

# The scope of judicial law-making in constitutional law and public law

At a time when the government has initiated reviews of administrative law and the Human Rights Act 1998, this is a suitable occasion for me to revisit the scope of judicial law-making. I have written on this subject before,<sup>1</sup> but have not written a paper which focusses solely on public law. In this paper I seek to place modern developments in constitutional law and public law in their historical context, discuss the circumstances which have enhanced the role of the judiciary in our society, and examine the necessary limitations on the judicial role.<sup>2</sup>

Public law in the jurisdictions of the United Kingdom is the product of the common law and statute law, notably in the devolution legislation and the Human Rights Act 1998, which incorporated into our domestic law rights and freedoms guaranteed under the European Convention on Human Rights (“ECHR”). Judges are sometimes criticised for developing the law, as if the law were a fixed set of rules which did not and should not adapt to social change. That is misconceived. Sir John Laws helpfully described the aim of the common law as “the refinement of principle over time”, a renewal created by the force of new examples, and the common law’s methods as “evolution, experiment, history and distillation”.<sup>3</sup> Lord Nicholls, who made such an outstanding contribution to the common law during his years as a Law Lord, explained the judicial role, saying:

“For centuries judges have been charged with the responsibility of keeping [the common] law abreast of current social conditions and expectations. That is still the position. Continuing but limited development of the common law in this fashion is an integral part of the function of the judiciary.”<sup>4</sup>

That responsibility is discharged in the field of public law against the background of the United Kingdom’s largely unwritten constitution which has as its two pillars the sovereignty of Parliament and the rule of law. Supporting those two pillars and enabling the executive branches of government, being both the UK government and the devolved administrations, to perform the difficult task of administering the country effectively, is a third principle, the separation of powers. This principle calls for clear-eyed recognition of the limits on the role of each branch of government, including the judiciary, and a shared respect for the roles of each branch.

## The judicial role

What is the judge’s role? As a judge, I have found a very useful guide in the writings of the distinguished academic lawyer who taught me jurisprudence, Professor Neil

MacCormick.<sup>5</sup> In summary, a judge's task is to make decisions that are justified by the law as it is; the judicial oath requires a judge to do right "after the laws and usages of this realm". But often the application of the law to a particular set of facts is not straightforward as precedents do not provide an answer to the case. The judge must therefore, when he or she can, decide such cases by using existing legal principles. Changes to the law are to be derived from existing legal materials by applying established principles and legal values in new contexts. When it is necessary, the judge is to work by analogy. He or she is to look for coherence, by assessing how far a possible ruling would be consistent with existing legal rules. In difficult cases, there can be a clash between competing legal principles causing the judge to look to the consequences of rival legal rulings. This consequential analysis involves an assessment of whether the grounds of judgment are repeatable in other cases as universal propositions of law, in other words "rule universalism". A consequential analysis may also involve the judge in assessing the socio-economic consequences of a particular determination, so far as he or she can. But judges are ill-equipped to carry out a wide-ranging analysis of the socio-economic consequences of innovative decisions and a decision which most closely fits the existing common law and the values embedded in it should be adopted. By this means judicial law-making remains interstitial and avoids radical legislative change which requires a democratic mandate, which judges do not have.

Judging is not simply the application of purely deductive reasoning. It involves what Professor MacCormick called "practical reasoning", recognising that legal norms are open-ended and open to interpretation. He acknowledged that universalistic rules were defeasible because unforeseen circumstances occur for which a carefully crafted prior ruling and justification provide no answer. Unforeseen circumstances may call for a rephrasing of the original legal statement or the creation of an exception. Wisdom, humanity and common sense have a role to play in judicial reasoning. While Professor MacCormick identified institutionalised criteria for judicial law-making, such as those set out in the immediately preceding paragraph, which could provide a norm, he recognised that his framework did not create fixed boundaries. His analysis was informed largely by cases involving private law; but I would suggest that it is properly to be applied in the field of public law. It is the unavoidable absence of fixed boundaries that on occasion creates tensions between the judicial and executive branches of government.

### **Judicial review: a radical departure?**

The principle that the executive branches of government should be subject to the rule of law is a principle which has ancient origins. In England, the medieval prerogative writs of prohibition, certiorari and mandamus, by which the Court of King's Bench kept other courts within their jurisdiction and upheld public rights and personal freedom of the subject,<sup>6</sup> came to be the instruments by which the High

Court determined the lawfulness of the acts of public authorities.<sup>7</sup> In Scotland, the supervisory jurisdiction of the Court of Session can be traced back to its foundation in the sixteenth century, building on supervisory functions of predecessor institutions exercised at meetings known as sessions.<sup>8</sup> With the abolition of the Scottish Privy Council in 1708, the Court of Session further developed its jurisdiction to include a broad equitable jurisdiction to administer justice which until then had been the purview of the Council.<sup>9</sup>

It is beyond doubt that the judicial development of administrative law in the second half of the last century has been a very significant development of the common law. In the *Kleinwort Benson* case<sup>10</sup> in 1999 Lord Goff, in a discussion of the development of the law by judges, said this:

“Occasionally a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of law. Perhaps the most remarkable example of such a development is to be found in the decisions of this House in the middle of this century which led to the creation of our modern system of administrative law.”

The development of administrative law in the second half of the twentieth century has indeed been a major legal development. But, as I seek to explain below, I am not persuaded that it is a major departure from established legal principles. Instead, I view it as the incremental application and development of pre-existing principles in changed circumstances and in response to developing social needs.

Before addressing the circumstances which led to the development of a relatively coherent body of administrative law in the later twentieth century, and the doctrines which have come to be recognised as a result of that development, I will consider two separate developments which have involved the courts in the adjudication of constitutional disputes resulting from initiatives by the UK Parliament: first, the role of the Judicial Committee of the Privy Council as a constitutional court and second, the constitutional jurisdiction over the devolved governments of the United Kingdom.

## **The Judicial Committee of the Privy Council and constitutional adjudication**

The Judicial Committee of the Privy Council (“JCPC” or “the Board”), on which justices of the UK Supreme Court and other senior judges from each of the jurisdictions of the United Kingdom serve, acquired the task (along with deciding many appeals on non-constitutional matters) of interpreting the constitutions of countries which were part of the British Empire and former colonies when the UK

Parliament enacted those constitutions. This public law exercise of giving meaning to the terms of constitutions predated by several decades the development of a coherent administrative law in the United Kingdom. It remains an important role of the JCPC in relation to those countries which have retained its jurisdiction.

For example, in the early twentieth century, the JCPC heard several cases concerning the constitution of Canada, which had been enacted in the British North America Act 1867. One of those cases, *Edwards v Attorney General for Canada*,<sup>11</sup> was concerned with whether women could serve on the Senate of Canada. The legal question was whether “persons” in section 24 of that Act included women as well as men, with the result that the Governor General could summon women to the Senate. The JCPC held that women could so serve. In a famous judgment delivered by Lord Sankey the Board acknowledged that a constitutional statute needed to be interpreted to take account of its nature as a constitution. The JCPC rejected the adoption of a “narrow and technical construction” stating that the constitution must be given “a large and liberal interpretation” so that it could develop through usage and convention. Lord Sankey stated:

“The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.”<sup>12</sup>

This wise approach to constitutional interpretation, which allows for unforeseen developments and changing social circumstances and attitudes, has informed the JCPC’s constitutional judgments ever since.

In the middle of the twentieth century, when the United Kingdom granted independence to most of its former colonies, the UK Parliament established written constitutions for many newly independent territories. It included in those constitutions entrenched human rights provisions, drawn from the ECHR, to provide protection to individuals and minorities. The Board has treated each of those constitutional instruments as requiring its own particular interpretation but has drawn parallels with other constitutional instruments and adopted the approach established in case law to the interpretation of such instruments. In a case in 1980, which concerned the question whether the term “child” in the constitution of Bermuda included an illegitimate child, Lord Wilberforce spoke of the need to take as a point of departure for the process of interpretation “a recognition of the character and origin of the instrument” and to be guided by “the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.”<sup>13</sup>

The JCPC continues to provide judgments interpreting those constitutions in this way. For example, in *Matadeen v Pointu*,<sup>14</sup> the Board addressed the question whether the Constitution of Mauritius had a general entrenched protection against discrimination or whether it was properly to be construed as entrenching such

protection only on a limited number of grounds enumerated in section 16 of the Constitution. The Board upheld the latter interpretation, reversing the judgment of the Supreme Court of Mauritius that the principle of democracy in section 1 of the Constitution and the protection of the law in section 3, established a general principle of equality. In a judgment delivered by Lord Hoffmann, the JPC confirmed the often-stated view that constitutions are not to be construed like commercial documents. A court had to have regard to the context in which an utterance was made, including its historical background and the purpose for which it was made. It was the task of a constitution “to lay down an enduring scheme of government in accordance with certain moral and political values”. The process of interpretation must take that into account. But the Board warned against judges giving free rein to what they thought should have been the moral or political views of the framers of the constitution:

“the court is concerned with the meaning of the language which has been used. As Kentridge AJ said in giving the judgment of the South African Constitutional Court in *State v Zuma* 1995 (4) BCLR 401, 412: ‘If the language used by the lawgiver is ignored in favour of a general resort to “values” the result is not interpretation but divination.’”<sup>15</sup>

The Board acknowledged that different democracies approached matters differently. Some constitutions, such as in the United States and India, entrenched a general principle of equality, others, such as New Zealand, entrenched protection against discrimination on specific grounds, and others, such as the UK, entrenched nothing, leaving it to the democratic legislature to provide appropriate protection. There was no alternative to reading the Constitution in question.

Lord Bingham made similar points in an appeal from Belize, *Reyes v The Queen*,<sup>16</sup> in which he emphasised that the court’s duty was one of interpretation. This involved careful consideration of the language used in the Constitution. “A generous and purposive interpretation is to be given to constitutional provisions protecting human rights” but the court had “no licence to read its own predilections and moral values into the Constitution”.<sup>17</sup>

The courts, in interpreting a constitutional document, can and should have regard to the norms in international instruments, to which a country has subscribed, as an aid to interpretation.<sup>18</sup> But the court must respect the words of the constitutional instrument and the principle of dualism where an international obligation has not been incorporated into a country’s domestic law. As Lord Hoffmann stated in another case:<sup>19</sup>

“The ‘living instrument’ principle ... is not a magic ingredient which can be stirred into a jurisprudential pot together with ‘international obligations’, ‘generous construction’ and other such phrases, sprinkled with a cherished

aphorism or two and brewed up into a potion which will make the Constitution mean something which it obviously does not.”

## **Devolution and constitutional adjudication**

Another parliamentary initiative which has involved the courts in constitutional adjudication domestically has been the enactment of devolution legislation since 1998. The establishment of devolved legislatures and devolved administrative institutions has created the potential for disputes about the limits of the competence of the devolved institutions.

There are three principal mechanisms by which the courts can find themselves adjudicating on the constitutional powers of devolved institutions.

The first is the ability of government law officers to refer to the UK Supreme Court proposed legislation by a devolved legislature before it comes into force in order to determine whether the legislation is within the devolved competence.<sup>20</sup> These references have been rare. There have been three references to the Supreme Court from Wales,<sup>21</sup> one from Scotland<sup>22</sup> and none from Northern Ireland.

The second mechanism is the devolution issue, by which a question whether a devolved legislature has acted within its legislative competence, or the executive branch of a devolved government has acted within devolved competence, can be brought before the courts.<sup>23</sup> The devolution issue also covered questions whether acts of a devolved executive authority or its failures to act were compatible with EU law. It continues to cover whether such acts or failures to act are incompatible with Convention rights under the Human Rights Act 1998. Individuals and corporations can raise devolution issues which can be the subject of appeal to higher courts, and government law officers can require a court to refer a devolution issue to the Supreme Court.

The third mechanism is the compatibility issue. This is an offshoot from the devolution issue which was created by the Scotland Act 2012.<sup>24</sup> It relates to criminal proceedings in Scotland and addresses questions relating to whether a public authority has acted in a way which is unlawful by reference to section 6 of the Human Rights Act 1998.<sup>25</sup>

While these statutory provisions might have the potential to create a rich seam of constitutional work for the UK's senior courts, what has been striking in recent years is the relatively small number of cases that have come to the Supreme Court.<sup>26</sup> This may well be because those advising the devolved institutions on questions as to their powers have been doing a very good job.

## The forces giving rise to the development of administrative law in the UK

While the JPC was engaged in constitutional adjudication in the earlier twentieth century, domestic legal challenges to the acts of public authorities on public law grounds were comparatively rare. There were important constitutional cases, such as *Attorney General v De Keyser's Royal Hotel*,<sup>27</sup> in which the House of Lords rejected the Government's attempt to rely on the royal prerogative to avoid paying compensation for the commandeering of property when parliamentary legislation had provided a scheme by which compensation would be paid. But people did not generally resort to the law to challenge the decisions of public authorities. Perhaps because of the exigencies of conflict in the two World Wars of 1914-1918 and 1939-1945, the courts showed great deference to the judgments of Ministers of the Crown. Thus notoriously, in *Liversidge v Anderson*,<sup>28</sup> a case decided in 1941 in the context of a national emergency caused by war, a majority of the House of Lords agreed with the lower courts in holding that when the Secretary of State acting in good faith made an order under the relevant Defence Regulations<sup>29</sup> to detain a person, stating that he had reasonable cause to believe that that person was of hostile associations, a court of law could not inquire whether the Secretary of State in fact had reasonable grounds for his belief. The belief, on which the detention was based, was a matter of executive discretion. The case, which is now most recognised for Lord Atkin's powerful dissent,<sup>30</sup> was perhaps the high-water mark of judicial deference to executive authority.

There are probably many causes for the sea change that occurred between the 1960s and 1980s with the rise of judicial review and the development of a generally coherent administrative law. Historically, it has been explained by the rapid expansion of the power of the executive.<sup>31</sup> I suspect that that has been a potent causal factor. The twentieth century saw a greatly increased role of government in the lives of its citizens in almost all democracies. Even in the context of re-armament in the years leading to the First World War, public expenditure as a proportion of Gross Domestic Product in 1913 was only 12.7 per cent. By 1996, the figure was 43 percent as politicians responded to the relentless demands of the electorate for the government to address and resolve multifarious problems.<sup>32</sup> More recently, the 2008 financial crisis and the current pandemic have made unprecedented demands on the executive branch of government and politicians generally.

Other factors may have contributed.<sup>33</sup> There was the rapid expansion of executive bodies empowered to take decisions significantly affecting people's lives. Concerns about the powers of such bodies and the fairness and impartiality of administrative procedures eventually led to the Franks Committee Report. It recommended greater

openness in administrative procedures and the enactment of the Tribunals and Enquiries Act 1958. There was an enormous increase in the number of new laws in the form of secondary legislation creating rules which were open to challenge by judicial review. The expansion of legal aid in those years also made the courts much more accessible to people of limited financial means.

Changes in social attitudes may have played their part too. There was a decline in respect for and deference to established public institutions, particularly in the 1960s, when “the establishment” became the fashionable subject of satire. Lord Sumption has argued that the real reason for the growth of judicial review since the 1960s was the declining public reputation of Parliament and a diminishing respect for the political process generally. He sees these changes as being a result of a belief that Parliament is not capable of holding ministers or officials to account because party discipline enables ministers with a majority in the House of Commons to control it.<sup>34</sup> I can readily accept that this was a factor in years when ministers had substantial majority support in the House of Commons; Quintin Hogg, the Conservative politician and later Lord Chancellor (Lord Hailsham) when in opposition in the late 1960s and again in the mid-1970s famously complained of the development of an “elective dictatorship”.<sup>35</sup> But other factors may also have been at work. It is not unreasonable to suggest, as Lord Neuberger has, that society became more questioning and inclined to litigate and that there was a greater public awareness of the individual’s rights, which may have been prompted in part by the ECHR.

Another factor which has contributed to the expansion of judicial review has been the changes to the rules of procedure, which in England replaced the prerogative writs with a specific procedure for judicial review applications in Ord 53 of the Rules of the Supreme Court in 1977 and section 31 of the Supreme Court Act 1981 (now the Senior Courts Act 1981). In Scotland a new procedure for judicial review was introduced in 1985 following a call by Lord Fraser in the House of Lords for the introduction of a procedure which would make available remedies “which are speedy and cheap and which protect public authorities from unreasonable actions.”<sup>36</sup> The relaxation of the rules of locus standi to allow campaigning groups and others to commence proceedings to vindicate the rule of law has also contributed to the development of public law.<sup>37</sup>

## **The underlying principle of the rule of law**

Whatever may have been the causal potency of each of the different forces which resulted in the development of judicial review and administrative law, the underlying principle is the rule of law which is now recognised as a fundamental constitutional principle in section 1 of the Constitutional Reform Act 2005.

In his response to the Independent Review of Administrative Law (“IRAL”) in October 2020,<sup>38</sup> Lord Reed, the President of the UK Supreme Court, stated that the rule of law “requires that every person should be bound by and entitled to the benefit of laws administered openly and transparently in the courts. In particular, all public bodies are bound to comply with the law, and recourse to the courts must be possible when they do not.” He continued:

“In accordance with the principle of Parliamentary sovereignty, the Government and other public bodies can only exercise powers given to them by Parliamentary legislation, with some limited exceptions recognised by the common law. The courts can only decide the disputes before them, including disputes relating to the exercise of Government and other public power, in accordance with the law. All three principal branches of government (Parliament, the Government and the courts) share a common commitment to the law enacted by Parliament and the common law developed over the course of our history by the courts. The role of the courts in applying the law is an essential part of the machinery of a democracy, and should be considered in that wider context.”

What the rule of law now demands in the field of administrative law is in large measure the product of the judicial development of the common law to which I now turn.

## **The post-World War II development of administrative law**

The concept of ultra vires is an ancient concept. But its systematic development into a coherent body of modern administrative law is a comparatively modern development. It is not possible in this short paper to discuss in any detail these developments which have been studied elsewhere.<sup>39</sup> My purpose is simply to draw attention to the historical sequence in which some of the principal milestones of the development of administrative law occurred.

The three-limbed *Wednesbury* test as to the lawfulness of the decision-making of a public authority was first articulated in 1947.<sup>40</sup> Lord Greene MR famously stated:<sup>41</sup>

“A person entrusted with a discretion must ... direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said ... to be acting ‘unreasonably’. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.”

In imposing those criteria on the decision-making of public authorities, the law has focused on the quality of decision-making rather than on the rights of the individual complainant. The third criterion, “*Wednesbury* unreasonableness”, although firmly associated with this case in the minds of most lawyers, had respectable antecedents, as Lord Greene MR acknowledged by referring to an earlier case in which Warrington LJ gave the example of the dismissal of a red-haired teacher because she had red hair.<sup>42</sup>

Another leading case which addressed the quality of public decision-making, was *Ridge v Baldwin*<sup>43</sup> which reached the House of Lords in 1963. In that case a chief constable, who had been dismissed from his post by a Watch Committee acting under statutory powers,<sup>44</sup> challenged the lawfulness of his dismissal on the ground of procedural impropriety. The House of Lords upheld his challenge, holding that the committee was obliged to observe the rules of natural justice, by informing him of the charges against him and giving him an opportunity to be heard. The House also held that the decision of the Secretary of State on a statutory appeal, although stated in the statute to be “final and binding”, did not exclude recourse to the courts if the decision subject to challenge was itself a nullity.

1968 saw two landmark decisions by the House of Lords. The first, *Padfield*,<sup>45</sup> concerned an attempt by milk producers to compel the Secretary of State, acting under the Agricultural Marketing Act 1958, to direct the Milk Marketing Board to investigate a complaint about the operation of the milk marketing scheme. The Secretary of State, without giving reasons, refused to do so. The Court of Appeal by majority, Lord Denning MR dissenting, held that the court could not challenge the minister’s discretion. But the House of Lords<sup>46</sup> reversed that judgment, holding that the decision was subject to judicial review where the refusal to investigate would frustrate the policy of the Act. The second, *Anisminic*,<sup>47</sup> concerned the decision of a tribunal to refuse to pay compensation for the seizure of property by the Egyptian Government. The decision involved an error of law but the relevant Act of Parliament contained an ouster clause which stated that the tribunal’s determination “shall not be called into question in any court of law”. The House of Lords by a majority of 3:2 held that the ouster clause did not apply because the tribunal had misconstrued the statute with the result that there had been no valid determination. The ouster clause could not operate to prevent the court from determining whether or not the order was a nullity.

In 1970, the House of Lords, in *British Oxygen*,<sup>48</sup> confirmed the rule that a person who has to exercise a statutory discretion must not fetter his or her discretion. Lord Reid<sup>49</sup> held that a decision-maker could adopt a policy or a rule which would govern the exercise of this discretion provided that he or she would nevertheless give careful consideration to representations which advocated a departure from the policy or rule.

In each of these cases, except perhaps for *Anisminic*, the courts were seeking to make sure that public officials, on whom Parliament had conferred powers, were exercising their powers in the way in which Parliament had laid down. That is consistent with the principle of Parliamentary sovereignty as Lord Reed stated in his response to the IRAL which I have quoted above. It is fair to conclude that the relevant legislation did not permit those to whom it gave power to take account of irrelevant considerations, make perverse decisions, adopt unfair procedures, or frustrate the policy of the legislation. *Anisminic* on the other hand protects fundamental and well-settled constitutional principles which require that the lawfulness of the actions of public bodies can be reviewed by a judicial authority.

Another innovation which began its development in this period is the doctrine of legitimate expectations. This doctrine is part of the doctrine of ultra vires and is justified by an assumption that the powers which Parliament conferred on a decision-maker should be exercised in a reasonable manner and in accordance with the principles of good administration.<sup>50</sup> To my mind, it draws on analogous rules in private law which give rise to estoppels arising from representations and detrimental reliance. The courts have required public authorities to comply with similar standards. Thus, where a public authority has led a person or a group to believe that certain procedural steps will apply, for example by making a statement or publishing a policy or guidelines on which those persons have relied, the public body will not be allowed to depart from those procedures without giving fair notice. For example, where a local authority licensed taxis and had given a public undertaking not to increase the number of licences until certain conditions were met, it could not depart from that undertaking without consulting with the aggrieved existing licence holders.<sup>51</sup> The principle applies where a public authority has made statements which are clear, unambiguous and devoid of relevant qualification and which are not inconsistent with its statutory duties.<sup>52</sup> If such statements give a person a legitimate expectation that he or she will be treated in a particular way, it is unfair and an abuse of power for the authority to act inconsistently with that expectation. A legitimate expectation can extend to the continued provision of a substantive benefit, requiring the public authority to show that there was an overreaching justification for departing from what had previously been promised.<sup>53</sup>

The period between the late 1940s and the mid-1980s thus saw prodigious legal developments in the field of administrative law, bringing a degree of coherence to the law which had previously been lacking. Lord Diplock, who had taken a close interest in achieving this coherence, was able in the *CCSU* case<sup>54</sup> in 1984 to articulate the principles of public law in summary form as (i) illegality, which is the requirement that a decision-maker understands the law that regulates his or her decision-making and must give effect to it; (ii) irrationality (also known as *Wednesbury* unreasonableness) which “applies to a decision which is so outrageous in its defiance of logic or of accepted morals that no sensible person who had applied his mind to the question to

be decided could have arrived at it"; and (iii) procedural impropriety, in which he included procedural legitimate expectations.<sup>55</sup>

From this necessarily summary review of the developments of administrative law between the mid-1940s and the mid-1980s it is, I think, clear that the central principles of judicial review were established in this period. Recent developments of the common law of judicial review have been modest by comparison.

That is not to say that there has not been controversy both during this period and more recently. I turn to consider two areas in which there has been such a debate. The first is the judicial review of prerogative power and the second is the principle of legality.

## **Judicial review of prerogative powers**

It has long been established that the exercise of a prerogative power may be superseded by parliamentary legislation and that the courts can prevent the Government from bypassing a scheme enacted by Parliamentary legislation by the invocation of a prerogative power.<sup>56</sup>

In *CCSU* the House of Lords held that the fact that the source of a power conferred on the executive was the prerogative and not parliamentary legislation did not deprive the citizen of the right to challenge the manner of its exercise which he or she would have if the source of the power were statutory. Lord Diplock thought that it was unlikely that decisions on government policy made in the exercise of prerogative powers would be amenable to judicial review on the ground of irrationality.<sup>57</sup> Lord Roskill confirmed that there were "excluded categories", which were not susceptible to judicial review because of their nature and subject matter. His list, which he stated was not exhaustive, comprised:

"Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others  
... ."<sup>58</sup>

In recent years the courts of the United Kingdom have been subjected to criticism for two decisions relating to the boundary between parliamentary power and the prerogative in the context of the hard-fought political debates over the UK's decision to withdraw from the European Union.<sup>59</sup> The first raised the question whether the government needed to obtain the authority of Parliament to invoke article 50 of the Treaty on European Union to commence the formal process of withdrawal.<sup>60</sup> The case turned principally on the interpretation of section 2 of the European Communities Act 1972 in its constitutional context. The Divisional Court held that Parliament's authority was required and the Supreme Court, which upheld that

decision, was divided 8:3 as to the correct answer. The second raised the question whether the Prime Minister's advice to HM the Queen to prorogue Parliament in a time of political crisis was amenable to legal challenge by way of judicial review or was non-justiciable.<sup>61</sup> The Supreme Court unanimously held that it was amenable to such challenge and declared the prorogation unlawful.

The merits of those decisions have been the subject of extensive debate. It is not appropriate for a Justice who was on the panel which determined those appeals to defend the outcomes on their legal merits. That must be left to others.<sup>62</sup> But I have to say that judgments such as these were not influenced by the personal views of individual Justices on the merits of Brexit. That is wholly inconsistent with the judicial role: judges must leave their personal views on such policy outside the door of the court.

## **The legality principle and basic constitutional principles**

The principle of legality in its traditional form is the rule that a statute needs to use clear and express words, or there must be a necessary implication of statutory terms, to displace vested private law rights.<sup>63</sup> There has also for a long time been the *prima facie* assumption, which the courts make when interpreting a statute, that Parliament takes for granted long-standing principles of constitutional and administrative law.<sup>64</sup> For example, Parliament confers discretionary powers which, according to the tenets of administrative law, must be exercised reasonably and with procedural fairness. The courts presume that Parliament so intended.<sup>65</sup>

Since the 1980s, the courts of the United Kingdom, perhaps influenced by EU law, international human rights law and in particular the ECHR before it was incorporated into domestic law, have come to recognise both that there are some fundamental common law rights which Parliament can override only if it is clear that that is a purpose of the statute and that there are some domestic law rights that are of greater importance than others and whose protection requires a closer judicial scrutiny than other rights under the *Wednesbury* principles.

An early example of the latter development is the *Bugdaycay* case in 1987,<sup>66</sup> which concerned the proposed repatriation of an asylum seeker and the right to human life, in which the House of Lords recognised that it must give "anxious scrutiny" to the decision of a public authority which interfered with such a fundamental right.

The courts have repeatedly recognised as a fundamental right the right of access to the courts,<sup>67</sup> and applied a more intense scrutiny of the actions of public authorities that have interfered with that right. Thus, in a series of cases from the early 1980s, the courts have upheld the rights of prisoners to communicate with their lawyers and

obtain legal advice as an inseparable part of the right of access to the courts themselves, and in several cases have invalidated prison rules which unnecessarily interfered with such rights.<sup>68</sup> In the case of *Leech*, Steyn LJ stated that the principle that every citizen has a right of unimpeded access to a court was a constitutional right and that unimpeded access to a solicitor for the purpose of receiving legal advice and assistance is an inseparable part of the right of access to the courts themselves.<sup>69</sup> In *Daly*,<sup>70</sup> the House of Lords held that a blanket policy of excluding prisoners from their cells, in which they had legally privileged correspondence, when prison authorities carried out searches, could not be justified by the legitimate public objectives of the searches as the infringement of the prisoners' rights was greater than was necessary to serve those objectives.<sup>71</sup>

Similarly, in 1997 in *R v Lord Chancellor, ex p Witham*,<sup>72</sup> the Divisional Court (Rose LJ and Laws J) granted a declaration invalidating a fees order as ultra vires section 130 of what is now the Senior Courts Act 1981. The order repealed provisions which relieved litigants in person in receipt of income support from the obligation to pay fees. The government's case was that there was no ultra vires argument available to the claimant as the words of the statute were wide enough to allow such an order. The court rejected that argument, holding that the right of access to the courts was a constitutional right. In his judgment Laws J explained the concept in these terms:<sup>73</sup>

"In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice, and any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it."

He continued:<sup>74</sup>

"the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right".

Absent such specific provision, the abrogation of such a right would be ultra vires. Similarly, the court must scrutinise with some intensity an interference by a public body with such a right.

In *Simms*,<sup>75</sup> Lord Hoffmann explained the position in these terms:

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”

Freedom of expression has also been recognised as a right whose restriction can only be justified by an important competing public interest. In *Brind*,<sup>76</sup> the House of Lords upheld the rationality of restrictions which the Secretary of State imposed on broadcasters to prevent the supporters of a recognised terrorist organisation from making live transmissions. Lord Bridge of Harwich stated that the court was “entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it.” The test remained one of review; he continued:

“The primary judgment as to whether the particular competing interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that judgment.”<sup>77</sup>

Thus, the test by which the courts assess the exercise of a discretionary power is still a rationality test but interference with rights which are recognised as fundamental gives rise to a more intensive or rigorous review. As Lord Reed has recognised, in such cases, where legislation is interpreted as requiring that such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference, the court is in substance applying a proportionality test in judicial review.<sup>78</sup>

The development of the principle of legality as the basis for a more intensive scrutiny of the interference by public authorities with what the common law recognises as constitutional or fundamental rights occurred principally in the period between the early 1980s and 2000, when the Human Rights Act 1998 came into operation. There was a hiatus after the Human Rights Act 1998 came into effect, during which judges appear to have focused on an analysis of fundamental rights through the prism of the Convention rights which it incorporated into our domestic law. But in several more recent cases judges have invoked the principle of legality as part of their reasoning.

Thus, in *AXA* in 2011 Lord Reed stated: “The principle of legality means not only that Parliament cannot 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>79</sup> In *Evans*,<sup>80</sup> the Supreme Court addressed the question whether section 53 of the Freedom of information Act 2000 empowered the Attorney General to override a reasoned decision of the Upper Tribunal requiring the disclosure of letters by the Prince of Wales advocating certain policies to Government departments. Lord Neuberger, with whom Lord Kerr and Lord Reed agreed, invoked two constitutional principles which he stated were also fundamental components of the rule of law. Those principles were first, that, subject to being overruled on appeal or by statute, a decision of a court cannot be set aside by anyone, including the executive. Secondly, subject to certain well-established exceptions, the decisions and actions of the executive are reviewable by a court at the instance of an interested citizen.<sup>81</sup> His disagreement with Lord Hughes was as to whether Parliament in section 53 had made crystal clear that the executive could override the tribunal’s decision.

In *UNISON*,<sup>82</sup> the Supreme Court was concerned with a challenge that a fees order regulating the fees charged for cases in the Employment Tribunal and the Employment Appeal Tribunal was ultra vires the power conferred by section 42 of the Tribunals, Courts and Enforcement Act 2007. Upholding the judgment of the Court of Appeal, the Supreme Court held that the order was unlawful both in domestic law and under EU law. In deciding the challenge under domestic law, Lord Reed looked to the constitutional principles which underlay the text of the statute, holding that the constitutional right of access to the courts was inherent in the rule of law and could only be curtailed by clear and express statutory enactment.<sup>83</sup> Where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is 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.<sup>84</sup>

The Supreme Court similarly invoked fundamental principles of constitutional law in *Miller II*, the prorogation case.<sup>85</sup> The principles in question were those of parliamentary sovereignty, and parliamentary accountability, ie the accountability of ministers to Parliament for the conduct of government.<sup>86</sup> Following its approach in *UNISON*, the court held that the advice to prorogue would be unlawful “if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.”<sup>87</sup>

I will return to the use by the courts of the principle of legality and common law constitutional rights when I discuss the constraints on the judicial role below. Before doing so, I turn to two Parliamentary initiatives which enhanced the role of judges in public law: the European Communities Act 1972 and the Human Rights Act 1998.

## **Parliamentary sovereignty and EU law**

The accession of the United Kingdom to the European Economic Community on 1 January 1973 involved the acceptance of a new source of law in the form of the new legal order which prevailed over the legislation of the United Kingdom Parliament. Section 2(1) of the European Communities Act 1972 (“the 1972 Act”) mandated the courts to recognise and enforce the rights, powers, liabilities, obligations and restrictions created and arising out of what became EU law. Subordinate legislation had to be construed and have effect subject to those provisions: section 2(4). The UK courts were required by section 3 to treat any question as to the meaning and effect of the treaties and as to the validity, meaning and effect of an EU instrument as a question of EU law and to determine such questions in accordance with principles laid down by the Court of Justice of the European Union (“CJEU”), or, if necessary, be referred to that court.

The power which Parliament conferred on the judiciary to disapply or re-write the legislation of the otherwise sovereign UK Parliament has been a unique legal development which has been brought to an end by the United Kingdom’s withdrawal from the EU.<sup>88</sup>

It is beyond the scope of this paper to discuss the impact of EU law on judicial law-making in domestic public law. It suffices to note that within the sphere of EU law the UK courts have been required to adopt approaches which have differed from our traditional domestic public law. Thus the courts adopted novel techniques of interpretation of national legislation such as the requirement, so far as possible, to interpret national legislation and domestic law in order to achieve the objectives of unimplemented EU directives in accordance with the *Marleasing* principle.<sup>89</sup> They have applied a proportionality test to reconcile conflicting rights and norms, involving an evaluation of whether a legislative measure pursued a legitimate aim and whether the measure was appropriate and necessary to achieve that aim. Within the sphere of EU law the courts have also had regard to the principles of respect for fundamental human rights and legal certainty, including the general prohibition of retroactive laws and the doctrine of legitimate expectation.

## **The Human Rights Act 1998**

The second significant parliamentary innovation is the Human Rights Act 1998 (“HRA”), which incorporated into domestic law the Convention rights listed in section 1(1) of the Act and set out in Schedule 1 to the Act.

Before the enactment of the HRA, there had emerged by the early 1990s a concern about the disparity between the United Kingdom’s obligations in the plane of

international law as a signatory of the ECHR and the more limited rights which were recognised in our domestic administrative law. Because of the United Kingdom's dualist approach, the courts did not recognise and enforce rights conferred by the ECHR. Claimants who failed to obtain what they wished in domestic law filed applications against the United Kingdom in the European Court of Human Rights ("ECtHR") in Strasbourg<sup>90</sup> and often were successful. Practitioners increasingly cited ECtHR decisions in domestic judicial reviews and the courts were aware that disappointed litigants would apply to the ECtHR for a remedy. Academic lawyers, such as Sir Jeffrey Jowell, called for domestic judicial review to embrace the doctrine of proportionality, and senior judges, such as Sir Thomas Bingham and Sir Stephen Sedley, advocated the incorporation of the ECHR into domestic law.<sup>91</sup> As Professor Varuhas has persuasively explained,<sup>92</sup> the Law Lords in *Brind* refused to incorporate the ECHR by the back door but the pre-2000 development of the principle of legality and the explicit recognition of fundamental common law rights occurred "under the shadow of Europe", namely the jurisprudence of the ECtHR and the CJEU.

The HRA carefully preserved the sovereignty of the UK Parliament: the courts cannot invalidate or disapply its primary legislation. Instead, the HRA provides two mechanisms by which the courts can give effect to the Convention rights in relation to legislation. First, both primary and secondary legislation "must be read and given effect in a way which is compatible with the Convention rights" (section 3). Where that is not possible, section 4 provides that specified senior courts<sup>93</sup> may make a declaration of incompatibility if the court determines that a provision of primary legislation is incompatible with a Convention right. Such a declaration does not affect the validity, continued operation and enforcement of the provision but leaves it to the UK Parliament to decide whether to act to remove the incompatibility.

UK courts and tribunals in determining a question concerning a Convention right do not enforce but simply "take into account" the judgments and decisions of the ECtHR (section 2).

Section 6 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Public authorities are defined to include courts and tribunals and any person who has functions of a public nature but not the UK Parliament or persons exercising functions in relation to its proceedings.

The HRA created a new field of domestic public law with an unprecedented focus on the recognition and enforcement by the domestic courts of the individual fundamental rights which have been given statutory recognition. In a series of seminal decisions after the enactment of the HRA, the House of Lords laid down the ground rules for its application.

In *Ullah*,<sup>94</sup> Lord Bingham established the principle (sometimes referred to as "the Ullah principle") that the court in performing its duty under section 2 to "take account

of” the jurisprudence of the ECtHR should, in the absence of some special circumstances, follow “any clear and constant jurisprudence“ of the ECtHR.<sup>95</sup> He also articulated what is often described as the “mirror principle”: “The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less.”<sup>96</sup>

Over time, the House of Lords and now the Supreme Court have clarified the Ullah principle. Thus, in *Pinnock v Manchester City Council*,<sup>97</sup> in a unanimous judgment of nine Justices, the court held that it was inappropriate for it to follow every decision of the ECtHR because it would destroy its ability to engage in constructive dialogue with the ECtHR which was of value in the development of Convention law. It stated:

“Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.”

A related question is whether domestic judges can interpret and apply Convention rights in a more expansive way than would the ECtHR if it were asked to address the same question. This question has divided both the House of Lords and subsequently the Supreme Court. As Lord Reed explained in his response to the call for evidence by the Independent Human Rights Act Review,<sup>98</sup> the issue has arisen where the ECtHR allows a contracting state a margin of appreciation in the application of a Convention right, with the result that it would find no violation, but domestic judges have disagreed as to whether they should allow an equivalent margin of appreciation or discretionary area of judgment to the relevant public authority. The leading example of a more expansive approach is the 2008 decision of the majority in the House of Lords in *Re G (Adoption: Unmarried Couple)*.<sup>99</sup> The court has continued to be divided on this issue, as shown, for example, in some of the judgments in *Nicklinson*,<sup>100</sup> the assisted suicide case, and more recently in *Commissioner of Police for the Metropolis v DSD and another*,<sup>101</sup> in which the court split 3:2.<sup>102</sup> The question, whether a domestic court can find that a Convention right had been violated although the ECtHR would not find that there had been a breach of the ECHR, is yet to be authoritatively resolved.<sup>103</sup>

In relation to the interpretative duty under section 3, the House of Lords early on adopted a muscular approach to give effect to what it understood to be the meaning of section 3. In 2004 in *Ghaidan v Godin-Mendoza*<sup>104</sup> it was held that section 3 authorised the court to depart from the unambiguous meaning which a legislative provision would otherwise bear in order to make it Convention-compliant. To that end the court was authorised to read in and read out words which changed the meaning of the legislation. But there were two important limitations: first, the court was not authorised to adopt a meaning that was inconsistent with a fundamental feature of

the legislation (the words to be implied must “go with the grain” of the legislation); secondly, the court was not authorised to make policy decisions for which it was not equipped.<sup>105</sup> This statutory power is a significant enhancement of the judicial role in relation to Parliamentary legislation, but it is noticeable that the government, when faced with a legislative provision which does not comply with the ECHR, frequently invites the court to exercise this power in preference to the court making a declaration of incompatibility.<sup>106</sup>

Parliament, in giving the courts the task of applying the HRA, has not given the courts a power to make political decisions or to make a decision “on the merits”. It has charged the courts with assessing whether the legislative or executive measures in question are a proportionate means of achieving a legitimate aim. It is well established in the jurisprudence of the ECtHR that this involves striking a fair balance between the individual’s fundamental rights and the general interest of the community in the impugned measure: the search for this balance is inherent in the whole of the ECHR.<sup>107</sup> In our domestic jurisprudence in relation to non-absolute rights under the HRA it is now well-established that the proportionality analysis involves four criteria or stages of analysis. The measure should (i) pursue a legitimate aim; (ii) be suitable in the sense of being rationally connected with the aim; (iii) be necessary, in the sense that a less intrusive measure could not be used without compromising the achievement of the objective; and (iv) be proportionate having regard to the effects of the measure on countervailing rights and interests and the objective that is to be achieved.<sup>108</sup>

Usually, the most difficult part of the proportionality exercise is the fourth stage (often called “proportionality *stricto sensu*”) which involves weighing up incommensurable factors in reaching a view as to whether the interference with a Convention right strikes a fair balance between the rights of the individual and the wider interests of the community as a whole. The HRA has innovated in giving the judiciary this evaluative task.

The House of Lords repeatedly confirmed that, unlike in traditional domestic judicial review, in which the primary decision-maker is the public authority and the court conducts a review according to a rationality standard, the court is the primary decision-maker on the question of proportionality.<sup>109</sup>

The proportionality test involves a more intensive review of such measures than what historically was perceived as the generally less demanding test of reasonableness. It is the test which the ECtHR applies in Strasbourg.<sup>110</sup> The reason why the domestic courts have this role is that Convention rights are free-standing rights which Parliament has enacted to be enforced by the domestic courts on a substantive basis in a similar manner to which they are enforced by the ECtHR. They are rights which the courts are charged with enforcing “without fear or favour”.

The HRA appears to be achieving its purpose. It was intended to provide a means by which domestic courts could provide remedies for the violation of Convention rights and to reduce the need for individuals to make applications to the ECtHR.<sup>111</sup> The number of cases going to the ECtHR from the United Kingdom has fallen in the 20 years since the HRA came into force and is now the lowest by population of all 47 contracting states.<sup>112</sup> Cases in which the ECtHR has held that the United Kingdom has violated the ECHR have become rare; they have fallen from an average of 22 per year in the period 2001-2004 (when pre-HRA cases were working their way through the system in Strasbourg) to an average of 2.5 per year in the period 2017-2020.<sup>113</sup>

The task of the courts in policing human rights needs to be conducted with a clear recognition of the constitutional role of the judiciary and respect for the constitutional roles of the democratically accountable branches of government. This calls for an appropriate degree of restraint, an acknowledgement of an appropriate margin of appreciation to the decision-maker, and an awareness of the institutional limitations of the judicial branch of government by comparison with the other branches. These are matters which I consider further below.

## **External influences on public law?**

In the last 50 years, our domestic public law has been open to several external influences. It is not clear whether or to what extent the judges who have sat in the House of Lords, the Supreme Court, and the JPC have been influenced in the way they think about domestic public law by the constitutional work which they have carried out on JPC cases and under the devolution legislation. There appears to be no obvious link between the JPC work and the development of domestic public law as the JPC's constitutional cases in the early part of the twentieth century coincided with a period of judicial passivity in public law.<sup>114</sup> Similarly, it is not clear that the devolution jurisdiction which has existed only since 1998 has influenced our public law significantly as it came into being after the principal periods in which judges developed our administrative law.

Other statutes may have had a greater influence. Historically, one of the influences on the common law has been statute law. Judges have often developed the common law in the field of private law by analogy to statute law.<sup>115</sup> Examples include the adoption of the implied terms of the Sale of Goods Act 1893 into contracts for work and materials,<sup>116</sup> and the application by analogy of statutory limitation periods to claims for equitable relief.<sup>117</sup> Has there been a similar process in public law? The European Communities Act 1972, which brought into our law the jurisprudence of the CJEU in relation to EU law, may have enabled judges to become familiar with proportionality assessments, and the *Marleasing* doctrine may have influenced the

House of Lords' interpretation of section 3 of the HRA in *Gaidan v Godin-Mendoza*.<sup>118</sup> The HRA itself has exercised a significant influence on the common law in more than one way. The ECHR, since the right of individual petition was accepted in 1966, and, since 2000, the incorporation of Convention rights into domestic law appear to have had an effect on public perceptions of the role of law and the autonomy of the individual citizen. Thus, for example, changing perceptions of the autonomy of the individual patient both within the medical profession and among the general public have influenced the development of the law of informed consent to medical procedures from a position of deference towards professional medical judgment to a greater emphasis on the autonomy of the individual patient in *Montgomery v Lanarkshire Health Board*.<sup>119</sup> More directly, the courts have had to adjudicate on challenges in particular cases in which they have had to address cumulatively the criteria of domestic law, EU law and the ECHR, including the tests of proportionality under EU law and in relation to the incorporated Convention rights. One may speculate that this has influenced judges to look more closely at the nature of the rationality challenge in domestic law. The absorbent nature of the common law may explain the recognition of common law constitutional rights and the current debate as to the scope of the principle of legality.

## **Role recognition, institutional limitations and judicial restraint**

It is trite that it is not the role of the courts to interfere with the exercise of discretion of a public body merely because they might disagree with the decision or action in question. A judge's personal view of the merits of a policy or decision is irrelevant. Where a public authority has been given the power to exercise its discretion, it is the primary decision-maker and the court intervenes only if a challenger can establish that the decision or action is faulty in its procedure or substance when measured against a legal standard. That remains the case both in domestic administrative law and in the protection of Convention rights. It is, at least in part, the product of the twin pillars of our constitution, which I have mentioned, namely the sovereignty of the UK Parliament and the rule of law, and the principle of the separation of powers which supports those pillars.

When the court considers the intensity of the scrutiny which it must conduct when evaluating a decision or action against a legal standard, judges have often spoken of showing deference towards the administrative decision-maker. To my mind, it is not so much a question of deference or self-denial but one of the recognition of the limitations of the judicial role in our constitution and of respect for the separate role of administrative decision-makers who are accountable to the UK Parliament and other democratic bodies for the implementation of policy. The judiciary has no democratic mandate to frame wide-ranging socio-economic policy<sup>120</sup> or to adjudicate, without legal principle, upon controversial and contested moral and ethical questions.<sup>121</sup>

Several constraints on the judiciary in developing the common law in the field of private law are also relevant to its work in the field of public law. There is a spectrum from what Lord Reid described as “lawyers’ law”<sup>122</sup> at one end and, at the other end, matters which involve contestable and contested choices in social and economic policy. Similarly, decisions which may have major consequences for public expenditure and the allocation of public funds must be approached with great caution.<sup>123</sup> The judiciary does not have the resources, including the ability to consult widely, that are necessary to formulate detailed policies and are available to the Law Commissions and to government departments. Thus, where in private law a suggested reform calls for a detailed legislative code,<sup>124</sup> the judiciary should leave the matter to the relevant legislature. In my view, a similar caution is required in questions of public law if a development has wide or unforeseeable ramifications. In private law, matters which affect large sections of the community and raise issues which are the subject of controversy should be left to the democratic legislatures.<sup>125</sup> Such matters, as Lord Sumption has argued in his 2019 Reith Lectures, which involve moral choices on which reasonable people may reasonably disagree, require political compromises or resolution by collective political choice through the work of democratic legislatures.<sup>126</sup> While, as I have said, judges develop the common law by drawing on analogies from statute law, they recognise the need for care in areas of law which Parliament has occupied; they may fill in gaps left by Parliament but they must not create incongruity.<sup>127</sup>

A particular constraint on judicial law-making which applies as much to public law as to private law is the rule of law requirement that the law must be accessible and, so far as possible, intelligible, clear and predictable.<sup>128</sup> When in 1966 the House of Lords issued the Practice Statement giving itself authority to depart from its previous decisions, it emphasised the importance of precedent in giving “some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.”<sup>129</sup> The Practice Statement recognised the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements had been entered into. The House of Lords used the Practice Statement on three occasions to depart from its own earlier decisions in the development of public law.<sup>130</sup> The Supreme Court has not used the power in such cases; but the concern of the Practice Statement about certainty and predictability must be a relevant consideration in the field of public law because a lack of predictability would be a major hindrance to good administration. It is not just the constitutional limitations on the judicial role but also the dictates of the rule of law which support the traditional and generally recognised view that judicial development of the common law should be incremental and interstitial.

Parliament, by enacting the Human Rights Act 1998, has given the judiciary a new role, and has effected a legal change which is much more than incremental and interstitial. The interpretative obligation under section 3 of that Act has the capacity

radically to alter the meaning of words which Parliament has chosen in enacting legislation. This can militate against certainty and predictability as legislators may not be able readily to identify in advance how the courts might read down or read up the words which they intend to use in enacting a statute. This limited inroad into certainty and predictability is the result of Parliament's choice to confer on the inhabitants of the United Kingdom the Convention rights set out in the Act. The UK Parliament as the principal law-making body in our country clearly has the power to make such a change.

The judiciary by contrast can develop the common law in response to changing circumstances only incrementally, drawing on established principles and avoiding radical departures. One such development is the development of the principle of legality, which, as I have said, in the last two decades of the last century, was applied to protect a prisoner's access to the courts<sup>131</sup> and to protect freedom of expression.<sup>132</sup> It can be seen in relation to the right to life in *Bugdaycay*<sup>133</sup> in 1987. More recently, it has been invoked in the context of the protection of United Kingdom citizenship.<sup>134</sup> Fundamental constitutional principles, namely the sovereignty of the UK Parliament and the accountability of UK government Ministers to Parliament provided the context for the application of the principle of legality in *Miller II*.<sup>135</sup> But, as I discuss below, such incremental development must be constrained by a respect for parliamentary authority and a recognition of the potential of the principle of legality to alter the ordinary meaning of statutes

When does development of the law cease to be incremental and interstitial? It is difficult to determine precise boundaries as the courts must respond to novel circumstances which citizens and other people bring before them for judicial determination. Treating the devolution statutes as constitutional and thereby requiring express words or necessary implication for their alteration is wholly consistent with the purpose of Parliament in enacting that legislation. It creates no incongruity. Recognition and application of the fundamental and undisputed constitutional principles, such as the right of access to the courts, which is an essential component of the rule of law underpinned by the separation of powers, and the sovereignty of the UK Parliament and ministerial accountability to that Parliament, which comprise the other pillar of our uncodified constitution, appear to me to fall clearly in the category of incremental development. Similarly, as society has developed and people have become used to invoking the Convention rights of the HRA, there may be scope for the common law to recognise by analogy some at least of those fundamental rights.<sup>136</sup>

But the need for judicial restraint in this field is obvious. First, the idea of a common law constitution is contested.<sup>137</sup> The uncodified constitution depends on political facts as well as legal rules and incremental development of the constitution depends upon acceptance by the people and acquiescence by other institutions of the state, particularly the United Kingdom Parliament.

Secondly, it is one thing to expect Parliament to use clear and express words, or necessary implication from the words it has used, to restrict or remove a fundamental common law right. That can readily be seen as giving effect to a general constitutional understanding. But as Sir John Laws warned when he was a judge at first instance, there is a good reason why the category of rights described as constitutional or fundamental is narrow. He stated:<sup>138</sup>

“The law should be astute to confine the concept of constitutional right to that special class of rights which, in truth, everyone living in a democracy under the rule of law ought to enjoy.”

He identified access to justice as one such right and freedom of the person, of speech, thought and religion as others. He thought that such rights were largely articulated in the principal provisions of the ECHR which was then being enacted into domestic law. He went on to say:

“If the courts were to hold that more marginal claims of right should enjoy the protection of a rigorous rule of statutory construction not applied in contexts save that of the protection of fundamental rights and freedoms, they would impermissibly confine the powers of the elected legislature.”

Thirdly, the interpretative tool of requiring specific provision is very different from the muscular power to read down or read up statutory provisions to make them comply with Convention rights which only statute can confer.<sup>139</sup>

Fourthly, the courts should be very cautious about using abstract and indeterminate formulations of common law fundamental rights or principles as springboards for the development of the common law. Judges must avoid the distortion of positive legal norms into what my colleague, Lord Sales, has described as “vague, uncertain, and poorly articulated standards”. He continued:

“If Parliament does not have fair warning of what the words it uses will be taken to mean, its ability to function as an institution which amends the law in accordance with what the elected representatives intend (and may have promised to achieve) will be undermined: the link between democratic will and law will be disrupted. If a citizen does not have a fair warning of what the words used in legislation mean, his ability to plan his affairs will to that extent be undermined.”<sup>140</sup>

Incautious or over-ambitious judicial development of the common law in this field therefore has the potential not only to damage the effective operation of Parliamentary sovereignty but also to militate against the predictability and determinacy of the law, which are important characteristics of the rule of law.<sup>141</sup>

There is evidence of such restraint. Professor Paul Craig, in a forthcoming article,<sup>142</sup> analyses cases which have involved the principle of legality between 1998 and 2021

and concludes that in that period 24 claims which were based on the *Simms* principle were successful. That is slightly more than one claim per year.

In common law judicial review there is a similar need for restraint in the courts' approach to the intensity with which it scrutinises the discretionary decisions of public bodies entrusted by Parliament with the exercise of public powers. In *Kennedy v The Charity Commission*,<sup>143</sup> Lord Mance recognised that the common law no longer insisted on a single, uniform standard of rationality review and endorsed the view expressed by Professor Paul Craig that a reasonableness review involves "considerations of weight and balance, with the intensity of scrutiny and the weight to be given to any primary decision maker's view depending on context".<sup>144</sup> In certain cases where executive action involves significant interferences with particularly important common law rights, the court may look for a cogent justification of the interference, asking whether a rational minister could think that the decision was proportionate.<sup>145</sup> In so far as the intensity of review is context specific and if there is, as Lord Sumption has suggested, a "sliding scale" by which the cogency of the justification required for interference depends upon the importance of a right and the extent of the interference, the courts must be alive to the need for their decision making to be predictable in the interests of good administration. Further, judges must, as I have said, have regard to the limitations of their institutional competence and show respect to (i) the institutional competence of government departments and other executive bodies, for example in the allocation of scarce financial resources, on questions of national security, and in making policy decisions in matters of controversial moral judgment, and (ii) the constitutional competence of those bodies in matters of policy.

What would not be incremental or interstitial legal development would be the erection of a set of common law fundamental rights as a restriction upon the sovereignty of the United Kingdom Parliament. To my mind that would weaken one of the two pillars of the constitution and be inconsistent with the separation of powers. That is not to say that one could not conjure up an extreme circumstance in which parliamentary sovereignty might be called into question, such as occurred in 1648 when in "Pride's purge", Colonel Thomas Pride arrested or excluded from Parliament MPs whom the Army thought would not support their policy, leaving a Rump Parliament of about 200 members who would do the Army's bidding. A Parliament comprising "the Saints" or "patriots" installed by a clique or an external force, such as Cromwell's Army, would lack all democratic legitimacy.<sup>146</sup> A judge may also legitimately ask where his or her duty would lie if Parliament were to do something which would universally be regarded as outrageous, such as ordering the execution of all red-headed people because they had red hair. Some judges might say that, because of the principle of parliamentary sovereignty, they would be under a duty to resign if they wished to avoid having to uphold such an outrage. But I question whether the correct response of a judge would be to hang up his judicial robe and depart into a melancholic retirement. Would it not be more consistent with the judicial

oath to state that such a measure was unrecognisable as law and face dismissal as a result? Whatever position a judge may take on such an issue, common law limitations on parliamentary sovereignty are to my mind largely theoretical because, as Professor Mark Elliott has observed, the probability that Parliament would enact what Lord Woolf described as “unthinkable” legislation must be, or must be close to, zero.<sup>147</sup> The one extreme exception, which Lord Hope has suggested might not be unthinkable and might cause the courts to refuse to recognise parliamentary legislation as law, is the abolition of judicial review.<sup>148</sup> Such legislation would be a major infringement of the foundational constitutional principle of access to the courts and would amount to a frontal attack on the second pillar of the constitution, the rule of law. Thankfully, it is an extremely unlikely occurrence.<sup>149</sup>

Last year, in *Elgizouli*,<sup>150</sup> the majority of the Supreme Court restated the established principle that the judicial development of the common law involved building incrementally on existing principles. As Lord Reed explained,<sup>151</sup> there are three reasons for that principle. First, judicial decisions are normally backward-looking, because they decide the law as it was at the time that is relevant to the dispute between the parties, with the result that legal certainty requires that a ruling be based on established principles. Secondly, Parliament has the pre-eminent constitutional role in making new law. Thirdly, procedural and institutional limitations prevent litigation in the courts from being an engine of law reform. What was argued for in that case, namely a common law right to life subject to specific qualifications, was not incremental development of the common law building on established legal principles but would have amounted to judicial legislation.<sup>152</sup>

In the concluding remarks of their report the IRAL recorded their view that the government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action.<sup>153</sup> Notwithstanding the criticism which has been directed towards the judiciary by some commentators and the differing views surrounding a few judicial decisions, I am convinced that that is correct.

## **Summary, constitutional fundamentals and the separation of powers**

In my discussion of the history of legal developments since the 1940s I have drawn attention to (a) the contribution which Parliamentary legislation has made to extending the role of judges in both constitutional and human rights adjudication and (b) the periods of greatest judicial creativity, being the 1960s to 1980s in relation to administrative law, the recognition of common law constitutional rights in the 1980s and 1990s, and the work of the House of Lords in establishing the ground rules for

the interpretation and application of the HRA in the first decade of this millennium. These developments have occurred over a prolonged period of more than 60 years. Against that timescale they can in my view be seen as incremental although cumulatively they have had the effect of establishing a developed and developing public law jurisdiction.

In the course of these developments, some judicial decisions have been the subject of disagreement among judges and some have given rise to political debate. Such tensions are unavoidable in a healthy democratic system and show that the system of the separation of powers is working. In our constitution it is within the power of the United Kingdom Parliament to change the law if it disagrees with a judicial decision. Any concerns about the role of judges in our society should be tempered by an acknowledgement of this reality.

It is also within the power of the United Kingdom Parliament to legislate to restrict access to the courts in particular circumstances by the use of ouster clauses. But judges in the 400-year history of judicial review have never looked with favour on such inroads into the right of citizens to have access to the courts, precisely because of their potential to damage one of the two fundamental pillars of our constitution, the rule of law.

Parliamentarians will want to approach with great caution any proposal to enact such ousters. The contribution of judges to our democracy includes their work of ensuring that powers conferred by Parliament are used to achieve the purposes of the legislation which Parliament has enacted and that legal rights conferred by Parliament or, to a more limited extent, by the common law are respected and upheld. Almost 40 years ago, Lord Diplock stated:<sup>154</sup>

“It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.”

The courts perform this vital function of deciding disputes as to whether the government and other public authorities have exercised their powers, and fulfilled their duties, in accordance with the law. Judges are involved in law and not in politics.

Parliament's role includes not only holding the government to account for its actions but also supporting the work of a government which retains its confidence. Judges also uphold the work of government when it acts within its powers. The courts in

performing their task of ensuring that governmental power is exercised in accordance with the law are not acting in opposition to the government and other public bodies which carry out executive functions, or the legislatures of this country.

Government, the United Kingdom Parliament and the devolved legislatures, and the judiciary share a common commitment to the maintenance of the law, which is essential to a healthy democracy. The sovereignty of the United Kingdom Parliament and the rule of law are the two pillars of our constitution. Respect for the separation of powers and for the distinctive role of each branch of government underpins those pillars.

Patrick S. Hodge

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<sup>1</sup> “Judicial Law-making in a Changing Constitution” (2015) 26 Stellenbosch Law Review 471-485 and “The Scope of Judicial Law-making in the Common Law Tradition” (2020) 84 *Rabels Zeitschrift* 211-227.

<sup>2</sup> This paper is an amalgam of lectures which I have delivered in Edinburgh and London in the summer of 2021. I wish to record my gratitude to my former Judicial Assistant, Francesca Ruddy, and my current Judicial Assistant, Rachel Malloch, for their help in the research for this paper.

<sup>3</sup> Sir John Laws, “The Common Law Constitution”, Hamlyn Lectures 2013 (2014), pp 6-7.

<sup>4</sup> *In re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680, para 32.

<sup>5</sup> Neil MacCormick, “Legal Reasoning and Legal Theory” (Clarendon Press 1978) and Neil MacCormick, “Rhetoric and the Rule of Law: A Theory of Legal Reasoning” (Oxford University Press 2005).

<sup>6</sup> Stanley De Smith, “The Prerogative Writs” (1951) 11 CLJ, 40-56.

<sup>7</sup> For an argument that there was a much more developed administrative law in England and Wales in the sixteenth and seventeenth centuries than is generally acknowledged, see Paul Craig, “English Administrative Law History: Perception and Reality”, in S Jhaveri and M Ramsden (eds), *Judicial Review of Administrative Action Across the Common Law World, Origins and Adaptation* (Cambridge University Press 2021) ch 2.

<sup>8</sup> Stephen Thomson, “The doctrinal core of the supervisory jurisdiction of the Court of Session” [2016] PL 670.

<sup>9</sup> *West v Secretary of State* [1992] SC 385, 393-395 (Lord Hope).

<sup>10</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 347, 378.

<sup>11</sup> [1939] AC 124.

<sup>12</sup> *ibid*, p 136.

<sup>13</sup> *Minister of Home Affairs v Fisher* [1980] AC 319, 329.

<sup>14</sup> [1999] AC 98.

<sup>15</sup> *ibid*, p 108.

<sup>16</sup> [2002] UKPC 11, [2002] 2 AC 235.

<sup>17</sup> *ibid*, para 26.

<sup>18</sup> *ibid*, para 27.

<sup>19</sup> *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400, para 59.

<sup>20</sup> Scotland Act 1998, s 33; Northern Ireland Act 1998, s 11; Government of Wales Act 2006, s 112.

<sup>21</sup> *Local Government Byelaws (Wales) Bill 2012 Reference* [2012] UKSC 53; *Agricultural Sector (Wales) Bill Reference* [2014] UKSC 43; and *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill Reference* [2015] UKSC 3.

<sup>22</sup> *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill- A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

<sup>23</sup> Scotland Act 1998, Sch 6; Northern Ireland Act 1998, Sch 10; Government of Wales Act 2006, Sch 9.

<sup>24</sup> Criminal Procedure (Scotland) Act 1995, ss 388Z, 288ZB and 288 AA.

<sup>25</sup> It also addressed incompatibilities with EU law prior to the UK’s withdrawal from the European Union.

<sup>26</sup> In the last six years the Supreme Court has received two devolution cases in 2015, one in 2016, five in 2017, three in 2018, one in 2019 and three in 2020.

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<sup>27</sup> [1920] AC 506

<sup>28</sup> [1942] AC 206.

<sup>29</sup> Regulation 18B of the Defence (General) Regulations 1939 stated, "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

<sup>30</sup> In that dissent Lord Atkin pointed out (p 227) that the words "if A has X" constituted a condition which required A to have X. He observed that "if A has a broken ankle" does not mean "if A thinks that he has a broken ankle".

<sup>31</sup> See, for example, William Wade and Christopher Forsyth, "Administrative Law" 11<sup>th</sup> edn (Blackwell's 2014), ch 1 and Mark Elliot and Jason Varuhas, "Administrative Law: Text and Materials" 5th edn (Blackwell's 2016), chs 1 and 4.

<sup>32</sup> It is not surprising that the *Carltona* principle, equating the acts of government officials with the acts of the minister in charge of the relevant department, was recognised during World War II because of the multifarious responsibilities of government ministers: *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA). But the idea that Ministers act through their civil servants predated this judgment.

<sup>33</sup> Lord Neuberger discussed these factors in his speech, "The Role of Judges in Human Rights Jurisprudence: a comparison of the Australian and UK experience" (2014) accessible at: [www.supremecourt.uk/docs/speech-140808.pdf](http://www.supremecourt.uk/docs/speech-140808.pdf)

<sup>34</sup> Jonathan Sumption QC, "Judicial and Political Decision-making: The Uncertain Boundary" (2011) F. A. Mann Lecture 2011 accessible at: <http://ukhumanrightsblog.com/wp-content/uploads/2011/11/jsumption-jr-talk.docx>

<sup>35</sup> Lord Hailsham (as Quintin Hogg MP) used the phrase in 1968 and 1969 but more famously in his BBC Richard Dimbleby Lecture in 1976: "The Listener" 496-500. He expanded on the theme of "centralised democracy" or "elective dictatorship" in his book, "The Dilemma of Democracy" (Collins 1978).

<sup>36</sup> *Brown v Hamilton District Council* 1983 SC (HL) 1, 49; 1983 SLT 397, 418. In 1985 a new rule of court, rule 260B was introduced into the Rules of the Court of Session; see now Ch 58 of the Rules of the Court of Session. The reforms failed to give the protection of public authorities which Lord Fraser envisaged but the requirement of permission to proceed with a judicial review and a strict time limit on the bringing of such challenges were eventually introduced by s 89 of the Courts Reform (Scotland) Act 2014. See Robert Reed, "The development of judicial review in Scotland" (2015) 4 Jur Rev 325.

<sup>37</sup> In England and Wales, the rules of locus standi were relaxed by the House of Lords in *Inland Revenue Commissioners v Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 and in Scotland the rules of title and interest were similarly relaxed by the UK Supreme Court in *AXA General Insurance Ltd v H M Advocate* [2011] UKSC 46, [2012] 1 AC 868, 2012 SC (UKSC) 122.

<sup>38</sup> <https://www.supremecourt.uk/about/publications.html>

<sup>39</sup> See for example Lord Woolf, Sir Jeffrey Jowell, Catherine Donnelly and Ivan Hare, "De Smith's Judicial Review" (8<sup>th</sup> edn, Sweet & Maxwell 2018), ch 4; Wade and Forsyth, "Administrative Law", (n 31) ch 2 and Elliott & Varuhas, "Administrative Law: Text and Materials", (n 31) ch 1.

<sup>40</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>41</sup> *ibid*, p 229.

<sup>42</sup> *Short v Poole Corporation* [1926] Ch 66, 90-91.

<sup>43</sup> [1964] AC 40.

<sup>44</sup> Municipal Corporations Act 1882, s 191(4).

<sup>45</sup> *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

<sup>46</sup> Lord Morris of Borth-y-Gest dissenting.

<sup>47</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>48</sup> *British Oxygen v Minister of Technology* [1971] AC 610.

<sup>49</sup> *ibid*, p 625, confirming the dicta of Bankes LJ in the earlier case of *Rex v Port of London Authority ex p Kynoch Ltd* [1919] 1 KB 176, 184.

<sup>50</sup> See, for example, *O'Reilly v Mackman* [1983] 2 AC 237, 275 (Lord Diplock); *Attorney General for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 637 - 638 (Lord Fraser of Tullybelton).

<sup>51</sup> *R v Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

<sup>52</sup> *R v Inland Revenue Commissioners ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1567-1570 per Bingham LJ.

<sup>53</sup> *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213.

<sup>54</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1984] AC 374, 408 - 410.

<sup>55</sup> *ibid*, 411.

<sup>56</sup> *Attorney General v De Keyser's Royal Hotel* [1920] AC 506.

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<sup>57</sup> CCSU, p 411.

<sup>58</sup> Ibid, p 418.

<sup>59</sup> See for example John Finnis, “The unconstitutionality of the Supreme Court’s prorogation judgment” (2019) and Carl Gardner, “The ‘principle of legality’ is out of control” (2017), both accessible at <https://judicialpowerproject.org.uk/>.

<sup>60</sup> *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>61</sup> *R (Miller) v The Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, [2020] AC 373.

<sup>62</sup> See for example, in relation to the art 50 case: Paul Craig, “Miller, Structural Constitutional Review and the Limits of Prerogative Power” (2017) PL Nov Supp 48, and Gavin Phillipson, “Brexit, Prerogative and the Courts: why did political constitutionalists support the Government’s side in *Miller*?” (2017) 36 UQLR 311; and in relation to the prorogation case: Mark Elliott, “Constitutional Adjudication and Constitutional Politics in the United Kingdom: The *Miller* II Case in Legal and Political Context” (2021) 16 European Const Law Rev 1.

<sup>63</sup> Jason Varuhas, “Conceptualising the Principle(s) of Legality” (2018) 29 PLR 187, 196 - 205.

<sup>64</sup> Sir Rupert Cross, “Statutory Interpretation” (1<sup>st</sup> edn, Sweet & Maxwell 1976), 142 - 143; *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 587-588, per Lord Steyn.

<sup>65</sup> See for example, *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531.

<sup>66</sup> *R v Secretary of State for the Home Department ex p Bugdaycay* [1987] AC 514.

<sup>67</sup> See Lord Reed’s discussion of the historical ancestry of the principle from the Magna Carta of 1215 in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869, paras 74-85.

<sup>68</sup> *Raymond v Honey* [1983] 1 AC 1; *R v Secretary of State for the Home Department ex p Anderson* (CA) [1984] QB 778; *R v Secretary of State for the Home Department ex p Leech* [1994] QB 198 (CA); *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. See also *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, in which the House of Lords invalidated a policy of indiscriminately banning prisoners serving life sentences from being interviewed by an investigative journalist in an attempt to gather new evidence to challenge the safety of a criminal conviction.

<sup>69</sup> [1994] QB 198 (CA), 210.

<sup>70</sup> [2001] UKHL 26, [2001] 2 AC 532.

<sup>71</sup> *ibid*, para 19 (Lord Bingham).

<sup>72</sup> [1998] QB 575.

<sup>73</sup> *ibid*, 581.

<sup>74</sup> *ibid*, 585.

<sup>75</sup> [2000] 2 AC 115, 131.

<sup>76</sup> *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

<sup>77</sup> *ibid*, 749.

<sup>78</sup> *Pham v Home Secretary* [2015] UKSC 19, [2015] 1 WLR 1591, para 119.

<sup>79</sup> *AXA General Insurance Ltd v H M Advocate* (n 37 above), para 152.

<sup>80</sup> *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787.

<sup>81</sup> *ibid*, paras 51 and 52.

<sup>82</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869.

<sup>83</sup> *ibid*, paras 65, 66 and 77-84.

<sup>84</sup> *ibid*, para 88.

<sup>85</sup> *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373.

<sup>86</sup> *ibid*, paras 41 and 46.

<sup>87</sup> *ibid*, paras 49-50.

<sup>88</sup> Subject to certain provisions in the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal) Act 2020.

<sup>89</sup> *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135.

<sup>90</sup> After the UK recognised the right of individual petition to the ECtHR in 1966. For the pivotal role in the origins of the ECHR of Conservative politicians, when in opposition in the UK (1945 - 1951), see Marco Duranti, “The Conservative Human Rights Revolution” (Oxford University Press 2017), chs 5 and 11. See also Brian Simpson, “Human Rights and the End of Empire” (Oxford University Press 2001) chs 13 and 14.

<sup>91</sup> Jason Varuhas, “Administrative Law and Rights in the UK House of Lords and Supreme Court” in Paul Daly (ed), “Apex Courts and the Common Law” (University of Toronto Press 2019) 225 - 278, pp 241 - 243.

<sup>92</sup> *ibid*, pp 243-254.

<sup>93</sup> The courts are specified in s 4(5) and include the Supreme Court, the JCPC, the High Court and the Court of Appeal in England, Wales and Northern Ireland and the High Court of Justiciary (sitting otherwise than as a trial court) and the Court of Session.

<sup>94</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323.

<sup>95</sup> *ibid*, para 26.

<sup>96</sup> *ibid*, para 20.

<sup>97</sup> [2010] UKSC 45, [2011] 2 AC 104, para 48.

<sup>98</sup> See <https://www.supremecourt.uk/about/publications.html>

<sup>99</sup> [2008] UKHL 38, [2009] 1 AC 173

<sup>100</sup> [2014] UKSC 38, [2015] AC 637.

<sup>101</sup> [2018] UKSC 11, [2019] AC 196.

<sup>102</sup> There is a majority decision in favour of the more expansive approach in *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, [2018] HRLR 14 See also *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, [2020] AC 1.

<sup>103</sup> For examples of where a majority of Justices of the Supreme Court have expressed caution about applying Convention rights further than one could be confident that the ECtHR would go, see *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435, paras 17-20, 73 and 86 and 101-105; *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52, para 43, and *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455, paras 145-148.

<sup>104</sup> [2004] UKHL 30, [2004] 2 AC 557.

<sup>105</sup> *ibid*, paras 32-34 (Lord Nicholls of Birkenhead).

<sup>106</sup> Lord Reed's Response to call for evidence by the Independent Human Rights Review (n 98), para 17.

<sup>107</sup> For example, *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35, para 69; *James v United Kingdom* (1986) 8 EHRR 123, para 50.

<sup>108</sup> *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] AC 167, para 19; *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] AC, 621, para 45; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, paras 20 and 74.

<sup>109</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, paras 40-42 and 44; *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, paras 29-31 and 68; *Huang* (n 108), para 11; *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420, paras 12-15 and 31; *E v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66, [2009] 1 AC 536, para 13 and 52-54. The Supreme Court has confirmed that insight in *R (Quila)* (n 108) paras 46, 61, 91.

<sup>110</sup> The ECtHR held that the traditional *Wednesbury* approach does not afford adequate protection for Convention rights: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

<sup>111</sup> *Rights Brought Home: The Human Rights Bill*, October 1997, Cm 3782.

<sup>112</sup> See Lord Reed's response (n 98) para 6 and the figures are derived from Ministry of Justice, "Responding to human rights judgements, Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019 - 2020" (2020) CP 347, p 9, accessible at: <https://www.gov.uk/government/publications/responding-to-human-rights-judgments-2019-to-2020>.

<sup>113</sup> The figures are quoted in Lord Reed's response (n 98), para 6 and are derived from statistics for ECHR Violations by State accessible at: [www.echr.coe.int](http://www.echr.coe.int).

<sup>114</sup> But in the Belmarsh case, *A v Secretary of State for the Home Department* (n 109), which involved a challenge under the HRA, Lord Bingham spoke of constitutional limitations on government. He also referred to JPCPC authority (*Matadeen v Pointu* (n 14)). See also Lord Bingham's statement in *Robinson v Secretary of state for Northern Ireland* [2002] UKHL 32, para 11 that the Northern Ireland Act 1998 was "in effect a constitution", requiring its provisions to be interpreted generously and purposively.

<sup>115</sup> Andrew Burrows, *Thinking about Statutes*, Hamlyn Lectures 2017 (2018) 48 - 56.

<sup>116</sup> *Samuels v Davis* [1943] KB 526; now the terms are implied by statute: Supply of Goods and Services Act 1982.

<sup>117</sup> See the discussion in Burrows (n 115), p 51 and in *Test Claimants in the Franked Investment Income Group Litigation and others v Commissioners of H M Revenue and Customs* [2020] UKSC 47, paras 117 - 122.

<sup>118</sup> *Gaidan v Godin-Mendoza* (n 104).

<sup>119</sup> [2015] UKSC 11, [2015] AC 1430, 2015 SC (UKSC) 63.

<sup>120</sup> See for example *R (Rotherham MBC and others) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6; [2015] 3 All ER 1. for the wide margin of appreciation that the majority of the Court recognised that the Secretary of State had in the allocation of European structural funds to the regions of the United Kingdom.

<sup>121</sup> For example, in *Nicklinson v Ministry of Justice* [2012] EWHC 2381 (Admin) and [2013] EWCA Civ the Divisional Court and the Court of Appeal rejected arguments that the courts should develop necessity as a defence to a charge of murder to accommodate certain cases of assisted suicide. In the Divisional Court Toulson LJ made it clear that that was a matter for Parliament to decide, and not the courts, for reasons of competence, constitutionality and control of consequences. The Justices of the Supreme Court were divided in their views as to the proper role of the court in the context of Mr Nicklinson's challenge to the statutory prohibition of assisted

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suicide on the ground that it infringed his right to respect for his private life under article 8 of the ECHR: [2014] UKSC 38; [2015] AC 657.

<sup>122</sup> *Pettitt v Pettitt* [1970] AC 777, 794-795.

<sup>123</sup> For example, in *Gregg v Scott* [2005] UKHL 2, [2005] 2 AC 176, para 90, one of the reasons for refusing to alter rules of causation was the impact of such an innovation on public expenditure on the National Health Service, which was a matter for Parliament and not the courts. See also *R v Cambridge Health Authority ex p B* [1995] 1 WLR 898.

<sup>124</sup> This was one of the circumstances which Lord Bingham identified as requiring judges to be particularly cautious in developing the law: Thomas Bingham, “The Judge as Lawmaker: an English Perspective” in “The Business of Judging: Selected Essays and Speeches” (Oxford University Press 2000) 25 - 34.

<sup>125</sup> Lord Walker, “How Far Should Judges Develop the Common Law?” in The UK Supreme Court Yearbook (Vol 4 2012 - 2013) 121 - 132; Lord Dyson, “The Limits of the Common Law” (2015) 27 Singapore Academy of Law Journal 271.

<sup>126</sup> Jonathan Sumption, “Trials of the State: Law and the Decline of Politics” (Profile Books 2020).

<sup>127</sup> *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, para 39, (Lord Hoffmann).

<sup>128</sup> Thomas Bingham, “The Rule of Law” (Allen Lane 2010) ch 3.

<sup>129</sup> Practice Statement (Judicial Precedent), 26 July 1966 [1966] 1 WLR 1234.

<sup>130</sup> I have in mind *Conway v Rimmer* [1968] AC 910, *R v Secretary of State for the Home Department ex p Khawaja and Khera* [1984] AC 74, and *Patel v Immigration Appeal Tribunal* [1988] AC 910.

<sup>131</sup> For example *Leech* (n 69), *ex parte Witham* (n 72), *Simms* (n 75) and *UNISON* (n 82).

<sup>132</sup> *Brind* (n 76).

<sup>133</sup> *Bugdaycay* (n 66).

<sup>134</sup> *Pham* (n 78).

<sup>135</sup> *Miller II* (n 85).

<sup>136</sup> Such as the right to life and freedom of expression.

<sup>137</sup> See, for example, the powerful critique of the common law constitution in Jeffrey Goldsworthy, “Parliamentary Sovereignty, Contemporary Debates” (Cambridge University Press 2010) ch 2, in which he argues that judicial acceptance of unwritten constitutional rules is not a sufficient condition for the existence of such rules because acceptance by other branches of government is necessary, not least because the doctrine of parliamentary sovereignty was not just a legal rule but an ultimate political fact; and the assertion of a pragmatic rationale for the doctrine of parliamentary sovereignty by Dawn Oliver, “Parliament and the Courts: a Pragmatic (or Principled) Defence of Parliamentary Sovereignty” in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), “Parliament and the Law” (Hart Publishing 2013) ch 12, in which she argues that each organ of the state has a responsibility for the constitution.

<sup>138</sup> *R (Lightfoot) v Lord Chancellor* [2000] QB 597, 609.

<sup>139</sup> By section 3 of the HRA.

<sup>140</sup> Philip Sales, “Rights and fundamental rights in English law” (2016) 75(1) CLJ 86.

<sup>141</sup> See Jason Varuhas, “The Principle of Legality” (2020) 79(3) CLJ 578-614 for a critique of the development of the principle of legality in which he warns of the dangers of inconsistency and incoherence in the law.

<sup>142</sup> Paul Craig, “Judicial Review, Methodology and Reform” (2021) (forthcoming).

<sup>143</sup> [2014] UKSC 20, [2015] AC 455, para 54. See also *Pham* (n 78) para 60 (Lord Carnwath), paras 94-96 (Lord Mance), paras 105-107 (Lord Sumption), and paras 114-119 (Lord Reed).

<sup>144</sup> Paul Craig, “The Nature of Reasonableness” (2013) 66 CLP 131.

<sup>145</sup> *Pham* (n 78) para 106 (Lord Sumption).

<sup>146</sup> It was an analogous circumstance that I had in mind in *Moohan v Lord Advocate* [2015] UKSC 67, [2015] AC 901, para 35.

<sup>147</sup> Mark Elliott, “The Fundamentality of Rights at Common Law” in Mark Elliott and Kirsty Hughes (eds), “Common Law Constitutional Rights” (Hart Publishing 2020), ch 9.

<sup>148</sup> *AXA* (n 37 and 79) para 51. See also *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 102 (Lord Steyn).

<sup>149</sup> See Alison Young, “Fundamental Common Law Rights and Legislation” in Elliott and Hughes (n 147) ch 10.

<sup>150</sup> *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10, [2020] 2 WLR 857.

<sup>151</sup> *ibid*, para 170.

<sup>152</sup> *ibid*, para 233.

<sup>153</sup> IRAL Report, CP 47 (March 2021) 132.

<sup>154</sup> *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* (n 37) 644.