

# SKIRTING SUPREMACY AND SUBORDINATION: THE CONSTITUTIONAL AUTHORITY OF THE UK SUPREME COURT

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## INTRODUCTION

In the late eighteenth and early nineteenth century, the revolutionary quality of French and American constitutionalism caused radical, liberal, and anti-reformers to reflect on the idea of the British constitution. Thomas Paine jettisoned the venerated British constitution and replaced it with imported French and American concepts of universal principle and natural rights. The new political vocabulary appealed to the present rather than to history and to traditional liberties. ‘The American constitutions were to liberty, what grammar is to language; they define its parts of speech, and practically construct them into syntax’.<sup>1</sup> The French and American Constitutions became the paradigm for scrupulously separating the organs of state, distinguishing between constituent and constituted power, and guaranteeing legally-enshrined and (later) judicially-protected individual rights against the state by means of constitutional documents that, as higher order law, took precedence over ordinary laws in the case of conflict.

Opponents of reform viewed Montesquieu’s argument that strict separation between the three organs of government in relation to both functions and personnel was a necessary condition for the protection of political liberty and the prevention of arbitrary power as Continental hubris. The UK’s own idea of ‘mixed government’, i.e. the joint participation of the three estates (united as Monarch, Lords and Commons) in the functions of government and with interlocking (rather than hierarchical) political institutions (with mutual checks and combined interpretations), was considered to be superior to the French and American paradigm. For George Canning, co-founder of the *Anti-Jacobin* newspaper, it was not Britain’s island status that had saved it from

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<sup>1</sup> T. Paine, *Rights of Man* (Oxford: Oxford University Press, [1791] (1995)), p.147.

Napoleon, but ‘some secret virtue in her constitution, under its present practice’.<sup>2</sup> Britain owed its political stability, economic wealth, and military successes to ‘the freedom of our government and the blessings of our constitution’, which was the ‘envy and admiration of the world’.<sup>3</sup>

If one had to pick a secret virtue of the eighteenth century constitution, one could do worse than to choose mixed government. It had already been fully defined by Sir William Blackstone’s *Commentaries on the Law of England* (1765-9), Jean de Lolme’s *Constitution of England* (1775), and William Paley’s *Principles of Moral and Political Philosophy* (1785). A quasi-independent judiciary upheld the laws of the land, and Parliament checked the ambitions of the Government. In short, the ideal of mixed government pursued a very similar objective to the doctrine of separation of powers, except by other means: it prevented one of the three estates from imposing its will upon another through an exercise of reciprocal checks and balances.<sup>4</sup> The British constitution thus produced its own brand of less visible separation of powers that was not the result of any conscious exercise in constitutional design, but of ‘political experience, the logic or accident of events.’<sup>5</sup>

While the façade of mixed government has remained largely intact until today, its inner workings have undergone radical change. The traditional subordination of the Courts to, and by, the ‘political constitution’<sup>6</sup> has since the middle of the twentieth century gradually yielded, permitting initially procedural but increasingly intrusive judicial review of administrative and executive decisions. More recently, this jurisdiction has been bolstered through the statutory allocation of explicit powers, and the arrogation of implicit powers, of quasi-constitutional review. These internal revisions of the mixed government model have culminated in significant and visible structural reform: the (physical) severing of links between Parliament and judiciary

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<sup>2</sup> See Canning’s Liverpool election speech of 1818, cited in J. Fulcher, ‘The English People and their Constitution after Waterloo: Parliamentary Reform 1815-1817’, in J. Vernon (ed), *Re-Reading the Constitution*, (Cambridge: Cambridge University Press, 1996), p.61 n.50.

<sup>3</sup> Mr Graham, 8 November 1814, House of Commons, *Hansard*, 29, 1814, col.39; cited in Fulcher *Ibid.*, p.60.

<sup>4</sup> See M.J.C. Vile, *Constitutionalism and the Separation of Powers* (2nd edn Liberty Fund, Indianapolis 1998), Chapters 3 and 5.

<sup>5</sup> I. Jennings, *The Law and the Constitution*, 5<sup>th</sup> edn, (London: University of London Press, 1959), p.9.

<sup>6</sup> For the now classic account see: J.A.G. Griffith, ‘The Political Constitution’ (1979) 42 M.L.R. 1-21.

with the establishment of an independent United Kingdom Supreme Court (UKSC) under the Constitutional Reform Act 2005.

The previous subordinate role of the judicial House of Lords arguably followed naturally from its presence in the Palace of Westminster. The abolition of the Appellate Committee of the House of Lords, therefore, raises a series of questions relating to the nature of the UKSC's relationship with Parliament and the constitutional authority of the United Kingdom's apex court. In this article we assess the cumulative effects of the gradual expansion of the constitutional competences of the UK's apex court and the rather more sudden formalisation of the doctrine of judicial independence through the structural independence of the UKSC. We argue that while the UKSC eschews many of the jurisdictional and structural precedents set by other constitutional or apex courts, its core tasks are integral to the constitutional function of subjecting *both* legislature and executive to the legal control. Though apparently running counter to orthodox accounts of the judicial role in the constitution we argue that the authority of the UKSC to review cases, conduct, and the constitution stems, not only from explicit statutory direction but, from its counter-majoritarian function that derives from the domestic constitutional principle of the rule of law. Any parallels with apex courts, constitutional councils, or councils of state on the European continent are not willed by us, but nor are they entirely accidental: where the mixed government model historically avoided the Continental, revolutionary and modern ideal of visible separation of powers, the contemporary UK constitution has incrementally and almost surreptitiously adopted some of its characteristics.

#### 'HANDMAIDS TO PARLIAMENT'S WILL': THE TRADITIONAL SUBORDINATION OF THE COURT

Adam Tomkins claimed in 2003 (before the establishment of the UKSC) that 'the separation of power English-style' continued to be 'a confrontational, bi-partisan, bi-polar separation, between the only two powers the constitution has ever recognised as enjoying any degree of sovereignty, namely the Crown and Parliament'.<sup>7</sup> It is true that the courts did not historically play a leading role in the interpretation of constitutional law and politics. Their role was restricted to identifying Parliamentary sovereignty as

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<sup>7</sup> A. Tomkins, *Public Law*, (Oxford: Clarendon Press, 2003), p.46 (emphasis added).

a political fact. The chapters of Walter Bagehot's *The English Constitution*, first published in 1867, deal with the Cabinet, the Monarchy, the House of Lords, the House of Commons, changes of ministry, checks and balances, and cabinet government; Bagehot has next to nothing to say about law or law courts. Similarly, A.V. Dicey's late-nineteenth century image of Parliament as the sole and final legal authority does not include the courts.<sup>8</sup> By the mid-twentieth century, however, Ivor Jennings defined legal sovereignty as

a form of expression which lawyers use to express the relations between Parliament and the courts. It means that the courts will always recognise as law the rules which Parliament makes by legislation.<sup>9</sup>

Here Jennings at least recognises the role of the courts, albeit as 'modest underworkers' and 'handmaids to Parliament's will'.<sup>10</sup> Their duty was to interpret the text and to declare the law,<sup>11</sup> and they enjoyed only limited review powers over delegated authority by Parliament to subordinate bodies.<sup>12</sup>

The eighteenth-century Blackstonean creed, that statutes had to be obeyed and applied, however unreasonable,<sup>13</sup> remained unchallenged until the first half of the twentieth century following two major *political* developments: first, the democratisation of the House of Commons (general franchise); second, the downgrading of the Parliamentary House of Lords with the loss of the suspensory veto in relation to public Bills introduced in the House of Commons (Parliament Act 1911). As the UK moved from oligarchy to democracy, the Reform Acts of 1832, 1867 and 1884 (women were enfranchised in 1918 and 1928) opened up political participation, and as the volume of legislation began to increase, it became

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<sup>8</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, [1885] 10th ed., (London: Macmillan, 1959).

<sup>9</sup> I. Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959), p.149.

<sup>10</sup> R. Cotterrell, 'Judicial Review and Legal Theory', in G. Richardson & H. Genn (eds), *Administrative Law and Government Action*, (Oxford: Clarendon Press, 1994), pp.17, 25.

<sup>11</sup> *Duport Steels Ltd v. Sirs* [1980] 1 W.L.R. 142, 157 (Lord Diplock).

<sup>12</sup> *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223, 230 (Lord Greene M.R.)

<sup>13</sup> W. Blackstone, *Commentaries on the Law of England Vol. I* (Oxford: Clarendon Press, 1765), p.156.

increasingly inappropriate for the judiciary to intrude into the public law arena. Judges found they had to interpret statutes, many of them directed to empowering public authorities to provide services or to regulate and control private activities. By adopting a plain meaning approach to statutory interpretation<sup>14</sup> (to avoid any charge of substituting its view of the law for that expressed by Parliament in legislation) the judiciary acknowledged that democracy and public policy (i.e. most of effective law-making) were generally regarded as political matters to be determined in and by Parliament not by the judges.<sup>15</sup>

The impact of this recognition on the constitutional status of the courts was enormous. Between 1842 and the UK's accession to the European Community in January 1973, not a single case (!) reached the House of Lords on the question of the absence of limitations of Parliament's ultimate law-making authority.<sup>16</sup> The period from World War II until the 1960s 'marked the depths of the irrelevance of the courts in the development of the constitution,'<sup>17</sup> driving Lord Devlin to conclude that:

The common law has now, I think, no longer the strength to provide any satisfactory solution to the problem of keeping the executive, with all the powers which under modern conditions are needed for the efficient conduct of the realm, under proper control. The responsibility for that now rests with Parliament.<sup>18</sup>

While the Warren Court in the USA<sup>19</sup> and the Federal Constitutional Court in Germany<sup>20</sup> were handing down landmark constitutional decisions that expanded civil

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<sup>14</sup> *River Wear Commissioners v. Adamson* [1877] 2 AC 743.

<sup>15</sup> Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Macmillan, 1980), esp. Chapters 4 and 5.

<sup>16</sup> B. Hadfield, 'Constitutional Law' in L. Blom-Cooper, B. Dickson and G. Drewry, *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press), p.501.

<sup>17</sup> R. Stevens, 'Government and the Judiciary', in V. Bogdanor (ed), *The British Constitution in the Twentieth Century* (Oxford: Oxford University Press, 2003), p.346; R. Stevens, *The English Judges: Their Role in the Constitution* (Oxford: Hart, 2005), Chapter 2.

<sup>18</sup> Lord Devlin, *The Common Law, Public Policy and the Executive* (1956) *Current Legal Problems* 1, 14.

<sup>19</sup> *Brown v. Board of Education* 347 U.S. 483 (1954).

<sup>20</sup> *Lüth*, BVerfGE 7, 198 (1958).

rights and liberties as well as judicial power, the UK judiciary essentially acknowledged, and contributed to, the failure of one key aspect of liberal constitutionalism: legal accountability of government in the courts. Moreover, in the absence of a codified constitution guaranteeing its status, and with nothing equivalent to the powers assumed by the Supreme Court in the United States, ‘the role of the judiciary under the constitution [remained] a matter of inference rather than express provision’.<sup>21</sup>

The historic subordination of the courts, however, cannot be solely be explained by the absence of a constitutional text or strict adherence to the separation of powers. The non-existence of effective principles of constitutionality that would permit legal control of the democratic law-making process is a logical consequence of Parliament’s unlimited and unrivalled legislative power.<sup>22</sup> Parliamentary sovereignty forces the judiciary into subservience which it justifies with reference to democratic legitimacy, which in turn results in a tendency towards formalist approaches to statutory construction and the existence of a strong judicial culture of deference to the legislature most clearly evidenced in the virtual immunity of statute from judicial challenge.<sup>23</sup>

One of the defining characteristics of the political constitution is that it permitted little, if any, scope for the courts to seek to bring a set of external, higher order, moral and political values to bear on the resolution of the *legal* disputes that the political process generated: the common law and its precedents, along with powers allocated by statute, had to suffice. However, it is also typical of the political constitution that the duty of the courts to apply statutes would be habitual, and thus liable to change, rather than legal. Whether the will of Parliament would be obeyed even in the case of pernicious legislation is a matter of dispute to which we will return later.

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<sup>21</sup> Dame Mary Arden, ‘Judicial Independence and Parliaments’ in Ziegler et al (eds), *Constitutionalism and the Role of Parliaments* (Oxford: Hart, 2007), p.192.

<sup>22</sup> J.E.K. Murkens, ‘The Quest for Constitutionalism in Public Law Discourse’ (2009) 29 (3) O.J.L.S. 1.

<sup>23</sup> *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [108] (Lord Hope).

## JUDICIAL INDEPENDENCE IN THE UNITED KINGDOM

The problem with Tomkins' view is that it does not draw attention to the constitutional significance of two statutes. First, the Act of Settlement 1701 granted the senior judiciary formal independence from the government, further underlining their constitutional importance. The historian of the British judiciary, Robert Stevens, dates 'the role of the judges as an independent force within the British Constitution' to the Act of Settlement 1701. Her Majesty's judges now held office *quamdiu se bene gesserint*,<sup>24</sup> rather than at Her Majesty's pleasure.

Second, the Appellate Jurisdiction Act 1876 established a new Court of Appeal which, together with the High Court, became the Supreme Court of England and Wales (renamed the Senior Courts of England and Wales by the Constitutional Reform Act 2005 to avoid confusion with the new Supreme Court of the United Kingdom).<sup>25</sup> The 1876 Act provided for the appointment of paid, full-time, professional judges (Lords of Appeal in Ordinary or, colloquially, Law Lords). Although the judiciary continued to acknowledge the superiority of Parliament and statute over the courts and common law, it nonetheless gained through reform a degree of insulation against both legislative and executive interference in its judicial role.

Admittedly, the independence and modernisation and professionalisation of the judiciary still failed to make the separation of powers visible. The 1876 Act still required the Law Lords to exercise judicial authority and sit in the legislature. Prime Minister Lord Salisbury said that since 'practically they have often to make law as judges, they will do it all the better from having to make it as legislators'.<sup>26</sup> However, these developments nonetheless mark the beginnings of an *increasingly visible* separation and serve to highlight that the changing relationship between the apex court and Parliament has been conditioned by *both* the strengthening of the ideal of judicial independence and by the incremental development of the powers of the judicial branch.

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<sup>24</sup> See Stevens, *The English Judges*, above n.00, pp.9, 10-13.

<sup>25</sup> See D. Steele, 'The Judicial House of Lords: Abolition and Restoration 1873-6'. in L. Blom-Cooper et al, *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009).

<sup>26</sup> Cited in R. Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (University of North Carolina Press, 1978), p.55.

This nineteenth-century fusion of governmental power was the express target of the Constitutional Reform Act 2005 (CRA), which curtailed the powers of the Lord Chancellor<sup>27</sup> and replaced the Appellate Committee of the House of Lords with a new United Kingdom Supreme Court as the ‘apex court’ for the whole United Kingdom on 1<sup>st</sup> October 2009. The UKSC assumed the existing jurisdiction of the House of Lords, as well as the devolution jurisdiction of the Judicial Committee of the Privy Council, becoming the final court of appeal in the United Kingdom in respect of civil and criminal matters originating in England and Wales, and Northern Ireland, and in respect of civil matters only originating in Scotland.

The principal concern of the CRA was to provide continuity (judicial independence<sup>28</sup>) as well as to instigate change (removal of the judicial House of Lords from the Palace of Westminster). The constitutional impetus for the latter had come from the jurisprudence of the European Court of Human Rights, which had assessed the independence and impartiality of tribunals under Article 6 ECHR ‘from an objective viewpoint’.<sup>29</sup> The intention behind the UK government’s response was, therefore, to *enhance* judicial independence physically and visibly by removing the judicial function from the House of Lords,<sup>30</sup> but also financially and administratively.<sup>31</sup> Introducing the bill, Lord Falconer said that ‘...the key objective [was] to achieve a full and transparent separation between the judiciary and the legislature’<sup>32</sup> – a sentiment echoed by the UKSC’s first president, Lord Phillips of Worth Matravers, on the day the Court opened for business:

For the first time, we have a clear separation of powers between the legislature, the judiciary and the executive in the United Kingdom. This is important. It

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<sup>27</sup> See: D. Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart Publishing, 2001) and now Part 2, Constitutional Reform Act 2005.

<sup>28</sup> Sections 3 and 4 CRA 2005. For a counter thesis see M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), p.66 and Chapter 2.

<sup>29</sup> *Findlay v. United Kingdom*, (1997) 24 EHRR 221, at [73]; *McGonnell v. United Kingdom* (2000) 30 EHRR 289.

<sup>30</sup> HL Debs, Vol.657, Col.92, 9 February 2004. On the Law Lords’ participation in the legislative and debating work of the House of Lords see: Lord Hope of Craighead, ‘Voices from the Past – the Law Lords’ Contribution to the Legislative Process’ (2007) 123 L.Q.R. 547.

<sup>31</sup> HL Debs, Vol.657, Col.928, 9 February 2004 (Lord Falconer).

<sup>32</sup> HL Debs, Vol.657, Col.1131, 9 February 2004.



emphasises the independence of the judiciary, clearly separating those who make the law from those who administer it.<sup>33</sup>

The CRA enhances (rather than create *ex nihilo*) judicial independence through visible separation. Complete institutional separation of the three branches of government remains the antithesis of the idea of mixed government. Yet the establishment of the UKSC – and the associated reforms implemented under the CRA – brings about and clarifies the status of the judiciary as a separate and distinct branch of government.<sup>34</sup> Yet obstacles remain. Judicial independence is, for instance, still not *constitutionally* guaranteed: the tenth edition of Wade and Forsyth’s classic textbook *Administrative Law* (published in 2009) still contains the caution that ‘if [the courts] fly too high, Parliament may clip their wings’.<sup>35</sup> Though portrayed as a cosmetic alteration to the constitutional architecture, the symbolic detachment of the judiciary from both executive and legislature has added an institutional dynamic to the principle of judicial independence that was previously lacking. Before considering the powers through which this influence might be realised, it is worth pausing to ask what would appear to be a more straightforward question: what type of court is the UKSC?

#### WHAT KIND OF COURT IS THE UKSC?

The literature suggests a number of labels for apex courts, none of which fit exactly the current self-understanding, competences, or likely future trajectory of the UKSC.

##### 1. A constitutional organ

###### i. A ‘specialist organ’ or ‘constitutional court’;<sup>36</sup>

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<sup>33</sup> Press Notice 01/09, ‘Supreme Court of the United Kingdom comes into existence’, 01 October 2009.

<sup>34</sup> R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge: Cambridge University Press, 2011), Chapter 8; V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009), Chapter 11.

<sup>35</sup> H.W.R. Wade & C. Forsyth, *Administrative Law*, 10th ed. (Oxford: Oxford University Press, 2009), p.26. See also: I. Jennings, *The Queen’s Government* (London: Penguin Books, 1961), p.145.

<sup>36</sup> Inspired by projects of constitutional review in the nineteenth-century constitutions of Norway, Denmark, and Greece, the Austrian jurist Hans Kelsen in 1920 drafted a new constitution for Austria that established the world’s first separate constitutional court.

- ii. A constitutional council;<sup>37</sup>
- 2. A legitimating organ
  - iii. the ‘ultimate legal guardian of the constitution’;<sup>38</sup>
  - iv. a ‘proto-constitutional’ court (that ensures constitutionality and legality, e.g. in relation to the war against terrorism);<sup>39</sup>
  - v. an agent of ‘external standards of justice’<sup>40</sup> or ‘the enduring values of our society’<sup>41</sup> (such as rights, liberties, restraints, and obligations which are fundamental to a democracy);
  - vi. an ‘agent of the people’;<sup>42</sup>
  - vii. a ‘counter-majoritarian institution’;<sup>43</sup>
- 3. A judicial organ
  - viii. A general or ordinary court of appeal/*legal* institution;<sup>44</sup>
  - ix. a federal court;<sup>45</sup>

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<sup>37</sup> The de Gaulle Constitution of France (1958) created the *conseil constitutionnel* with the power to declare parliamentary bills unconstitutional (i.e. prior to enactment). But it is a council, not a court of law, and it does not form part of the judicial system. Litigants have no access to it directly or indirectly via appeals from lower courts: see: J. Bell, ‘What Is the Function of the Conseil d’État in the Preparation of Legislation?’ (2000) 49(3) I.C.L.Q. 661.

<sup>38</sup> Lord Bingham of Cornhill, *A New Supreme Court for the United Kingdom* (The Constitution Unit, UCL, 2002), p.7.

<sup>39</sup> On ‘proto-constitutional court’ see T. Dalyell, House of Commons debates, 12 May 1998, col. 209; R. Hazell, R. Masterman, et al, ‘The Constitution: Coming in from the Cold’ (2002) 55(2) *Parliamentary Affairs*, 219-234, 233; in relation to terrorism see A. Barak, ‘A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002-3) 116 *Harvard Law Journal* 19, esp. 158-160.

<sup>40</sup> D. Adamany, ‘Legitimacy, Realignment Elections, and the Supreme Court’ (1973) *Wisconsin Law Review* 790, 794-795.

<sup>41</sup> A.M. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics*, (Indianapolis : Bobbs-Merrill, 1962), p.26.

<sup>42</sup> See e.g. Article 25(4) of the German *Federal Constitutional Court Act*: ‘The decisions shall be issued “in the name of the people”’. See also *Rhode Island Bar Association v. Automobile Service Association* 53 R. I. 122, at 138, 179 Atl. 139, at 146 (1935).

<sup>43</sup> A.M. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), pp.16-23.

<sup>44</sup> Section 40 Constitutional Reform Act 2005; P.E. Quint, ‘Most Extraordinarily Powerful Court of Law the World Has Ever Known – Judicial Review in the United States and Germany’ (2006) 65 *Maryland Law Review* 152.

- x. an ‘agent of Parliament’ (that hands down neutral and impartial judgements that are respectful of precedent and based on the will of Parliament as expressed in statute);<sup>46</sup>
  - xi. a ‘supervisory’ court;<sup>47</sup>
4. A political organ
- xii. a national policy-maker/*political* institution?<sup>48</sup>
  - xiii. An agent of constitutional change.<sup>49</sup>

At the outset, two types can be ruled out: the UKSC is neither a clearly political institution,<sup>50</sup> nor was it ever destined to enjoy a general power to invalidate legislation akin to that exercised by the Supreme Court in the United States, and the Constitutional Courts in South Africa and Germany.<sup>51</sup> In many ways the sudden creation of a new institution is an un-British occurrence, and the UKSC itself is an un-British court: it does not have an original name, and it was designed to deal with an alien problem that arose out of a particular reading of the European Convention of Human Rights.<sup>52</sup>

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<sup>45</sup> In relation to the ‘quasi-federal’ character of the UK, see V. Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999), p.291; M. Laffin and A. Thomas, ‘The United Kingdom: Federalism in Denial?’ (1999) 29(3) *Publius* 89-107.

<sup>46</sup> In principal-agent models, authoritative acts of delegation are linked (as in a chain) from one constitutionally recognised authority to another. Judges possess broad decision-making powers within the constitutional framework. But does it make the UKSC – in the terminology of delegation theory – an agent? See R.A. Posner, *The Federal Courts: Crisis and Reform*, (Cambridge, Mass: Harvard University Press, 1985), pp.286-287; A. Stone Sweet, ‘Constitutional Courts and Parliamentary Democracy’ (2002) 25(1) *West European Politics* 77–100, 81.

<sup>47</sup> D. Oliver, *Constitutional Reform in the UK* (Oxford: Oxford University Press, 2003), p.89.

<sup>48</sup> R.A. Dahl, ‘Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker’, (1957) 6 *Journal of Public Law* 279.

<sup>49</sup> R. G. McCloskey, *The American Supreme Court*, (Cambridge: Cambridge University Press, 1960); see also M.A. Graber, ‘The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary’ (1993) 7 *Studies in American Political Development* 35-73.

<sup>50</sup> *Laker Airways Ltd. v. Department of Trade* [1977] 2 W.L.R. 235, 267 (Lawton L.J.).

<sup>51</sup> Department of Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom* (CP 11/03), July 2003, at [23].

<sup>52</sup> See *McGonnell v UK* above n .00.

Although the CRA 2005 did not instigate radical constitutional change, the transition from House of Lords to UKSC has nonetheless had two significant effects. The first adjustment is superficial: the traditional division of labour between court and legislature has been enhanced and made increasingly visible, but neither the UKSC's jurisdiction nor its initial composition departed radically from those of the House of Lords. In this respect, the UKSC's creation is in line with 'the evolutionary nature of the common law and the institutional pragmatism of the constitution'.<sup>53</sup>

The second outcome relates to the increased institutional independence of the UKSC. To be sure, the UKSC does not have *suprema potestas*, but neither is it 'a third chamber in perpetual session'. Instead, we argue that it has been emancipated from subservience and matured into a court with its own independent and autonomous constitutional status. The creation of the UKSC comes at the tail-end of a steady expansion of judicial power and a broader recalibration of the historic imbalance between the constitutional influence of the judiciary, executive and Parliament that began in the 1960s in judicial review cases. In the 1980s the courts began to review cases of administrative action based not on the authorisation of Parliament, but on common law standards.<sup>54</sup> The effects of this transition, which accelerated during the 1990s, have been described as 'one of the most fundamental realignments of the constitutional order since the end of the seventeenth century'.<sup>55</sup> Over this period – as a cumulative result of the explicit (statutory) conferral and implicit arrogation of judicial powers – the apex court gradually developed a 'pronounced public law profile'<sup>56</sup> such that the UKSC can now be seen to discharge 'some of the functions of a constitutional court'.<sup>57</sup>

Yet the absence of explicit authorisation to act as a 'counter-majoritarian' force, as 'guardian of the constitution', or as an 'agent of constitutional change' acknowledges two paradoxes. First, while a culture of legal controls and judicial

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<sup>53</sup> C.J.S. Knight, 'Striking Down Legislation Under Bi-polar Sovereignty', [2011] P.L. 90, 91.

<sup>54</sup> J. Jowell, & A. Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] P.L. 368.

<sup>55</sup> A. Tomkins, *Public Law*, (Oxford: Clarendon Press, 2003), p.23.

<sup>56</sup> T. Poole and S. Shah, 'The Impact of the Human Rights Act on the House of Lords' [2009] P.L. 347, 361. See also: *The Supreme Court Annual Report and Accounts 2010-2011* (London: The Stationery Office, 2011), HC 976, p.6.

<sup>57</sup> Lord Phillips, Gresham Lecture, 2 June 2010.

review of the constitution has historically been absent, the UKSC – as a result of both the expanded role for the court as a constraint on government and the enhanced legitimacy which attaches to its institutional independence – enjoys greater constitutional influence than its predecessor; Lord Hope has spoken of the ‘added authority’ carried by decisions handed down by a *Supreme Court* independent of the legislature,<sup>58</sup> while it has been suggested in Parliament that the UKSC is ‘increasingly robust’.<sup>59</sup> Second, whereas the judges have claimed and received more power in their relations with government and Parliament, deference to the elected branches remains a recurrent – though contested – characteristic of public law litigation.<sup>60</sup>

As Robert Stevens has observed, ‘[t]he cult of parliamentary sovereignty hangs so heavily in the air that the reality of recent transfers of powers to the judges is shrouded in its mythology.’<sup>61</sup> Instead of perpetuating that mythology by airbrushing the courts out of the constitutional picture (cf. Dicey, Jennings, Tomkins), we argue on the grounds of both the power and status it has acquired that the UKSC be recognised in most (legal) cases as an ‘ordinary court’ of final appeal, and in exceptional (constitutional) cases as a ‘liminal’ or threshold court equipped with ‘residual powers’<sup>62</sup> that operates at the intersection of law and politics.<sup>63</sup> Authority for

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<sup>58</sup> Lord Hope, Barnard’s Inn Reading, ‘The Creation of the Supreme Court – Was it worth it?’, 24 June 2010.

<sup>59</sup> HC Debs, Vol.523, Col.968, 16 February 2011 (Mark Pritchard MP).

<sup>60</sup> For instance: *R v. Director of Public Prosecution, Ex p Kebilene* [2000] 2 AC 326, at 380-1 (Lord Hope). Cf. M. Hunt, ‘Sovereignty’s Blight: Why contemporary public law needs a concept of “due deference”’ in N. Bamforth and P. Leyland, *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003); T. R. S. Allan, ‘Human Rights and Judicial Review: A Critique of “due deference”’ [2006] C.L.J. 671.

<sup>61</sup> Stevens, above n.00, p.143.

<sup>62</sup> See S. Wheatle, ‘The Residual Powers of the Court’, UK Constitutional Law Group blog, 10 July 2012. The concept of a ‘liminal’ or threshold court is our own coinage.

<sup>63</sup> It is impossible to demarcate the boundary between a legal and a political decision. At one level, every decision is political. But ‘political questions’ (i.e. foreign affairs, fiscal policy, and national security) have tended to be non-justiciable in UK courts (see e.g. *R (Campaign for Nuclear Disarmament) v. Prime Minister* [2002] EWHC 2777 (Admin)). Generally, ‘the more purely political...a question is, the more appropriate it will be for political resolution....Conversely, the greater the legal content of any issue, the greater the potential role of the court’: *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [29] (Lord Bingham); see also at [108] (Lord Hope); see also R. Hirschl, ‘The Judicialization of Politics’, in

this proposition stems from the rule of law which conceives and legitimates the constitutional role of the UKSC as a counter-majoritarian institution to the consent-giving processes of Parliament.

#### THE CONSTITUTIONAL COMPETENCES OF THE UKSC

The autonomous, and authoritative, interpretative function of the UKSC underpins its burgeoning constitutional jurisdiction and adds weight to the suggestion that the UKSC be regarded as co-equal to Parliament in the resolution of constitutional disputes. The following section will discuss the specific constitutional functions the UKSC has acquired in relation to EU law, individual rights, and devolution. In these areas the UKSC fulfils a number of the functions commonly associated with apex courts which have marked the court out as a constitutional actor in its own right.

#### *Explicit Powers of Quasi-Constitutional Review*

The UKSC has ‘explicit’ powers of quasi-constitutional review in relation to matters arising under the European Communities Act 1972, the Human Rights Act 1998 and the United Kingdom’s devolution legislation.<sup>64</sup> In these areas, the UKSC operates as a proto-constitutional court and – in the exercise of the devolution jurisdiction – as a functional federal court, adjudicating over competence disputes between the Westminster parliament and devolved bodies.<sup>65</sup>

The jurisdiction inherited by the UKSC from the Appellate Committee of the House of Lords permitted two specific areas of review on constitutional grounds. In the context of EU law, Parliament’s competence is substantively limited in two ways: first, it may not legislate contrary to EU law (s.2(4) EAC 1972); and second, courts enjoy power to ‘disapply’ national law to the extent that it is inconsistent with directly effective provisions of EU law.<sup>66</sup> It is acting in this capacity – and in exercising the

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Robert E. Goodin, (ed.) *The Oxford Handbook of Law and Politics*, (Oxford: Oxford University Press, 2008).

<sup>64</sup> Northern Ireland Act 1998; Scotland Act 1998; Government of Wales Acts 1998 and 2006.

<sup>65</sup> For instance: *Martin and Miller v. Her Majesty’s Advocate* [2010] UKSC 10.

<sup>66</sup> *R v. Secretary of State for Transport, ex parte Factortame (No.2)* [1991] 1 A.C. 603.

power to disapply primary legislation – that the UKSC most clearly discharges functions akin to ‘strong form’ judicial review.<sup>67</sup>

HRA review gives rise to consequences of a slightly different order, permitting courts to interpret primary legislation in order to achieve compliance with ‘the Convention Rights’ so far as it is possible to do so or in the alternative providing for the issue of a declaration of incompatibility. Though neither option permits the court to mount a direct challenge to the legality of an Act of Parliament, the HRA nonetheless empowers the UKSC to act as a ‘counter-majoritarian’<sup>68</sup> institution, an agent of ‘external standards of justice’, and arguably also (in prompting legislative reform via a declaration of incompatibility) as an ‘agent of constitutional change.’<sup>69</sup>

To this developing constitutional jurisdiction can now be added the powers of the UKSC to determine legal disputes relating to ‘devolution issues’ that arise out of the transfer of legal powers to elected legislative bodies in Northern Ireland, Scotland and Wales.<sup>70</sup> The power of the Supreme Court – previously exercised by the Judicial Committee of the Privy Council – is something of a departure from the traditional distinction placed by the constitution on the review of executive and legislative action, in the devolved context potentially subjecting both to judicial review. In this context, the UKSC’s jurisdiction is once more counter-majoritarian and with a clear quasi-federal dynamic which, although nascent since legal challenges to the legislative competence of the devolved legislatures have not been a common occurrence,<sup>71</sup> nonetheless provides evidence of the expanding powers of the court to intervene, on constitutional grounds, in decisions originating in the political sphere.

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<sup>67</sup> See: M. Tushnet, ‘New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries’ (2003) 38 *Wake Forest Law Review* 813.

<sup>68</sup> See: *RB (Algeria) v. Secretary of State for the Home Department* [2009] UKHL 10, at [209]-[211] (Lord Hope).

<sup>69</sup> For two notable examples see: *R (Anderson) v. Secretary of State for the Home Department* [2002] UKHL 46 (and the legislative response in the Criminal Justice Act 2003); *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68 (prompting reforms contained in the Prevention of Terrorism Act 2005).

<sup>70</sup> Constitutional Reform Act 2005, s.40 and sch.9.

<sup>71</sup> See: *Martin and Miller v. Her Majesty’s Advocate* [2010] UKSC 10; *AXA General Insurance v. Lord Advocate* [2011] UKSC 46. For analysis see: R. Hazell, ‘Out of Court: Why have the courts played no role in resolving disputes in the United Kingdom?’ (2007) 37 *Publius* 578.

### *Implicit Powers of Quasi-Constitutional Review*

The basis for the implied constitutional jurisdiction of the House of Lords, and now UKSC, can be found in the regulatory role of the rule of law as well as in the parallel rejection of the suggestion that governmental powers might be substantially immune from judicial review.<sup>72</sup> The continued expansion of judicial review and erosion of non-justiciability doctrines, which challenge Dicey's monolithic reading of sovereignty, provides the clearest evidence of the incremental changes to the courts' role within the constitution. On the one hand, the courts have acknowledged that external factors might influence statutory construction; a judicial belief in the 'sanctity'<sup>73</sup> of statutory language has yielded ground to more generous and purposive techniques of construction (particularly in the constitutional sphere).<sup>74</sup> On the other, the development of ideas associated with what has been referred to as 'the common law constitution'<sup>75</sup> have exposed the traditional positivist and sovereignty-driven explanation of the constitution as being inadequate.

The constitutional aspirations of the common law (and of at least some of the judges) have been revealed through the incremental development of a body of 'constitutional rights',<sup>76</sup> and acknowledged in the distinction between constitutional and non-constitutional statutes.<sup>77</sup> The high watermark of this line of reasoning remains Lord Hoffmann's articulation of the principle of legality in *R v. Secretary of State for the Home Department, ex parte Simms*.<sup>78</sup> Via the controlling mechanism of

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<sup>72</sup> See eg: *Jackson and others v. Her Majesty's Attorney-General* [2005] UKHL 56; [2006] 1 A.C. 262, at [101]-[102] (Lord Steyn); *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] 1 A.C. 453, at [35] (Lord Hoffmann).

<sup>73</sup> G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), p.74.

<sup>74</sup> *Robinson v. Secretary of State for Northern Ireland* [2002] UKHL 32, at [11] (Lord Bingham).

<sup>75</sup> For the most comprehensive analysis see: T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001). Cf. J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010), Chapter 2.

<sup>76</sup> *R v. Lord Chancellor, ex parte Witham* [1998] Q.B. 575; *R (on the application of Daly) v. Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532.

<sup>77</sup> *Thoburn v. Sunderland City Council* [2003] Q.B. 151, [2002] EWHC 195 (Q.B. Div. Ct.) at [62]. See also Lord Phillips of Worth Matravers, 'The art of the possible: statutory interpretation and human rights', first Public Law Lecture in memory of Lord Alexander of Weedon QC, 22nd April 2010.

<sup>78</sup> *R v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115, 131. Cf. *Watkins v Secretary of State for the Home Department* [2006] UKHL 17; [2006] 2 A.C. 395.



the common law, Hoffmann addresses one of the most controversial and divisive issues in contemporary public law discourse; the tension between the legal controls imposed by the rule of law and the theoretically limitless legal powers wielded by Parliament. On the one hand, Hoffmann is at pains to preserve the ability of Parliament to legislate contrary to fundamental individual rights. On the other, the constitutional function of the common law has very clearly expanded so as to subject primary legislation to a degree of legal control.

To say, however, that the principle of legality permits courts to ‘apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document’<sup>79</sup> is to overstate the point. Clear legislative intent remains an unquestionable trump. The most the common law empowerment allows the judges to do is to require express or unambiguous words where Parliament wishes to override fundamental rights or the rule of law.<sup>80</sup> So on what basis can the UKSC interpret constitutional laws in future cases in a manner that respects the sovereignty of the legislature *and* the rule of law?

#### A FINAL INTERPRETATIVE AUTHORITY

Kate Maleson’s analysis of the evolving role of the UKSC concludes that ‘any assessment of its future role is inevitably speculative’.<sup>81</sup> Knight concedes that any attempt to list the circumstances in which the court might ‘strike down legislation’ is ‘an impossible task’.<sup>82</sup> Similarly, Lord Phillips hopes that the power struggle between Parliamentary sovereignty and the rule of law ‘will remain academic’.<sup>83</sup> Instead of avoiding the issue, we outline the foundation that underpins the court’s role before seeking to map out legitimate judicial responses for certain types of future constitutional cases. Three sources of judicial review are available to determine the nature of the court’s response to questions of legislative and constitutional

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<sup>79</sup> *Simms*, above n.00, 131. See also: *Thoburn v. Sunderland City Council* [2003] Q.B. 151, 187.

<sup>80</sup> *AXA General Insurance Ltd v. The Lord Advocate* [2011] UKSC 46, at [149-152] (Lord Reed). See also Lord Neuberger, ‘Who are the Masters now?’, Second Lord Alexander of Weedon Lecture, 6 April 2011, [73].

<sup>81</sup> K. Maleson, ‘The Evolving Role of the Supreme Court’ [2011] P.L. 754, 771.

<sup>82</sup> Knight, above n.00, p.90.

<sup>83</sup> *R (on the application of Cart) v The Upper Tribunal* [2011] UKSC 28, at [73].

interpretation: Parliamentary intent, the common law constitution, and the rule of law. We argue that it is the rule of law that provides the foundation of, and normatively frames, the UKSC's constitutional authority. The alternative sources (the doctrine of parliamentary sovereignty and the common law) neither fully account for, nor explain, the constitutional influence of the UKSC for the reason that both structure the relationship between Parliament and the UKSC in hierarchical terms. The argument that the UKSC derives its authority from the doctrine of Parliamentary sovereignty reduces the court's constitutional supervision to determining the 'will' of Parliament: the result is the necessarily subordinate role discussed in the context of the judicial House of Lords. It fails to capture anything beyond the 'plain meaning' interpretation of statutes, is blind to new institutional conditions and environment, and is unable fully to conceptualise the functions and powers that the UKSC has acquired.

The alternative thesis, by contrast, overextends the common law as the source of the UKSC's authority. T.R.S Allan identifies two constitutional obligations for the courts. They have a primary, positive obligation to develop progressively the constitution,<sup>84</sup> and a secondary obligation (to Parliament) 'to apply the constitutional law of the United Kingdom, in accordance with the political morality on which that law is based'.<sup>85</sup> The courts' obedience to statute is subject to the normative substratum of the common law which consists of 'independent principles of justice', such as fairness, reason, accountability, but also fundamental rights and equality of treatment, 'that are appropriate for judicial application in all other areas of the common law'.<sup>86</sup> In other words, the courts do not merely police government action, but also the process of democracy itself (i.e. the formal validity of an Act). If the Act fails to commit 'to some irreducible, minimum concept of the democratic principle', its invidious nature would render it 'unconstitutional' and release the courts from their (habitual) obligation to apply it.<sup>87</sup> Allan relegates Parliament in Lockean fashion from

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<sup>84</sup> T.R.S. Allan, 'Parliamentary Sovereignty: Law, Politics and Revolution' (1997) 113 *Law Quarterly Review* 443, 451.

<sup>85</sup> T.R.S Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993), p.281. For a recent restatement see T.R.S. Allan, 'Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism' (2011) 9(1) *International Journal of Constitutional Law* 155-162.

<sup>86</sup> Jowell & Lester, above n.00, 382.

<sup>87</sup> T.R.S Allan, *Law, Liberty, and Justice*, above n.00, p.282.

‘sovereign’ to ‘supreme law-maker’, and promotes the courts to acquire ‘legal sovereignty’ for it is they who ultimately ‘determine the validity of statutes in accordance with the principle of equality and with due regard for the other essential constituents of the rule of law’.<sup>88</sup>

Instead of rooting the court’s authority for judicial review in the common law, which for Allan rivals and replaces the doctrine of Parliamentary sovereignty as the rule of recognition, we would base it on the rule of law which for Dicey was ‘closely connected’ to, and thus mediated, Parliament’s legislative competence.<sup>89</sup> Our premise has a number of advantages. A negative advantage is that it avoids the trappings of having to conceive the common law as a ‘higher order law’<sup>90</sup> or as a ‘common law constitution’<sup>91</sup> and, by extension, having to over-promote the UKSC by attributing to it full powers of constitutional review as the guardian of a supreme body of common law which it patently does not have. The UK constitution has not, to date, generated its own *Marbury v. Madison* moment, in which the apex court unilaterally claimed for itself the power to invalidate legislation which infringed the constitution.<sup>92</sup> Nor, as a result of the pervasive influence of the sovereignty doctrine, has the separation of powers been so clearly defined as to permit United Kingdom courts to state that ‘[i]t is emphatically the province and duty of the Judicial Department to say what the law is’ with the same authority as the US Supreme Court in that decision.<sup>93</sup>

Yet it is undoubtedly the role and function of the court to vindicate the rule of law.<sup>94</sup> We argue that the UKSC’s authority proceeds from, and is framed by, the rule of law. This premise ‘lends additional normative weight and legitimacy to the judiciary, and explains why exactly judges should enjoy a privileged status’.<sup>95</sup> It is

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<sup>88</sup> T.R.S Allan, *Constitutional Justice*, above n.00, p.3.

<sup>89</sup> Dicey, *Introduction to the Study of the Law of the Constitution*, 184. See now *R (Cart) v. The Upper Tribunal* [2009] EWHC 3052 at [36] (Laws LJ).

<sup>90</sup> J. Laws, ‘Law and Democracy’ [1995] P.L. 72, 87.

<sup>91</sup> Allan, *Law, Liberty, and Justice and Constitutional Justice*.

<sup>92</sup> *Marbury v. Madison* 5 US 1 Cranch 137 (1803).

<sup>93</sup> *Ibid.*, 180.

<sup>94</sup> See for instance: *R v Horseferry Road Magistrates’ Court, ex parte Bennett* [1994] 1 AC 42, 61-62; *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin), at [59], [62], [96] and [170].

<sup>95</sup> D. Smilov, ‘The Judiciary: The Least Dangerous Branch?’, in M. Rosenfeld and A. Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), p.866.

true that the rule of law is subject to divergent, formal and substantive, interpretation,<sup>96</sup> but there is general agreement that it is an ideal for both Parliament and the courts. That the rule of law is one of the twin fundamentals on which the constitution rests,<sup>97</sup> is acknowledged by scholars,<sup>98</sup> judges<sup>99</sup> and primary legislation.<sup>100</sup> Whereas Parliament is the ‘grand forum of the nation’ that determines the national interest and enacts laws that should be prospective, stable, clear and general, the court is ‘the forum of principle’<sup>101</sup> and of individual rights.

For present purposes, the principles that the rule of law embraces are two-fold. On the one hand, they include factors that are designed to uphold individual rights retrospectively through their independence, accessibility, and the principles of natural justice. A counter-majoritarian function is, therefore, integral to and inherent in the residual power of the courts to uphold the rule of law: ultimately, ‘the rule of law is nothing if it fails to constrain overweening power.’<sup>102</sup> In short, the rule of law is ‘the ultimate controlling factor on which our constitution is based’,<sup>103</sup> and may well be necessary for democracy itself.<sup>104</sup>

On the other hand, the rule of law is designed to enhance two judicial virtues: courage and integrity.<sup>105</sup> Courage allows the judge ‘to withstand pressures and

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<sup>96</sup> See generally M. Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), Ch.11.

<sup>97</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, [1885] 10th ed., (London: Macmillan, 1959), ch.XIII.

<sup>98</sup> See eg: J. Jowell, ‘The Rule of Law and its underlying values’ in J. Jowell and D. Oliver (eds), *The Changing Constitution* (7<sup>th</sup> ed) (Oxford: Oxford University Press, 2011), p.12.

<sup>99</sup> See eg: *R v. Secretary of State for the Home Department, ex parte Pierson* [1998] 1 AC 539, 591; *R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295, at [73]; *Jackson and others v. Her Majesty’s Attorney General*, above n.00, at [107].

<sup>100</sup> Constitutional Reform Act 2005, s.1 and s.17(1).

<sup>101</sup> A. Bickel, *The Least Dangerous Branch*, above n.00, pp.23-28; R. Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), pp.33-71.

<sup>102</sup> *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin), at [64] (Moses LJ).

<sup>103</sup> *Jackson and others v. Her Majesty’s Attorney General*, above n.00, at [107] (Lord Hope).

<sup>104</sup> F. Hayek, *The Constitution of Liberty* (London: Routledge, 1960), p.216.

<sup>105</sup> D. Pimentel, ‘Reframing the Independence v Accountability Debate: Defining Judicial Structure in Light of Judges’ Courage and Integrity’ (2009) 57 *Cleveland State Law Review* 2.

influences, even threats and exercise true independence in her decision-making’, whilst integrity demands ‘a commitment to the highest principles of judicial decision-making’.<sup>106</sup> The judges’ ‘privileged status’ is necessary for them to work unencumbered from political and populist pressures,<sup>107</sup> budgetary constraints, or the concerns of the press, and to decide individual and fundamental rights questions in accordance with constitutional principle. In the United Kingdom, the rule of law lies behind the constitutional importance of independent justice, and is directly responsible for the visible separation of the UKSC from the structures of central government.

Daniel Smilov traces judicial authority to four normative foundations (the separation of power, the rule of law, the judiciary’s ultimate authority to decide legal disputes, and their independence and impartiality<sup>108</sup>). But these four aspects actually make up our broader understanding of the rule of law: it is more than a procedural, functional device in administrative law and less than a substantive, normative source in common law constitutionalism. The expanded constitutional function of the UKSC runs in train with (and in some instances has precipitated) an understanding of the rule of law which demands justification for interferences with individual freedoms and which has steadily come to reject the construct of courts as mere agents of parliamentary intent. Even if this reading of the rule of law remains open to debate, it must be conceded that a more formalist interpretation acknowledges that judges enjoy power to settle legal disputes and to state the law authoritatively so as to establish precedents.<sup>109</sup> It is the acceptance of the determinative power of judicial decisions that underpins the positive contribution of the UKSC to the resolution of constitutional disputes.<sup>110</sup>

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<sup>106</sup> Ibid. at 20, 23.

<sup>107</sup> Alexander Hamilton, Federalist Paper 78, in A. Hamilton, J. Jay, & J. Madison, *The Federalist*, 4th ed., (Cambridge, MA: Harvard University Press, 1974); Bickel, *The Least Dangerous Branch*, above n.00, p.17.

<sup>108</sup> D. Smilov, ‘The Judiciary: The Least Dangerous Branch?’, above n.00, p.862-863.

<sup>109</sup> L. Heuschling, ‘Why Should Judges Be Independent?’, in K. Ziegler et al, *Constitutionalism and the Role of Parliaments* (Oxford: Hart Publishing, 2007), p. 202.

<sup>110</sup> *In re McFarland* [2004] UKHL 17; [2004] 1 W.L.R. 1289, at [7] (Lord Bingham of Cornhill). See also: *M v. Home Office* [1994] 1 A.C. 377, 395 (Lord Templeman).

The authoritative interpretative function of the court is further supported by the fact that the occasions on which legislative action has been taken to reverse or otherwise avoid a judicial determination of the law have been rare.<sup>111</sup> The legally-binding nature of judicial decisions is a requirement of legal certainty imposed by the rule of law, and therefore by the constitution. To coin a phrase: Parliament habitually recognises judicial decisions as binding law. Indeed, the interpretative powers of the courts are so well-established that they are regarded as ‘politically entrenched’ by the elected branches, meaning that it is ‘not only politically difficult but also constitutionally questionable for parliaments to reject a court’s particular interpretations or even question a court’s interpretative methods.’<sup>112</sup> As Laws L.J. has observed:

The interpreter must be impartial, independent both of the legislature and of the persons affected by the text’s application, and authoritative – accepted as the last word, subject only to any appeal. Only a court can fulfil that role.<sup>113</sup>

Current practice is best illustrated with the operation of the HRA: to date there have been no legislative reversals of action taken pursuant to s.3(1), while declarations of incompatibility – the measure supposed to preserve the legislative discretion of Parliament<sup>114</sup> – have been acted upon positively in all but one (particularly controversial) instance.<sup>115</sup> As a result, in each instance the declaratory function of the courts has been endorsed either tacitly or explicitly in subsequent remedial legislation.

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<sup>111</sup> For a notorious example see the War Damage Act 1965 (legislative avoidance of the consequences of *Burmah Oil Ltd. v Lord Advocate* [1965] AC 75).

<sup>112</sup> T. Campbell, ‘Incorporation through Interpretation’ in T. Campbell, K.D. Ewing and A. Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001), p.87.

<sup>113</sup> *R (Cart) v. Upper Tribunal* [2009] EWHC 3052, at [37].

<sup>114</sup> Section 4(6) HRA.

<sup>115</sup> Aileen Kavanagh has referred to the emergence of a ‘practice’ under which the ‘elected branches do not reject’ declarations of incompatibility (A. Kavanagh, *Deference or Defiance? The limits of the judicial role in constitutional adjudication* in G. Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008), p.214. While the declaration – issued in *Smith v. Scott* [2007] S.C. 345 – that s.3(1) of the Representation of the People Act 1983 was incompatible with Article 3 of Protocol 1 of the European Convention on Human Rights remains outstanding, the Coalition Government remain committed to a legislative response (see: HC Debs, Vol.520, Cols.150-151 WS, 20 December 2010).

The role of the apex court in the determination of the obligations imposed upon both executive and Parliament is not to be found in the making of non-binding contributions to a broader dialogue between branches,<sup>116</sup> but often as the effective final domestic arbiter of the requirements of the HRA. Moreover, the suggestion that the legislative reversal or amendment of a judicial determination of the requirements of the law necessarily demonstrates parliamentary superiority ignores the fact that Parliament might well legislate for reasons other than asserting its constitutional superiority. Primary legislation might clarify a particularly difficult or unclear area of the law, or provide certainty in the aftermath of a split decision of the apex court.<sup>117</sup>

#### LEGITIMATE JUDICIAL RESPONSES IN CONSTITUTIONAL CASES

But how would the court respond, for instance, if Parliament passed legislation that disenfranchised a substantial proportion of the population on arbitrary grounds<sup>118</sup> or insulated vast tranches of governmental activity from the scrutiny of the courts<sup>119</sup> – in other words, failed to commit ‘to some irreducible, minimum concept of the democratic principle’ (Allan’s example noted above)? Possible judicial responses to Parliament doing the ‘unthinkable’<sup>120</sup> – as Malleeson has acknowledged – tend to be couched in ‘non-specific and slightly euphemistic terms’<sup>121</sup> and are countered with a straightforward re-assertion of the sovereignty of Parliament.<sup>122</sup> None of these statements are practically helpful or normatively insightful.

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<sup>116</sup> T. Campbell, ‘Incorporation through Interpretation’ in T. Campbell, K.D. Ewing and A. Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001). Cf. T. Hickman, ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act’ [2005] PL 306.

<sup>117</sup> See: *YL v. Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95 and Health and Social Care Act 2008, s.145.

<sup>118</sup> Dicey, *Law of the Constitution*, above n.00, pp.78-79; Allan, *Law, Liberty, and Justice*, above n.00, p.282.

<sup>119</sup> *Jackson and others v. Her Majesty’s Attorney General*, above n.00, at [102] (Lord Steyn). See also Baroness Hale at [159].

<sup>120</sup> Lord Woolf, ‘Droit Public – English Style’ [1995] P.L. 57, 69: *AXA General Insurance Ltd v. The Lord Advocate* [2011] UKSC 46, at [51] (Lord Hope).

<sup>121</sup> Malleeson, above n.00, 763.

<sup>122</sup> See: Lord Neuberger, ‘Who are the masters now?’ Lord Alexander of Weedon Lecture, 6 April 2011; Stephen Sedley, ‘Judicial Politics’ 34(4) *London Review of Books*, 23 February 2012.

Our argument is that the UKSC should be accommodated within the constitution as a locus of power, that is on a par with, but not superior to, the other political institutions, in order to determine disputes at the intersection of law and politics using its own inherent residual powers that are not anti-democratic but counter-majoritarian. It is, after all, within Parliament's own reserve power to amend the law itself (a power which for Bickel 'is of the essence, and no less so because it is often merely held in reserve'<sup>123</sup>). In this heterarchical institutional conversation, the possibility of Parliament amending a judicial decision might condition the particular judicial remedy proposed, but so too may the possibility of an adverse judicial response condition Parliamentary law-making.<sup>124</sup> Our constructive proposal is that the UKSC be recognised as:

1. A constitutional organ

- i) it exercises proto-constitutional powers in relation to the European Union and the European Convention of Human Rights;
- ii) it acts as a quasi-federal court in devolution cases;

2. A judicial organ

- iii) an ordinary court of law that habitually recognises Parliament's legislative monopoly;
- iv) a supervisory court in non-constitutional (administrative) judicial review cases;

3. A legitimating organ

- v) a liminal or threshold court in certain constitutional cases.

We have already discussed the first two functions of the UKSC and concluded that those functions are now established and non-controversial. It is in its role as a legitimating organ that the status of the UKSC will likely be assessed in future cases. Where the UKSC acts as a liminal or threshold court with residual power in certain constitutional cases – to return to Allan's example – the judges should neither straightforwardly interpret (and apply) the plain will of Parliament nor invalidate the

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<sup>123</sup> Bickel, *The Least Dangerous Branch*, p.17.

<sup>124</sup> See, for instance, the saga relating to the Asylum and Immigration (Treatment of Claimants) Bill 2004. On which see: R. Rawlings, 'Review, revenge and retreat' (2005) 68 M.L.R. 378, 379.



Act based on ‘higher’ principles. The UKSC is unlikely to follow uncritically and slavishly the central tenet of Diceyan orthodoxy: the ‘respect to be shown to the considered judgment of a democratic assembly’ is no longer a matter of assumption and ‘will vary according to the subject matter and the circumstances.’<sup>125</sup> Conversely, the argument that the UKSC should extend its brief and strike down legislation would be a clear usurpation of the powers of the legislature. We argue that there are three legitimate judicial responses in constitutional cases, each occupying a position between uncritical, literal application of parliamentary intent and robust judicial enforcement of a substantive rule of law.

The most robust course available to the court draws inspiration from the seminal House of Lords decision in *Anisminic v. Foreign Compensation Commission*.<sup>126</sup> In the exceptional case of a clash between constitutional fundamentals, the *Anisminic* decision might be deployed in order to support the reinstatement of a jurisdiction apparently ousted by statute, or – read more broadly – prevent the attempted insulation by statute of otherwise *ultra vires* activity from judicial review. While falling short of US-style constitutional review, ‘knowing’<sup>127</sup> or ‘disingenuous’<sup>128</sup> judicial disobedience to primary legislation remains the most potent weapon available to the UKSC in the event of such a constitutional clash.

Sitting below outright disobedience, in legal terms at least, would be the judicial articulation of a ‘declaration of unconstitutionality.’ Drawing inspiration from declarations of incompatibility under the HRA 1998, David Jenkins has argued that the courts possess the inherent power to declare Acts of Parliament to be unconstitutional ‘when Parliament legislates against legal norms or fundamental baselines for political behaviour deemed by courts of special significance within Britain’s unwritten constitution.’<sup>129</sup> Such declarations, Jenkins argues, would

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<sup>125</sup> *R (on the application of Countryside Alliance) v. Attorney-General* [2007] UKHL 52; [2008] A.C. 719, at [45].

<sup>126</sup> *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208.

<sup>127</sup> J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010), p.286.

<sup>128</sup> M. Aronson, B. Dyer and M. Groves, *Judicial Review of Administrative Action* (3<sup>rd</sup> ed) (Pymont, NSW: Lawbook Co, 2004), p.830.

<sup>129</sup> D. Jenkins, ‘Common Law Declarations of Unconstitutionality’ (2009) 7 *International Journal of Constitutional Law* 183, 186.

respectful of sovereignty in two ways. First, they would be ‘nonbinding and not affect the legal validity’ of the statute in respect of which they were made.<sup>130</sup> Second, ‘the declaration openly recognizes Parliament’s exercise of sovereign power within (or, one might say, against) an accepted constitutional context.’<sup>131</sup> Judicial disobedience would pose the most obvious threat to Parliament’s authority by rendering subsequent applications of the legislation contingent on the court’s disobedient response (though legislative restoration, or refinement, of the disputed provision would remain a possibility). The consequences of the issue of a ‘declaration of unconstitutionality’ would not be so severe. A legislative response to such a declaration might result from the political damage caused by the interpretative authority attached to the judicial reading of the requirements of the constitution, but would not be an inevitability. The impugned statute would remain operable. The declaration of unconstitutionality would, therefore, better straddle the principle of judicial control and the principle of legislative supremacy, and offer greater respect to the political underpinnings of the UK constitution.

Finally, the courts may in certain constitutional cases need to soften the letter of the law in order to achieve fairness in individual cases. Like equity, which ‘mitigates the rigour of the common law’,<sup>132</sup> the rule of law ensures that the formal legal doctrine of Parliamentary sovereignty does not lose sight of constitutional principles (e.g. legality and equality) that are of fundamental importance in individual circumstances. According to Lord Hoffmann, the ‘principle of legality’ can be overridden by the clear direction of statutory language, which protects the sovereignty of Parliament yet arguably undercuts the notion of the United Kingdom as a ‘European liberal democracy’ that recognises societal pluralism and protects the rights of minorities.<sup>133</sup>

In conclusion, we argue that the rule of law requires courts to interpret an Act of Parliament and also to ensure that its application does not result in unfairness in

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<sup>130</sup> Jenkins, above n.00, 214.

<sup>131</sup> Jenkins, above n.00, 187.

<sup>132</sup> *Earl of Oxford’s Case* (1615) 1 Ch Rep 1, per Lord Ellesmere LC: ‘to soften and mollify the extremity of the law’; *Lord Dudley v Lady Dudley* (1705) Prec Ch 241, 244, per Lord Cowper, LC: ‘Equity is no part of the law, but a moral virtue which qualifies, moderates and reforms the rigour, hardness and edge of the law’.

<sup>133</sup> Lord Steyn, *The Constitutionalisation of Public Law*, above n.00, 4.

specific cases. Limits to majoritarianism are set through adjudication that is principled, reasoned, and public.<sup>134</sup> Attempts to reconcile parliamentary intent with the requirements of the rule of law are a less dramatic and a more realistic and workable suggestion than the conferral of a general discretion on the courts to disapply unconstitutional and pernicious Acts of Parliament.<sup>135</sup> Our proposal that sovereignty and the rule of law be acknowledged as constitutional equals reflects the new institutional balance that is not defined by the hierarchical ordering of the legislature and the judiciary, and a new constitutional choice that is not limited to the subordination or supremacy of the courts.<sup>136</sup>

To classify this new conception as ‘judicial supremacism’ or ‘extra-judicial romanticism’<sup>137</sup> would be too easy. The mature constitution of a stable liberal Western democracy must have the ability to subject the legislative function to a degree of judicial control in the case of a conflict between a statute and a fundamental constitutional principle. To classify the quasi-constitutional functions of the UKSC as a step towards judicial supremacism is to deny the distinctive functions of the legislative and judicial branches: ‘[c]ourts do not substitute Parliament in the making of policy decisions as they are limited by the principle of institutional integrity: “[t]here is a Rubicon which they may not cross.”’<sup>138</sup> It also denies the crucial constitutional role of the courts in their habitual recognition of Parliament as sovereign.<sup>139</sup> The constitutional functions and authority of the UKSC, therefore, form the embodiment of the balanced constitution in its modern incarnation. The role of the UKSC is complementary to that of Parliament, and of the executive. To portray it otherwise is to deny the equality of parliamentary sovereignty and the rule of law, and to make the rudimentary mistake of viewing courts as either supreme or subservient.

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<sup>134</sup> J. Raz, *Ethics in the Public Domain, Essays on the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), Chs. 10, 13.

<sup>135</sup> Lord Woolf, ‘Droit Public – English Style’ [1995] P.L. 57, 68-69.

<sup>136</sup> Cf. K.D. Ewing, “Judiciary”, in M. Flinders et al. (eds), *The Oxford Handbook of British Politics* (Oxford: Oxford University Press, 2009), p.278.

<sup>137</sup> Lord Irvine ‘Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review’ [1996] P.L. 59, 75.

<sup>138</sup> Lord Steyn, *The Constitutionalisation of Public Law*, above n.00, 7.

<sup>139</sup> *R (Cart) v. The Upper Tribunal* [2009] EWHC 3052 at [38] (Laws LJ).

## CONCLUSION

At first blush, the UKSC represents the least radical option. It is neither a US-style Supreme Court nor a dedicated European-style constitutional court separate from the judicial system.<sup>140</sup> Although no longer ‘hidden beneath the robes of [the] legislative assembly,’<sup>141</sup> the UKSC assumes the jurisdiction of the judicial House of Lords, but with the addition of appeals arising under the Scots, Welsh and Northern Irish devolution legislation of 1998. It exercises the same powers, and has no new power to annul or strike down legislation. Its procedures, although modernised, will much more closely resemble those of its predecessor than those of, say, the top courts of other European countries. In sum, the creation of the UKSC is not a radical departure from the mixed constitution with interlocking institutions.

The argument advanced here has suggested that this narrative of continuity and stability understates the increased constitutional status and the continuing political repercussions of the UKSC. In terms of constitutional theory, it represents greater adherence to the visible separation of powers and the requirements of judicial independence.<sup>142</sup> More importantly, however, the creation of a formal apex court is also a milestone in the formalisation of the judicial branch and its functions and a manifestation of the ongoing shift in the balance of power, away from politicians towards the judges, which has implications for all constitutional institutions. The creation of the UKSC finally vindicates aspects of the French and American constitutional paradigm. However, instead of forming part of a revolutionary constitutional moment or explicit break with the past, the UKSC ushers in a more visible separation of powers by stealth.

There are those who see danger in the increased formalisation and autonomy of the judicial branch; Lord Neuberger, Master of the Rolls, has cautioned against the possibility of ‘judges arrogating to themselves greater power than they have at the moment’.<sup>143</sup> Judicial review is still limited by Parliamentary sovereignty. However,

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<sup>140</sup> For a discussion of the available options at the time see Lord Bingham of Cornhill, *A New Supreme Court for the United Kingdom*, above n.00; A. Le Sueur (ed), *Building the UK's New Supreme Court: National and Comparative Perspectives*, (Oxford: Oxford University Press, 2004).

<sup>141</sup> W. Bagehot, *The English Constitution*, p.96.

<sup>142</sup> Masterman, above n.00.

<sup>143</sup> A. Anthony, ‘Lord Phillips: Liberal-minded master of lucidity’, *The Observer* 4 October 2009. See also: Neuberger, above n.00.

this limitation has been significantly reduced by membership of the European Union, the increased effect of the European Convention on Human Rights, and the determination of some judges to protect fundamental constitutional rights. This trend may continue, should the courts claim an inherent power to strike down legislation or, at least, to render ineffective any Act of Parliament viewed as ‘unconstitutional.’<sup>144</sup> Such an outcome is, however, by no means certain. The democratic underpinnings of statute law clearly resonate within the higher judiciary.<sup>145</sup> As a result, the more accurate constitutional position is somewhere between the two extremes, with the UKSC operating at a variable, and context-specific, point between subordination and supremacy.

Writing shortly before the announcement that the House of Lords would be replaced by a new Supreme Court, Robert Stevens asked whether the constitution should recognise ‘a “real” separation of powers and more meaningful concept of judicial independence’.<sup>146</sup> The narrative so far of the UKSC provides an account that is partial, indirect, incomplete, and fails to address the newly-gained status and authority of the court. The essence of modern constitutionalism is not determined by its form (e.g. visible separation of powers, documentary constitution, higher-order law etc.) but through its content. The ‘new constitutional settlement’ that consists of the Human Rights Act 1998, the devolution legislation of 1998, and the Constitutional Reform Act 2005 is best understood as allowing for a new constitutional relationship between Parliament and the courts in which each is able to make a distinctive contribution to the furtherance of rights protection and to the articulation of constitutional norms.<sup>147</sup> The search for an ultimate constitutional authority is a

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<sup>144</sup> See the dicta by Law Lords Steyn and Hale in *Jackson* above, n.00. Cf. R. Clayton, ‘Judicial Deference and “Democratic Dialogue”: The Legitimacy of Judicial Intervention under the Human Rights Act 1998’ [2004] P.L. 33, 34.

<sup>145</sup> Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010). See also n.00 above.

<sup>146</sup> Stevens, above n.00, p.141 (Stevens’ book was first published in 2003).

<sup>147</sup> A. Kavanagh, *Constitutional Review under the UK Human Rights Act 1998* (Cambridge: Cambridge University Press 2009); I. Cram, ‘Judging Rights in the United Kingdom: The Human Rights Act and the New Relationship between Parliament and the Courts’ (2006) 12 *Review of Constitutional Studies* 53-82; See generally Constitution Committee, ‘Relations Between the Executive, the Judiciary and Parliament’ HL (26 July 2007), 6.

diversion: 'legislative and judicial functions are complementary; the supremacy of either has no place.'<sup>148</sup>

In this new constitutional order, democratic decision-making cannot simply mean securing the approval in legislatures of temporary political majorities. The courts share in the task of policing the boundaries of a rights-based democracy with the legislature and executive.<sup>149</sup> By skirting the extremes of constitutional subordination and superiority the UKSC plays a meaningful constitutional role as a counter-majoritarian institution authorised by the principle of the rule of law to review private and public law cases, governmental conduct, and determine fundamental constitutional questions. In doing so it complements, and occasionally challenges (within reason and on grounds of principle), the traditional dualism between the legislature and the executive. Empowered by the rule of law (the new 'secret virtue' of the UK constitution) the UKSC functions as a counter-majoritarian check within a reconfigured Westminster model of mixed government that recognises the valid contributions of all three organs of state power.

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<sup>148</sup> R. Cooke, 'The Road Ahead for the Common Law' (2004) 53 I.C.L.Q. 273, 278.

<sup>149</sup> See, critically, J.E.K. Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29 O.J.L.S. 427-455.