments and reasoning methods. For example, while Dawn Oliver’s and Sir John Law’s analyses are more philosophical in nature (proposing conceptual starting points different from mine), Paul Craig’s account focuses, albeit not exclusively, on providing a historical justification for the elevated status of the common law. Meanwhile, TRS Allan concentrates on the virtues of the common law itself.

<sup>843</sup> Robert B Taylor, ‘The Contested Constitution: An Analysis of the Competing Models of British Constitutionalism’ [2018] *Public Law* 500, 506.

<sup>844</sup> Jo Eric Khushf Murkens, ‘Democracy as the legitimating condition in the UK Constitution’ (2018) 38(1) *Legal Studies* 42, 51.

view that legal authority cannot “eliminate moral judgment” where liberal democracy-constitutive rights are at stake.<sup>845</sup> Thus, the essence of the normative position advanced in this thesis reflects one key part of common law constitutionalism. This is the more general idea of legal constitutionalism, which advocates government subject to effective legal constraints, including the recognition and enforcement of constitutional rights. I also share the scepticism common law constitutionalists have about the abilities of the political process, which leads me to adopt the view that action “inimical” to a liberal democracy “may come from either source: Parliament may enact oppressive general laws; public officials may apply otherwise non-oppressive laws oppressively”.<sup>846</sup> However, I caution that if we view the English common law as containing “the fundamental principles that ought to guide its political and legal decision-making”,<sup>847</sup> we fall short of the ingredients of a legitimate constitutional order as proposed in this chapter.

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<sup>845</sup> TRS Allan, ‘Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority’ (2004) 63(3) *Cambridge Law Journal* 685, 686.

<sup>846</sup> Thomas Poole, ‘Back to the Future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23(3) *Oxford Journal of Legal Studies* 435.

<sup>847</sup> Michael Gordon, ‘The conceptual foundations of parliamentary sovereignty: reconsidering Jennings and Wade’ [2009] *Public Law* 520, 521-522, referencing Thomas Poole, ‘Back to the Future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23 *Oxford Journal of Legal Studies* 435, 453.

## CONCLUSION

It is no longer the case that “the common law does not generally speak in the language of constitutional rights”.<sup>848</sup> As this thesis has shown, common law constitutional rights have become an established part of UK law, particularly since *Guardian News*,<sup>849</sup> one of the earliest cases of the second wave I outlined in Chapter 2. Judgments such as *UNISON*,<sup>850</sup> *A v BBC*<sup>851</sup> and *Osborn*<sup>852</sup> have triggered a renewed engagement with the constitutional and human rights properties of the English common law. Indeed, recent case law shows that judges are now more routinely calling into question - as Toulson LJ invited them to do in *Guardian News* - the assumed primacy and sufficiency of the ECHR. In other words, Lord Reed’s remarks in *Osborn* - that the protection of human rights under the common law was not superseded by the ECHR but instead continues to be enshrined in domestic law - has gained traction with UK judges. For example, in *In the matter of D (A Child)*, a case concerning article 5 ECHR, Irwin LJ remarked that,

“The ECHR enshrines the rights of the citizen, but its principal purpose and function is the protection of rights by engaging the State. The Convention is not an academic exercise. Key questions in every case where the Convention is invoked are: on the facts, is there an obligation for the State to become involved? Are the domestic laws and procedures apt to engage the State when necessary, and to protect the citizen's rights? But these are

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<sup>848</sup> *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB) (Laws J).

<sup>849</sup> *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618.

<sup>850</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>851</sup> *A v BBC* [2014] UKSC 25, [2015] AC 588.

<sup>852</sup> *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

questions to be asked and answered of the domestic law, for our purposes the common law. It should be no surprise that the common law has provided the answer here”.<sup>853</sup>

This thesis showed that common law constitutional rights have implications far beyond the reassessment of the relationship between the ECHR and the English common law. Indeed, the study of common law constitutional rights enabled a direct exploration of the workings and the nature of the UK constitution more broadly. It is through this vantage point, that the following key findings were made:

- 1) The examination of judicial reasoning in public law cases shows that the UK constitution is best described as nuanced.
- 2) The nuanced constitution’s key characteristic is the absence of a principled constitutional philosophy or justificatory basis for public power. As such, the case law demonstrates as having a combination of features from both the political and legal constitutionalism schools of thought, which fall on a spectrum.
- 3) Which of the two theories will manifest itself more prominently in an individual case depends on a variety of factors including the statutory context, the existence of common law precedent and to some extent a judge’s individual persuasion. However, typically public law cases are approached through the prism of Parliamentary Sovereignty until a point where this would infringe a fundamental constitutional value. At this point, a case is pulled closer towards the legal constitutionalism side of the spectrum, and the courts consider if any legislative wording is general enough to allow for a ‘value-compatible’ interpretation.

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<sup>853</sup> [2017] EWCA Civ 1695, [2017] 10 WLUK 723 [157]-[158].



- 4) Ambiguities in constitutional theory result in ambiguities in individual judgments.
- 5) Parliamentary Sovereignty cannot be defended normatively. Many of the values it claims to protect are either logically unsound or fictitious ideas rather than socio-political reality.
- 6) A liberal democracy requires that an independent Judiciary be vested with the power to review all laws adopted by both Parliament and the Executive for their compliance with liberal democracy-constitutive values, which can be referred to as constitutional rights.
- 7) Common law constitutional rights - which can loosely be characterised as human rights that are protected through the English common law - are impacted by the obscurities of the wider constitutional framework. Their reach and scope are unclear, and their enforcement is threatened by the use of clear legislative language overriding them.
- 8) Opposed to what some of the rhetoric suggests, there will be many situations in which the English common law would be of limited or no assistance to an individual seeking to enforce their constitutional rights. Indeed, except in cases concerning the administration of justice or liberty, we can say that the value of the study of common law constitutional rights lies mainly in the exploration of fundamental questions about the allocation of public power, rather than the substantive protection these rights offer.
- 9) The nuanced constitution is unable to adequately protect values that are constitutive of a liberal democracy despite the resurgence of common law constitutional rights.

10) While the overall trend may be that the UK constitution is moving closer towards a legal constitution, for the time being it remains nuanced, even in light of cases such as *UNISON* and *Privacy International*. Accordingly, we can expect to continue to see in public law adjudication a perpetual to-and-fro between the parameters set by the two opposing constitutional theories.

In what follows, I highlight two of the themes that have emerged in this thesis before analysing some of the ramifications of the arguments I developed. First, I summarise some of the key observations I made about the first theme, the character of the nuanced constitution. Second, I summarise why common law constitutional rights jurisprudence, the second theme, is unsatisfactory. Finally, I conclude by considering avenues to remedy some of the shortcomings identified by this thesis.

## **1. Caught in-Between Two Normative Visions**

This thesis referred to the UK constitution as ‘nuanced’. It exhibits subtle shades of meaning and complex qualities that cannot be fully captured by political or legal constitutionalism. While institutional legitimacy concerns continue to play a central role in public law cases, attention is also paid to substantive values, which increase or decrease in importance depending on the context. This is a phenomenon which can be observed not just in cases that would typically be classified as constitutional cases. Indeed, our constitutional dynamics are shaped more holistically. In Chapter 1, I gave the example of *Armes*,<sup>854</sup> in which the notions of justice, fairness and reasonableness, inherent in the common law concept of vicarious liability, led to the legislation in question being read as vesting liability in the state for the abuse by individuals of fostered children. The case demonstrates how nuanced

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<sup>854</sup> *Armes v Nottinghamshire CC* [2017] UKSC 60, [2018] AC 355.

reasoning, guided by substantive values, enables the redefinition of public power and obligations.

Public law is - following its partial departure from political constitutionalism - in an indeterminate state, partially because of the influence context has on adjudication. Thus, in one such context, where the courts are dealing with ambiguous statutory language, one can persuasively argue that Parliamentary Sovereignty has largely been abandoned in that principles independent of legislative intent become determinative. However, it seems equally accurate to suggest that Parliament's legislative power remains legally unlimited where it has made its intention sufficiently clear.

At the same time, public law appears to be more complicated than this simple juxtaposition suggests. For example, both *Evans*<sup>855</sup> and *Privacy International*<sup>856</sup> demonstrate that in certain contexts, the threshold as to what constitutes clear statutory language appears to be so high that it is questionable whether (a) the courts are indeed truly concerned with legislative intent, and (b) the threshold could ever be met where particularly prized constitutional principles are at stake. Indeed, Lord Carnwath's obiter dicta in *Privacy International* suggest that there may be circumstances in which an Act of Parliament would not have binding legal effect, which presents a complete departure from Parliamentary Sovereignty.

The fact that the nuanced constitution designates a framework that entails "in uncertain ways and to an uncertain extent, both a political model and a legal model"<sup>857</sup> is problematic. The legal and the political constitution are irreconcilable.

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<sup>855</sup> *R (Evans) v Her Majesty's Attorney General* [2015] UKSC 21, [2015] AC 1787.

<sup>856</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219.

<sup>857</sup> Graham Gee and Gregoire CN Webber, 'What is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 292.

Political constitutionalism is unable to accommodate legal limits, which means that neither 'expansive' interpretation based on substantive rule of law notions nor the invalidation of statutes are acceptable. Meanwhile, legal constitutionalism promotes the notion of legally limited government. Unhelpfully, domestic public law debate has brought out some unprincipled academic positions that advocate a compromise between the two theories. Equally, members of the judiciary have in extra-judicial writings sought to reconcile the irreconcilable. Those attempts, I argued, are ultimately futile, and do not advance the field in any meaningful way.

Judges have also struggled with the constitution's nuanced character and its inherent tensions. Many decisions are ripe with judicial disagreement and confounded reasoning. Indeed, Chapter 4 highlighted the significant disagreement between the *Privacy International* judgments of the Divisional Court and the Court of Appeal on the one hand, and the majority opinion of the Supreme Court on the other. Sales LJ's judgment at the Court of Appeal is the strongest judicial manifestation of the political constitution. He endorsed the view that 'Parliament intends to legislate for a liberal democracy subject to the rule of law, respecting human rights and other fundamental principles of the constitution', and that 'the rule of law and the ability to have access to a court or tribunal to rule upon legal claims constitute principles of fundamental character'. However, due to the respect owed to the legislative intent, which is the paramount consideration under the political constitution, none of these substantive values could lead to an abrogation of the latter. There is no semblance of nuance - the case turned simply 'on a short point of statutory construction'. In other words, the Court of Appeal's legal analysis largely starts and finishes with what the relevant part of the statute - following a natural reading - appears to suggest. If we contrast this with the majority opinion of the Supreme Court judgment, we see that Parliamentary Sovereignty is equated with - if not downgraded to - Parliament's general law-making power. The rule of law is conceptualised as an essential - equal - counterpart to said power.

Thus, similarly to academic attempts to reconcile the two concepts - Parliamentary Sovereignty and the substantive notion of the rule of law - Lord Carnwath suggested that these are two leading constitutional principles that co-exist. For the reasons mentioned above, this is conceptually unsound. One of the two principles would have to be significantly qualified - to the point that their essence is lost - for co-existence to be possible. We can see this at work in Raz's focus on uninhibited legislative authority, which reduces the rule of law to formal requirements as well as in Allan's focus on the substantive notion of the rule of law, which qualifies Parliament's omnipotent law-making power.<sup>858</sup>

Given this persistent tension, public law reasoning is frequently confused. In fact, judges often attempt to reconcile the two schools of thought by attributing rights-based reasoning to legislative intent. Accordingly, judges spend intellectual energy on explaining how the conclusion reached is aligned with what Parliament would have sanctioned. This process often makes public law adjudication disproportionately concerned with institutional legitimacy at the expense of substance. Thus, judicial reasoning under the nuanced constitution, which attempts the impossible by trying to reconcile unlimited law-making powers with meaningful human rights protection, has an inbuilt mechanism that hampers the advancement of common law constitutional rights.

Indeed, under the nuanced constitution institutional legitimacy may also act as an ultimate criterion for the enforcement of constitutional rights; where clear legislative language so prescribes, rights ordinarily have to give way to majority will. As I argued in Chapter 6, this means that we perceive of government as limited by constitutional principles while at the same time conceding that government itself can determine limitations to the limits it faces. This is undesirable and paradoxical.

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<sup>858</sup> Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195; TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and the Common Law* (Oxford University Press 2013).

Indeed, as my analysis showed, the trouble is not that we cannot describe the constitution. It is possible - without attempting to capture every intricacy of our constitutional law - to paint a relatively comprehensive picture. The trouble is that what we find entails contradictory assumptions, and that democracy-constitutive values are often insufficiently protected.

We can only escape this dilemma by advancing a principled position which safeguards constitutional fundamentals. This can only be done by abandoning the political constitution, which is riddled with conceptual and normative shortcomings. We can then devise a coherent public law framework that effectively protects by enshrining in law those rights that are constitutive of a liberal democracy.

## **2. The Weaknesses of Common Law Constitutional Rights Protection**

There is no doubt that “from the latter part of the twentieth century, rights discourse has made a bid to become more central in the way we reason about law”.<sup>859</sup> Indeed, as I showed in Chapter 2, UK courts have utilised common law constitutional rights to protect values deemed to be of increasingly significant constitutional importance since the 1990s. These rights are not revolutionary; they are a natural extension of what the constitutional framework of this jurisdiction offers. For instance, judicial review “also draws upon ideas of natural law, such as the doctrines of natural justice and fairness”.<sup>860</sup>

As this thesis has shown, several challenges and weaknesses can be associated with common law constitutional rights protection. These operate on different levels but remain intrinsically connected. We can categorise them as follows.

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<sup>859</sup> Sir Philip Sales, ‘Rights and Fundamental Rights in English Law’ (2016) 75(1) Cambridge Law Journal 86, 88.

<sup>860</sup> *ibid* 88.

## The Lack of a Philosophical Foundation

As Chapter 2 showed, common law constitutional rights are a phenomenon that has been heavily driven in reaction to external factors. Conscious of the domestic shortcomings that crystallised in comparison with European human rights standards, the courts have sought to develop the English common law so that it would not offer lower levels of protection. For instance, in the run-up to the passing of the HRA, the senior judiciary was keen to cement the idea that the UK had “principles of constitutionality little different from those that exist in countries where the power of the legislature is expressly limited by a constitutional document”.<sup>861</sup> This domestic ‘rights update’ was not always done in an incremental way, as the traditional common law method would suggest. Sometimes, the courts simply declared that the common law contained the same constitutional rights protection as European law - ECHR and EU-based - offered.

In this process, given the limitations placed on the courts by doctrines like dualism, which prevented an open transposition of ECHR rights into the domestic legal order without legislative implementation, the courts have often sought to stress the historical role the common law played in fundamental rights protection. We can observe similar patterns today, arguably partially in reaction to the ongoing political threat to abolish the HRA.<sup>862</sup>

It is perhaps partially due to the pre-occupation with these external factors that - as the examination of the case law in Chapters 3 and 5 showed - there is today no

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<sup>861</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) [131] (Lord Hoffmann).

<sup>862</sup> This seems particularly pertinent under the newly constituted Johnson cabinet, which is composed of various prominent supporters of the HRA’s abolishment and replacement with a British Bill of Rights.

clear reasoned foundation for common law constitutional rights. In other words, while the parameters of common law constitutional rights are defined by the courts, we are not told *why* it is that they can and ought to enforce them. Consequently, there is no established set of criteria that allows us to identify rights or define their respective limits.

In *Witham*,<sup>863</sup> Laws LJ suggested that what makes a common law right constitutional is the fact that it cannot be abrogated unless abrogation is specifically permitted by Parliament. Meanwhile, in *Pierson*<sup>864</sup> the House of Lords said that prisoners in this jurisdiction retain all such (common law) rights that are not expressly taken away from them by Parliament. However, both these remarks only refer to the principle of legality. The latter only tells us that common law constitutional rights espouse a level of resilience in the face of statutory law. However, importantly, it does not give us any substantive reasons as to why that is the case, and it does not provide a framework within which judicial reasoning is conducted in a principled manner. There continues to be no clearly discernible foundation for common law constitutional rights. Inherent jurisdiction is an empty label, as is the rule of law. The actual justification for the existence, scope and enforcement of these rights is a question of political morality which the principle of legality does not address, and the case law has largely ignored. As Chapter 3 showed, various techniques have facilitated the skirting of questions about the legitimacy of common law constitutional rights. For instance, judicial constitutional comparativism provides a shortcut to legitimacy, the recognition and enforcement of a common law rights in other eminent common law courts being treated as validation. In sum, the case law does not comprehensively answer the question of what it is that empowers a judge to enforce an individual's right against the state.

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<sup>863</sup> *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB).

<sup>864</sup> *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 (HL).



How then do we “move beyond simple assertions by individual judges of the existence and dimensions of [constitutional] rights?”<sup>865</sup> This thesis argued that we ought to develop a system that is “able to attract loyalty irrespective of the particular decisions it produces”.<sup>866</sup> To that end, we must confront the difficult underlying questions of constitutional theory to provide a strong, coherent foundation. Otherwise, the sceptical view that common law constitutional rights “are appealed to in order to mobilise judicial power”<sup>867</sup> is difficult to combat. The advancement of a positive case for the judicial protection of liberal democracy-constitutive rights is crucial in this regard. It is on the basis of the values and requirements of a liberal democracy that we can argue that it would be wrong to view constitutional rights as a strategic tool. Strengthened judicial power is a side-effect of constitutional rights, not their objective.

### **The Lack of Comprehensive Coverage**

Chapter 5 showed that common law constitutional rights are underdeveloped as far as coverage and scope are concerned. While we can point to numerous case law examples that recognise, for instance, the right to property,<sup>868</sup> the right to free

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<sup>865</sup> Sir Philip Sales, ‘Rights and Fundamental Rights in English Law’ (2016) 75(1) Cambridge Law Journal 86, 96.

<sup>866</sup> Aileen McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62(5) Modern Law Review 671, 696.

<sup>867</sup> Sir Philip Sales, ‘Rights and Fundamental Rights in English Law’ (2016) 75(1) Cambridge Law Journal 86, 87.

<sup>868</sup> See for example *Attorney-General v Blake* [2001] 1 AC 268 (HL); *Chesterfield Propertie de Walden Estates s Plc v Secretary of State for the Environment* [1997] 7 WLUK 491 (HC); *Howard Ltd v Aggio* [2007] EWCA Civ 499, [2008] Ch 26.

speech,<sup>869</sup> and the right to a fair trial/procedural fairness,<sup>870</sup> some rights, which are commonly protected in international law instruments, such as the right to freedom of thought and/or religion, are noticeably absent. Furthermore, the scope of many of the common law rights we recognise remains unclear. For instance, in *R (Amin) v Secretary of State for the Home Department* the House of Lords stated that “a profound respect for the sanctity of human life underpins the common law”.<sup>871</sup> However, in *R (BA) v Secretary of State for Health*<sup>872</sup> the Administrative Court held that this right did not include a right to receive medical treatment. Finally, other rights also exist only in skeleton form. These would classify as common law constitutional rights, but in practice their content is too restricted or underdeveloped in the face of statutory occupation of the field to grant the relief sought by the individual in a particular case. I discussed *Moohan*,<sup>873</sup> which is illustrative of this point.

This thesis identified the character and the workings of the English common law as a key hurdle to the development of a comprehensive, effective system of human rights enforcement. In other words, the development of a comprehensive common law constitutional rights jurisprudence has been partially held back by the source from which it springs. Proceeding on a case-by-case basis, with a strong focus on judicial tradition, the rights that are firmly established today - predominantly rights

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<sup>869</sup> See for example *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247; *McCartan Tukrington Breen v Times Newspaper Ltd* [2001] 2 AC 277 (HL); *Rushbridger v HM Attorney-General* [2003] UKHL 38, [2004] 1 AC 357; *Derbyshire CC v Times Newspaper Ltd* [1993] AC 534 (HL).

<sup>870</sup> See for example *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531; *Jude v Her Majesty's Advocate* [2011] UKSC 55, 2012 SLT 75.

<sup>871</sup> *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653 [30].

<sup>872</sup> *R (BA) v Secretary of State for Health* [2017] EWHC 2815 (Admin), [2018] 4 WLR 2.

<sup>873</sup> *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901.

related to the administration of justice - are those that have historically been embedded in the common law.

Furthermore, rights have traditionally been considered and protected on an individual basis rather than by reference to a wider vision of the constitutional order; judges enforced them if this strikes them as reasonable given the context. As Postema notes, the common law,

“is not concerned with the moral vision of any individual, however soundly argued it may seem to be, but rather with the convergence of the views and judgments of the larger community, and forging and maintaining a common sense of reasonableness. Saliency, not vision, and pragmatic convergence, not theoretical coherence, were its fundamental aims”.<sup>874</sup>

Put differently, “the life of the law has not been logic; it has been experience”.<sup>875</sup> In sum, the common law’s strong focus on ‘tradition’, combined with its affinity to procedure,<sup>876</sup> remedies and questions of jurisdiction<sup>877</sup> rather than substance, is one factor that stifles the development of a principled, clearly reasoned constitutional rights framework. The resulting lack of engagement with the wider political morality underlying the protection of constitutional rights has been compounded by the nuanced constitution’s strong adherence to institutional legitimacy. I turn to this next.

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<sup>874</sup> Gerald J Postema, ‘Philosophy of the Common Law’ in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 595.

<sup>875</sup> Oliver W Holmes, *The Common Law* (MacMillan & Co 1882) 1.

<sup>876</sup> Michael Lobban, *The Common Law and English Jurisprudence, 1760 - 1850* (Clarendon Press 1991) 16.

<sup>877</sup> H Patrick Glenn, *On Common Laws* (Oxford University Press 2007).

## Vulnerability

The word 'nuanced' has positive connotations, suggesting a certain level of complexity and thoughtfulness. However, as this thesis has argued, in the context of the UK constitution, part of the complexity - or 'nuance' - arises from the continued influence of Parliamentary Sovereignty. This hampers the protection of common law constitutional rights. Having characterised them as logically prior to legislative authority, they "must lie beyond majoritarian politics".<sup>878</sup> However, under this jurisdiction's constitutional arrangements, they are not sufficiently insulated from potential legislative limitation or abrogation.

Case law analysis shows that, while there is under the nuanced constitution significant room for constitutional rights protection through value-infused interpretation, ultimately there is a seemingly insurmountable barrier - express statutory wording. The latter theoretically trumps constitutional rights, no matter how fundamental. Any right is likely to become negligible if Parliament expressly permits its abrogation or the statutory scheme dictates that the right ought to be abrogated, thereby enforcing the political constitutionalist component of the nuanced constitution. In sum, we find that within this uncertain framework common law constitutional rights are - due to the courts' continued attachment to Parliamentary Sovereignty and the other factors identified in this thesis - inherently vulnerable.

This theoretical vulnerability is partly counteracted by the fact that the UK constitution is in the process of being legalised. Powerful recent authorities suggest that the courts are increasingly comfortable to protect fundamental constitutional principles, sometimes even in the face of apparently clear statutory language. Further, Lord Carnwath's obiter dicta in *Privacy International* that the

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<sup>878</sup> Jo Eric Khushal Murkens, 'Democracy as the legitimating condition in the UK Constitution' (2018) 38(1) Legal Studies 42, 57.

Judiciary could refuse to give binding legal effect to primary legislation in certain circumstances points to a potentially more effective protection of fundamental constitutional values. However, as I cautioned in Chapter 5, we must not forget that context is key. In *Privacy International* the envisaged scenario involved abolishing the ordinary role of the courts. Judicial review is an aspect of our constitutional framework which is so basic that it functions as a prerequisite for the protection of constitutional rights. Indeed, the abolition of judicial review would be the end of democracy as we know it. Accordingly, the judgment does not guarantee that substantive rights independent of the 'administration of justice' will be recognised or enforced in the face of contradicting primary legislation. In other words, the right to free speech, for instance, is unlikely to be more strongly insulated from statutory abrogation post-*Privacy International*. Finally, the majority in *Privacy International* was very thin indeed, and Lord Carnwath's relevant obiter dicta were not endorsed by a majority. Another bench may have tilted the scales in the IPT's favour.

In sum, while our legal system offers an increasingly robust system of human rights protection, it falls short of providing mechanisms and principles that guarantee the protection of constitutional rights to a satisfactory degree. As it remains the case that there is still nothing the state cannot take away, it is therefore debatable whether we can realistically say that we truly have a system of 'limited government'. Perhaps it is more realistic to say that ours is a system of restrained government in which majority rule can ultimately govern limitlessly.

There are however two other factors which may absorb some of the negative effects of the above-identified system. First, statutes seldom explicitly abrogate constitutional rights. As the principle of legality dictates, where express language is lacking, the courts presume that even the most general words were intended to be subject to the basic rights of the individual, and uphold these by interpreting the statute in question accordingly. Second, as Lord Reed appears to have suggested

in *UNISON*, even express statutory abrogation could be qualified or softened by the courts: “even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation”.<sup>879</sup> However, the strength of both these factors can be called into question in light of the Supreme Court’s reasoning in *Beghal*.<sup>880</sup> Here, despite the initial recognition of a common law privilege against self-incrimination, the Court focused almost exclusively on the purpose of the statute in question, and on how the Executive could govern effectively to maintain national security. The right in question ended up being abrogated by the Court on the basis of ‘necessary implication’. Thus, depending on various factors, a right may not be secure even where statute does not expressly dictate its abrogation.

### **Integrity versus Rhetoric**

The findings of this thesis show that there is an issue with integrity. Despite the judiciary’s express recognition that certain common law rights are “important”,<sup>881</sup> “fundamental”,<sup>882</sup> “basic”,<sup>883</sup> and “inherent [...] to democratic civilised society”,<sup>884</sup> it is not guaranteed that an appropriate remedy will vindicate the breach of a constitutional right. In order to further understand and eventually address the weaknesses identified above in an effective way, we must realistically assess -

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<sup>879</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [88].

<sup>880</sup> *Beghal v DPP* [2015] UKSC 49, [2016] AC 88.

<sup>881</sup> *R v Secretary of State for the Home Department, ex p Saleem* [2001] 1 WLR 443, [2000] 4 All ER 814, 828 (Lady Hale).

<sup>882</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) [131]-[132] (Lord Hoffmann).

<sup>883</sup> *Her Majesty's Treasury v Mohammed Jabar Ahmed* [2010] UKSC 1, [2010] 2 AC 697 [183] (per Lord Rodger, with whom Lady Hale agreed).

<sup>884</sup> *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 [30] (Lord Cooke).

based on rigorous textual analysis - the state of constitutional rights protection. Indeed, we must avoid conflating rhetoric with substance.

As Chapter 2 noted, the narrative that has been established about the strength of rights protection under the English common law is partially due to the romanticising of famous historical examples of common law constitutional rights, such as *Somerset v Stewart*.<sup>885</sup> Analysed critically, the latter's fame is not warranted by its substance. Its subsequent coverage has created a successful illusion as to the virtue and strength of the English common law, which on closer inspection cannot be upheld. Unless we assess common law constitutional rights jurisprudence critically, we risk repeating the mistakes of the past, with potentially serious consequences. The English common law today is undoubtedly more prepared to replace the constitutional rights protection offered by the HRA than it was able to compensate for the lack of the latter's implementation in the 1990s. However, it would still not be able to operate as a sufficient substitute. As I showed in Chapter 3 in the analysis of the current judicial reformulation of the relationship between common law constitutional rights and the HRA, we can again detect a problematic tendency in the case law. The common law's rejuvenated claim to sufficiency is mistaken, and it may backfire in that an illusory belief in the strength of domestic constitutional rights may inadvertently support the case for the scrapping of the HRA.

### **3. Ramifications**

This thesis does not make radical proposals. Parliament is free to legislate as it pleases as long as certain thresholds are not crossed. Indeed, my argument suggests that the procedural conditions of periodic and competitive elections and effective, equal and universal participation are necessary, but they are not

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<sup>885</sup> *Somerset v Stewart* (1772) Lofft 1, 98 ER 499.

“*sufficient* conditions of democracy”.<sup>886</sup> In other words, “formal voting equality is a logical starting point [...] not the end point”.<sup>887</sup> The courts are not tasked with formulating new legal rules, but rather they have an oversight function. Theirs is a duty to check whether the output generated by the elected branches of government transgress constitutional rights. In other words,

“the democratic ideal has two strands. The first premise is that the people entrust power to the government to carry on its business in accordance with the principle of majority rule. The second premise of the democratic ideal is that the basic values of liberty and justice for all and respect for human rights and fundamental freedoms must be guaranteed”.<sup>888</sup>

### **A Written Constitution?**

That said, this thesis has argued that if we accept the English common law as we find it, we have to acknowledge that it cannot fully accommodate for the constitutional rights protection model this thesis has advocated. My arguments result in the following position. On the one hand, I am saying that, morally speaking, constitutional review of primary and secondary legislation - enforcing those constitutional rights that are indispensable in a liberal democracy properly so called - is legitimate and necessary. However, on the other hand, I disagree that the English common law is an apt vehicle to realise this.

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<sup>886</sup> Jo Eric Khushf Murkens, ‘Democracy as the legitimating condition in the UK Constitution’ (2018) 38(1) *Legal Studies* 42.

<sup>887</sup> Jeff King ‘Three Wrong Turns in Lord Sumption’s Conception of Law and Democracy’ in Richard Ekins, Paul Yowell and NW Barber (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 143, 147.

<sup>888</sup> Johan Steyn, ‘Dynamic Interpretation Amidst an Orgy of Statutes’ (Brian Dickson Memorial Lecture 2003) as recently published in Johan Steyn, *Democracy Through Law: Selected Speeches and Judgments* (Routledge 2018).



In light of this conclusion, it is worth exploring what changes can be suggested to enable UK public law to develop constitutional rights more coherently, and protect them more effectively. Arguably, one way of looking at my argument could be to say that it calls for a written constitution. Currently, there is in the UK “no canonical constitutional master-text, and no live proposal to have one”.<sup>889</sup> However, the above findings are in favour of an attempt to secure more clarity in our constitutional arrangements, and a more solid foundation for effective constitutional rights protection.<sup>890</sup> One way of achieving this could be a codified constitution.<sup>891</sup> I agree with Payne that part of the problem is that we currently have an “obscure constitution that depends upon the judiciary to piece together”.<sup>892</sup> I further agree that,

“in the absence of a written constitution designating the role of a top constitutional court, the Supreme Court may lack institutional confidence in its role and authority and seek to portray its decisions as merely technical

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<sup>889</sup> John Gardner, ‘Can There Be a Written Constitution?’ in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 1* (Oxford University Press 2011) 163.

<sup>890</sup> For a ‘democracy-based’ account for a written constitution see Jeff King, ‘The Democratic Case for a Written Constitution’ (2019) 72 *Current Legal Problems* 1.

<sup>891</sup> I note that I only look at the desirability of a codified constitution from the specific angle of aiming to secure a more solid judicial protection of democracy-constitutive rights. I am aware that there are many other dimensions that form part of this debate, such as the potential desirability of a review of the UK’s devolution arrangements the royal prerogative, and the likely gain in executive power post-Brexit.

<sup>892</sup> Sebastian Payne, ‘The Supreme Court and the Miller Case: More Reasons Why the UK Needs a Written Constitution’ (2018) 107(4) *The Round Table: The Commonwealth Journal of International Affairs* 441, 442.

applications of the law rather than assertions of creative and active constitutional law-making”.<sup>893</sup>

Thus, one advantage that would be gained from a codification process would be the strengthening of judicial authority. Another advantage of replacing common law constitutional rights with codified rights is the likely gain in “definitional certainty”.<sup>894</sup> Even if there remains a “level of vagueness that persists in the definition of each right guaranteed in a Bill of Rights, courts can be more sure-footed by reliance on both the wording of the rights provisions and the context of the overall instrument”.<sup>895</sup> More broadly, “a written constitution would be an opportunity to design an integrated and coherent body of constitutional law drawing on over 200 years of constitution-making from across the globe and the common law world assisted by comparative constitutional scholarship and the practical experience of governments and law-makers”.<sup>896</sup>

Further incentive is provided by the continuing threat to the HRA, which may be replaced by a less suitable domestic alternative if and when the UK’s withdrawal from the European Union is finalised. In any case, while the HRA currently provides a relatively solid system of human rights protection, we must

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<sup>893</sup> Sebastian Payne, ‘The Supreme Court and the Miller Case: More Reasons Why the UK Needs a Written Constitution’ (2018) 107(4) *The Round Table: The Commonwealth Journal of International Affairs* 441, 442.

<sup>894</sup> Roger Masterman and Se-shauna Wheatle, ‘Unity, Disunity and Vacuity: Constitutional Adjudication and the Common Law’, in Mark Elliot, Jason N Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2015) 128.

<sup>895</sup> *ibid* 128.

<sup>896</sup> Sebastian Payne, ‘The Supreme Court and the Miller Case: More Reasons Why the UK Needs a Written Constitution’ (2018) 107(4) *The Round Table: The Commonwealth Journal of International Affairs* 441, 450.

acknowledge that - just as is the case for the alternative rights protection offered by the English common law - its effectiveness is ultimately compromised by the lack of constitutional review and the lack of sufficient entrenchment, both of which put democracy-constitutive rights at risk.

Accordingly, the codification option carries heavy theoretical force, particularly given the consensus that Brexit will lead to a weakening of constitutional rights protection. However, we must acknowledge that this is an option that is just that: theoretical. At this moment in time - given amongst other things the pre-occupation with Brexit, the associated political turmoil and ongoing devolution pressures - it is completely unrealistic to suggest that a codification of the UK's constitution is on the cards.

Equally, in the unlikely event that the UK does adopt a capital-C constitution, it is not guaranteed that the rights that are constitutive of a liberal democratic legal order would feature in such a document. Likewise, it would be uncertain - particularly given the UK's traditional constitutional philosophy - that effective constitutional review mechanisms would be incorporated. The same uncertainties surround the potential replacement of the HRA with a more entrenched UK Bill of Rights. Indeed, similar obstacles to those identified above apply. One could not reasonably expect - particularly given the current political climate - for the Government to pass a bill that strengthens domestic human rights protection. Indeed, in light of the Conservatives' 2014 proposals, any attempts to replace the HRA with a domestic alternative is likely to seriously undermine the UK's liberal democratic order.

## The Role of the Supreme Court

In light of the above challenges, the most realistic option is the gradual adaptation of the English common law towards a more principled approach that develops constitutional rights comprehensively.

As I have stipulated throughout this thesis, this would go against the grain of the English common law, a legal system that has - in various forms - existed for centuries. In fact, even in view of the current 'legalisation trend' and the powerful obiter dicta in *Privacy International*, it seems unlikely that the Supreme Court will develop a coherent constitutional rights framework as advocated by this thesis. Amongst other things, this would necessitate a partial departure from incrementalism, a transition from the focus on institutional legitimacy to a focus on political morality as part of the engagement with substantive values, and less deferential attitudes towards the elected branches of state. One could argue that this would be a revolution rather than a reform.

That being said, the Supreme Court may theoretically be in a position to effectuate this change. Unlike the Court of Appeal, the Court is not bound by precedent, and an important aspect of their function,

“is the development of the law, through [the] consideration of the cases raising the most important questions. The performance of that function requires a sense of the coherence of the law as a whole, an awareness of how it has developed over time, and an understanding of how it needs to develop now so as to respond to the evolving needs of our society”.<sup>897</sup>

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<sup>897</sup> Lord Reed, 'The Supreme Court Ten Years On' (The Bentham Association Lecture, University College London 6 March 2019) 3-4.

The current needs of our society, particularly in the present political climate, may indeed be seen as demanding a more principled constitutional rights framework. Thus, the most realistic prospect is the most minimal one, namely for cases like *UNISON* to be used as a template for future constitutional rights cases. As this thesis has shown, common law constitutional rights cases often only communicate the outcome without detailing the reasoning underpinning it. In other words, there is rarely a systematic engagement with the normative properties of a constitutional right. However, *UNISON* is exceptional with regard to the level of detail that is provided. Its reasoning provides an opportunity for an open reflection on our constitutional arrangements. A more open engagement with the reasoning behind a decision, which openly recognises and addresses aspects of political morality, would be an important first step towards a more meaningful, comprehensive engagement with constitutional rights under the current framework.

It will take significant academic and judicial efforts to engage in this process of bringing us closer to a constitutional framework in which the Judiciary is vested with the power to review, in a more meaningful way, the laws adopted by both Parliament and the Executive for their compliance with constitutive constitutional values. To proceed in this direction, public law debate first needs to shift from its predominantly institutional focus to one more concentrated on exploring the substantive values underpinning a liberal democracy.

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