

Long Waves of Constitutional Principle in the Common Law

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This presentation seeks to explore the way in which constitutional law as embedded in and emerging from the common law addresses the problem of democratic time. It draws on analogies from states with written constitutions, which also have to address the problem of democratic time.

The tempo of democratic time

Chapter 7 of Helen Thompson's book, *Disorder: Hard Times in the 21st Century* is entitled "Democratic Time". She refers there to the traditional understanding associated with, in particular, Machiavelli and Polybius, that time "is the dimension of instability" in politics.¹ According to Polybius, government progresses between kingship, aristocracy and democracy, as each form of government is destroyed by its own excesses; "[t]he only way to check the cycle and allow for a long middle – what he called 'a state of equilibrium' is to balance the three positive forms of government ... and have them counteract each other".² Transposing this idea to modern times, according to Thompson a balance is required between the aristocratic element and the democratic element. The aristocratic element tends to predominate in a representative democracy subject to the rule of law with strong protection for property rights, but can be balanced by the democratic element, involving equal voting rights. If liberal democracy is to survive, tendencies to either aristocratic excess – excessive control by rich elites³ – or democratic excess – with a danger of decay, as feared by Max Weber, into authoritarianism through power acquired by a charismatic, demagogic leader⁴ – have to be controlled and corrections made. She points out that Machiavelli "started from the premise that states, including republics, had to change to sustain themselves against time."⁵ Liberal democracies have to be able to engage in repair and reform across time in order to sustain the acceptability of the basic settlement they achieve between what is essentially a contingent compromise between the tradition of political liberalism – "the rule of law, the separation of powers and the defence of individual freedom" – and the democratic tradition, "whose central ideas are equality and popular sovereignty".⁶ One thinks of the marvellous line in Lampedusa's *The Leopard*, "Things have to change if they are to stay the same" – albeit that was applied to the old aristocratic order and the recognition that it had to change with the times to retain its power.

There are three tempos of time in a democracy embedded in a common law constitution. There is the need for an elected government which can respond at speed to events in the world as they unfold. This is executive time. It is characterised by a high level of discretion and flexibility for manoeuvre within very broad legal parameters. There is essentially an unavoidable need for a high degree of discretion in order to govern. As Raymond Geuss puts it: "to attempt in a thoroughgoing and comprehensive way to oppose a discretionary power which is to some extent unpredictable is not a

¹ H Thompson, *Disorder*, 182, quoting JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Political Tradition* (1975), 77

² Thompson, *Disorder*, n 1, 183.

³ Thompson, *Disorder*, n 1, 185

⁴ Thompson, *Disorder*, n 1, 186

⁵ Thompson, *Disorder*, n 1, 187

⁶ C Mouffe, *For a Left Populism* (2018), 14, citing CB Macpherson, *The Life and Times of Liberal Democracy* (1977).

coherent project, because such discretionary power is of the essence of politics".⁷ A political order needs the capacity to react, and react quickly, to unpredictable changes in circumstances.

Then there is the need for the elected legislature to be able to consider proposals for reform of the law and to make decisions in light of what is judged to be the needs of the day. This is legislative time. It proceeds from public debate from which matters of public concern emerge, through refinement by application of democratic procedures (voting in elections on the basis of party manifestos, adoption of legislative proposals for presentation to Parliament) into enactment by Parliament as concrete laws.⁸

Then there is the need for basic ground rules to be worked out to provide the framework for democratic contestation and engagement. This is the dimension of constitutional time. It is in the dimension of constitutional time that it is appropriate to speak of long waves of constitutional principle in the common law.

Framing and repair through constitutional law in the liberal democratic order

Analysed in this way, the role of constitutional law is the framing and repair of the liberal democratic order. It frames that order because the ground rules have to be taken to be fixed and stable to a high degree in order to make engagement in democratic politics comprehensible and effective. It contributes to repair of the order by adjusting it over time in an effort to keep the legal order aligned with social expectations and understandings.

In English law, the idea of constitutional law is indistinct. Speaking broadly, constitutional law is concerned with the generation and allocation of power to act, and with ensuring that it is exercised within proper bounds and subject to proper constraints. These aspects are inter-related. In part, ensuring that power is exercised within proper bounds involves policing how it is allocated. Power is generated by stipulating who may exercise it and specifying how their authority is constituted. Ensuring that power is exercised in the proper way also involves checking that this is done by the persons who have it assigned to them; and requiring them to respect certain values and standards when they do exercise it contributes to the generation of power by helping to secure public acceptance when it is exercised.⁹ But partly because this is such a broad account of constitutional law, and partly because there is no comprehensive written constitution, there is no settled or rigorous definition of constitutional law. Constitutional law can be taken to extend from high principle to fine detail, such as the nuts and bolts of election law, so that where the limits of it are drawn is largely a matter of convenience, as Maitland put it.¹⁰ He pointed out that it is difficult to discern where constitutional law ends and administrative law (the law governing the proper exercise of public power) begins; in the UK there is no sanctity attaching to constitutional law. Nonetheless, some aspects of constitutional/administrative law are more fundamental than others and may therefore be taken to be more constitutional in their impact. So I concentrate on these aspects in this presentation.

What contribution does the common law, specifically, make to these constitutional aspects of the law? In this context, common law is taken to be synonymous with judge-made law. I am concerned with the judicial contribution to the governing legal scheme, focusing on the position in the United Kingdom. The critical elements of this are the practice of and doctrine associated with statutory interpretation and the articulation of the principles of judicial review.

⁷ R Geuss, *History and Illusion in Politics* (2001), 107.

⁸ J. Habermas, *Between Facts and Norms* (trans W Rehg, 1996).

⁹ Stephen Holmes, *Passions and Constraint: On the theory of liberal democracy* (1995).

¹⁰ FW Maitland, *The Constitutional History of England* (1908), 526-539, 'The Definition of Constitutional Law'.

Speaking about the judicial contribution to constitutional law means that analogies can be drawn with jurisdictions which have a written constitution. In such jurisdictions, the judicial contribution to constitutional law remains considerable, because the application of a legal instrument in the form of a constitution calls for judicial interpretation in novel situations (as does the application of a legal instrument in the form of a statute) and because constitutional provisions (particularly those setting out fundamental rights¹¹) are often in general terms, so that their application is under-determined by the instrument itself. Jurisdictions with written constitutions develop their own constitutional common law.

The framing function of constitutional law by setting the ground-rules of the liberal democratic order set out in constitutional law is not simply a matter of containment and restraint – though the rules do that as well; it is a matter of establishing the grammar of the system.¹² The ground-rules are power generating, in that they allow the joint formation of intentions which enables the taking of coherent action by the state according to a structure of authority which commands public acceptance.

The requirement that the executive and legislature respect constitutional norms means that the constitution slows down the tempo of executive time and legislative time, and so has a calming effect on politics. That aids legitimacy as well, and reinforces loser consent. It gives reassurance that minority views have been considered and not lost in the rush to get things done. As Jan-Werner Müller pithily puts it, the essence of liberal democracy is that the majority gets their way after the minority have their say,¹³ and the slowing of the tempo of executive and legislative time allows for the minority's voice to be heard and be seen to be heard. It undercuts what Hannah Arendt called “the contempt of the administrator”, an impatience with procedural rules which, by requiring justifications to be given for action, gets in the way of pure executive fiat.¹⁴

The repair function of common law constitutional law is made possible by the judicial contribution to that law, which allows for adjustments over time to align constitutional norms with social expectations, so that they do not drift too far apart. Application of legal norms is a constant process, which can arise in the courts at any time. This distinguishes it from legislative action, where the focus is on a specific act at a particular time to define new laws to govern in the future. The judicial application of an already existing norm binds together past, present and future in a way that a legislative act does not. A judge has to understand how the norm to be applied came to exist in the past and its meaning then and decide what meaning it should bear in the present to govern the dispute before the court and (potentially) what meaning it should carry into the future to be derived from the precedential value of the decision.

The framing function of constitutional law suggests that the ground rules comprised within it should be unchanging. In order to be able to participate fully and effectively in the exercise of public authority on behalf of the state political actors need to understand clearly the grammar of the system, where they stand vis-à-vis other actors, what options are available in order to negotiate or engage with those others, what actions are open to them acting alone and what actions might be open to them acting with others. The executive needs to know what its powers are so that it can act with legitimacy and minimise the risk of getting into difficult and mutually damaging battles with the courts. But in practice

¹¹ Judicial latitude in applying a constitutional provision will be considerably less in relation to those which are framed in concrete and specific terms: *Chandler v The State (No 2)* [2022] UKPC 19, para 73.

¹² Holmes, *Passions and Constraint*, n 9, ch 5; P Sales, “Legalism in Constitutional Law: Judging in a Democracy” (2018) Public Law 687, 691-695.

¹³ J-W. Müller, *Democracy Rules* (2021), 65, 72.

¹⁴ C. Volk, *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (2015), 120.

a democratic system can function effectively so long as the ground rules are *sufficiently* understood and are *reasonably* stable over time.¹⁵

This allows space for the repair function of constitutional law, which is also important.

The repair function in liberal democracy

The liberal democratic system can only function effectively if respect for it and consequently for the laws it produces is maintained across time. As Hegel observed:

‘How blind they are who may hope that institutions, constitutions, laws which no longer correspond to human manners, needs and opinions, from which the spirit has flown, can subsist any longer; or that forms in which intellect and feeling now take no interest are powerful enough to be any longer the bond of a nation!’¹⁶

The question of reasonable alignment potentially raises issues across the whole field of constitutional law. They extend from the balance between sources of authority stemming from the two political traditions - is authority sufficiently democratic? does it provide effective government? Does it provide effective protection of rights? - and hence how power is allocated between the different institutions of the state, to the way in which public power is exercised – is it done fairly? Is there sufficient examination of relevant matters of the public interest? Is there effective recognition of individual rights? Is there sufficient opportunity for individuals’ participation in decisions which affect them?

Four reasons why the work of repair through the maintenance of a reasonable alignment of the law (and constitutional law in particular) and social expectations is important may be emphasised. First, in order for its governance to be effective the state requires a high degree of cooperation from citizens, and this has to be secured by ensuring that they regard the law as legitimate.¹⁷

Secondly, since the balance between the two political traditions is inherently ambiguous and potentially liable to get out of kilter, thereby threatening one or other of the primary benefits conferred by liberal democracy (individual autonomy and participation in actions of collective autonomy), and hence the legitimacy of the whole system, work is required to adjust the tiller from time to time to ensure that both benefits are secured so far as possible in a self-reinforcing relationship. They cannot be allowed to descend into a spiral of growing mutual antagonism. Both are founded on an anti-paternalistic epistemological premise that there is no final truth about what is good for the individual, only what he or she decides upon, and there is no final truth about what is good for society; rather, the only a criterion for the public good is what the people, freely organised and able to decide freely, will choose.¹⁸ As Beetham observes, this ambiguity makes democratic critique of liberalism both necessary but also problematic, if it threatens the conditions of liberal democracy itself.¹⁹ “To be able to shape the course or conditions of one’s life through sharing control over collective decisions is a necessary counterpart to exercising such control at the personal or individual level”.²⁰

¹⁵ This point can be made generally about planning in the light of common law norms: Cf M.A. Eisenberg, *The Nature of the Common Law* (1988), 158: “The greater part of the common law, although not certain, is nevertheless sufficiently determinate for planning purposes”.

¹⁶ ZA Pełczyński (ed), *Hegel’s Political Writings* (TM Knox tr, Clarendon Press 1964), 243–44.

¹⁷ HLA Hart, *The Concept of Law* (3rd ed); Tom R. Tyler, *Why People Obey The Law* (2006).

¹⁸ David Beetham, “Liberal Democracy and the Limits of Democratization” (1992) *Political Studies* XL, Special Issue, 40, 41-42.

¹⁹ Beetham, “Liberal Democracy”, n 18, 44.

²⁰ Beetham, “Liberal Democracy”, n 18, 45.

Thirdly, when they deliver their rulings courts represent society, and in order to preserve the legitimacy of their own function in the eyes of citizens, they have to be able to maintain the perception that they are doing this.²¹ This too is important for preserving the legitimacy of the liberal democratic order since courts have to play such a central part in it by upholding individual rights while also ensuring that the government and legislature are able to rule.

Fourthly, by maintaining an appreciation of the legitimacy of the liberal democratic order, founded on the benefits it can and does provide, the courts make a significant contribution to ensuring that loser consent exists for democratic choices made by the majority under fair conditions. Loser consent is the essence of democracy, since without it majoritarian rule on a foundation of consensus cannot operate.²²

Why change in common law constitutional principles comes in long waves

The framing function of constitutional law is also legitimacy-building, since it enables the democratic elements in the constitution to operate effectively. Coherent formation and exercise of democratic will be frustrated if the ground rules of constitutional law are liable to an excessive degree of unheralded and unexpected change, affecting the meaning and effect of choices made in the light of those rules. So they cannot be wholly overridden in the interests of repair. A reasonable balance between maintaining stability in the interests of the framing function and change in the interests of the repair function means that the changes ought to take place slowly and incrementally.

Executive time and legislative time produce changes according to high frequency wave-lengths, reacting to the high pace of the emergence of issues in the public sphere and the need for action to respond to them. Constitutional time produces changes according to low frequency, long wave-lengths. The framing function of constitutional common law means that it cannot change at such speed as executive and legislative time. The ground rules comprising constitutional law might appear unchanging, but in fact they are capable of change through the interpretive activity of judges, but at a far slower pace than executive action or legislative change. Since it provides the framework within which the high tempo engagement involved in executive time and legislative time is played out, constitutional law has to be stable enough to allow participants in democratic politics to be able to form coherent expectations about what actions are and are not permitted in the course of compromise, conflict and debate about how to proceed.

A requirement that change should occur at a slow pace and incrementally allows for the possibility of some notice that it is or may be on the way, so that political actors can allow for the risk that it may occur. In the common law, the way in which evidence may begin to mount in judicial statements and practice that a change might be on the cards can be likened to the way in which a wave begins to form and gather mass before it breaks.

In addition to this functional constraint on the development of common law constitutional norms, there are constraints on judges in the development of such norms stemming from judges' position and limited authority in a democratic order. Judges are appointed with guarantees of their independence and insulation from having to respond in the immediate term to shifts in public opinion. By contrast with the legislature, they do not have democratic legislative authority to change the law. Such legal change as judges can produce has to be carried out interstitially in the process of interpreting existing law, within comparatively narrow limits consonant with the legitimate exercise of judicial authority. This means that it has to be conducted at a slow pace, in such a way that it can

²¹ P Sales and F Wilmot-Smith, "Justice for Foxes" (2022) LQR forthcoming [p24].

²² Thompson, *Disorder*, n 1, ch 7; Adam Przeworski, *Crises of Democracy* (2019).

be regarded as legitimately interpretive and not illegitimately legislative. Constitutional theory intersects here with a more general theory of the common law.

A significant constraint which reduces the legitimacy of law-making by courts is the problem of being able to identify with confidence what are the public expectations with which the law is to be brought into conformity. This relates to the epistemic point above. In times before the hegemony of liberal democracy, judges as leading members of their societies felt more confident of their role in laying down the law.²³ Now, the appeal to natural law by a social elite has lost its persuasive force.²⁴ Democratic choice and selection of value is what remains, along with the recognition of legitimacy associated with maintaining in place and in healthy order the preconditions for the free exercise of such choice. In the absence of a clear written constitutional norm to which appeal can be made, the courts feel natural reticence in interfering with laws passed according to democratic procedures.²⁵ A vote taken pursuant to democratic procedures appears to fill the epistemic gap: the people have spoken and have collectively declared the values to be promoted.

Courts looking to carry on their repair function by keeping the law aligned with social expectations therefore have to apply far more demanding criteria before they can have confidence that public opinion has changed so widely and so strongly or persistently that it is legitimate for them to act to change the law. It typically takes a long time for sufficient evidence to accumulate to allow the courts both to identify what action needs to be taken and to be sure that it will be regarded as legitimate for them to take it.

From the perspective of common law theory, Melvin Eisenberg argues that “The common law should seek to satisfy three standards: social congruence, systemic consistency and doctrinal stability”.²⁶ By social congruence he means that the law should be made congruent with what he calls social propositions, ie moral norms, policies and experiential propositions about the way the world works.²⁷ As he says, “The rules made by courts should be durable – generalizable over time as well as over persons – and therefore should not be based on policies that seem transitory”.²⁸ Also, because they are not representative institutions in the democratic sense, courts have to proceed slowly and taking care not to impose their own values: “The legitimacy of the judicial establishment of legal rules therefore depends in large part on the employment of a process of reasoning that begins with existing legal and social standards rather than those standards the court thinks best”.²⁹ A judge is not free to employ those social propositions he or she thinks best, but acts in a position of trust for society as a whole.³⁰

Benjamin Cardozo similarly described the compromise between rest and motion, stability and progress which lies at the heart of the common law.³¹ The law needs both a spirit of change and a spirit of conservation.³² As he puts it: “When changes of manners or business have brought it about that a rule of law which corresponded to previously existing norms or standards of behaviour, corresponds no longer to the present norms or standards, but on the contrary departs from them,

²³ P Sales, “Modern Statutory Interpretation” (2017) 38 Statute Law Review 125, 129.

²⁴ M Loughlin, *Public Law*.

²⁵ See eg *SC v Secretary of State for Work and Pensions* [2021] UKSC 6, paras 208-209, *Suraj v Attorney General of Trinidad and Tobago* [2022] UKPC 26 para 93.

²⁶ M.A. Eisenberg, *The Nature of the Common Law* (1988), 50. For further discussion, see P Sales, “Common Law: Context and Method” (2019) 135 LQR 47.

²⁷ Eisenberg, n 26, ch 4.

²⁸ Eisenberg, n 26, 31.

²⁹ Eisenberg, n 26, 150.

³⁰ Eisenberg, n 26, 2-3.

³¹ Benjamin N. Cardozo, *The Paradoxes of Legal Science* (1928).

³² Cardozo, n 31, 7.

then those same forces or tendencies of development that brought the law into adaptation to the old norms and standards are effective, without legislation, but by inherent energies of the judicial process, to restore the equilibrium".³³ This is a statement of the repair function as something inherent generally in the common law legal process.

Cardozo addresses the problem of what criteria to apply before the courts can modify legal norms in the absence of legislation. He says, "Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate; but this is uncertain, and morality may vary between groups in the same community, so how is the choice to be made? At what level does the social pressure become strong enough to convert the moral norm into a jural one?" According to Cardozo the line should be drawn higher than the lowest level of moral principle or practice in society and lower than the highest; the law will strive to follow the principle and practice of the people of the community "whom the social mind would rank as intelligent and virtuous".³⁴ Law should follow public opinion, defined as "critically thought out social judgments".³⁵ It is the "strong and preponderant opinion" which has capacity to turn desire into law. In Cardozo's formulation, "The common will must have made itself known for so long a time as well as in so distinct a manner as to have gained stability and authority"; this may be difficult to identify, but a judge must try.³⁶

Looking at the matter more broadly, the test for change in the law should not be that a judge has to wait to be satisfied that *everyone* in society would agree with it, since that would contemplate a situation in which the courts pressed on with an existing misaligned law which a substantial and stable majority regarded as illegitimate. The failure to adjust in such circumstances would risk discrediting the law in the eyes of the general public. But a judge has to be confident that there is a solid and sustained preponderance of view in favour of change, rather than react to more epiphenomenal shifts on the surface of public debate.

Turning more particularly to constitutional law, there are again accounts of how judges have a responsibility to maintain a degree of congruence between the law and social expectations, but again balanced by the need to maintain stability as part of the law's framing function.

In *Law and Public Opinion in England* Dicey endorsed the law-making function of the courts. "New combinations of circumstances – that is, new cases – constantly call for the application, which in truth means the extension, of old principles; or, it may be, even for the thinking out of some new principle, in harmony with the general spirit of the law, fitted to meet the novel requirements of the time"; courts are influenced by the beliefs of the time and public opinion, "But ... they are also guided by professional opinions and ways of thinking which are, to a certain extent, independent of and possibly opposed to the general tone of public opinion ... [judges] are more likely to be biased by professional habits and feeling than by the popular sentiment of the hour".³⁷ In trying to sustain the values of the legal system, the ideas of expediency or policy accepted by the courts may differ from those of the general public.³⁸ According to Dicey, judicial legislation aims more at securing certainty and maintaining a fixed legal system with strong respect for precedent, than at amending the deficiencies of the law. "And this view is substantially sound. Respect for precedent is the necessary foundation of judge-made law ... If the Courts were to apply to the decision of substantially the same case one

³³ Cardozo, n 31, 14-15

³⁴ Ibid, 37

³⁵ Ibid, 50.

³⁶ Ibid, 51

³⁷ A V Dicey, *Law and Public Opinion in England* ([1905] 2nd ed, 1914), 363-364.

³⁸ Ibid 367-370.

principle today, and another principle tomorrow, men would lose rights which they already possessed; a law which was not certain would in reality be no law at all".³⁹

Peter Cane offers this account of Dicey's approach:⁴⁰

"For Dicey, history was an important part of law's context; but the history that mattered to him was history that enabled students better to understand the law of the contemporary constitution – 'practically relevant' history, we might say. One of the social functions of norms, including legal norms, is to manage the relationship between a polity's (and a society's) past, present and future. Norms promote stability. In order to understand today's norms, it may be necessary to look to the past in which the norm was established and applied over the years. On the other hand, excessive stability may be dysfunctional. Norms may, and sometimes must, change in step with changes in the needs, interests and ideas of those whose conduct they regulate. ... On the other hand, because too much radical change in a given period may itself be dysfunctional, normative change is typically, to a greater or lesser degree, incremental."

Writing about the US constitution, Jack Balkin links the maintenance of a sense of the legitimacy of the constitution to loser consent in a democracy. Government under the constitution must be sufficiently effective to maintain security and social peace and sufficiently just to be deserving of cooperation: "Legitimacy ... is a feature of a political and legal system that makes the system sufficiently worthy of respect so that the people who live within it have good reasons to continue to accept the use of state coercion to enforce law against themselves and others, even when they do not agree with all of the laws ... and may even think that some of the laws are quite unjust. This applies especially to people who try to change the law through politics and lose. They still respect the political and legal system as a whole ...".⁴¹ To maintain the legitimacy of the system, there is a need to avoid constitutional idolatry and complacency, and allow for a degree of change in constitutional doctrine to reflect public opinion.⁴² "Constitutional argument relies on professional judgment, but professional judgment relies on assumptions about what both professionals and non-professionals think is reasonable at any point in history. The self-image of professionals is that of reasonable people who proceed through reasoned arguments; therefore professionals often care deeply about what others think is reasonable or beyond the pale. ... But what is reasonable in this sense of the word depends on the practice of persuasion in public life, the institutions of public thought and expression, and the gradual development of public values and public opinions."⁴³

As Jon Elster writes, "Constitutionalism ensures that constitutional change will be slow, compared to the fast lane of parliamentary politics. The constitution should be a framework for political action, not an instrument for action".⁴⁴

Common law constitutional norms and the idea of a living constitution

What is a common law constitution, in relation to which it makes sense to speak of constitutional norms? Even in the United Kingdom, which has no general written constitution, some norms with important status have a canonical written form, typically as statutes which have significance for

³⁹ Ibid 366-367.

⁴⁰ P Cane, "AV Dicey as Legal Theorist" (2021) MLR 1, 4.

⁴¹ Jack M Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (2011), 34.

⁴² Ibid, 11

⁴³ Ibid, 12

⁴⁴ J. Elster, *Ulysses Unbound* (2000), 100.

constitutional framing such as the Bill of Rights of 1689 and, prior to Brexit, the European Communities Act 1972. Alongside these are norms developed as principles through judicial practice and recognition of their constitutional significance. These include the foundational norm of parliamentary sovereignty,⁴⁵ privilege in respect of parliamentary debates as a common law principle⁴⁶ and the responsibility of the executive for national security.⁴⁷ Some of these norms have legal effects, some are purely conventional and operate as a form of political custom or morality.

To treat norms as matters of convention makes for flexibility, but means they are particularly vulnerable to change and hence to aristocratic or democratic excess, to use Thompson's terminology. As the cultural conditions for a strong political morality based on conventions have been eroded,⁴⁸ there have been increased calls for elevation of norms into the legal sphere.⁴⁹ In part, Parliament has responded to reduced trust in government and reduced effectiveness of political processes to compel high standards of administrative conduct by legislating to impose such standards through law, eg by creating obligations of consultation. In part, the courts have responded over the longue durée, in constitutional time, by gradual change in legal doctrine. In some ways, this can be seen as a process of elevation of conventional norms into law.

Common law principles and political conventions also have a major role to play where there is a written constitution. The legal rules laid down by a constitution may be highly specific, but often they are expressed in general terms which means that their application is under-determined by the written rule itself. This creates a significant degree of discretion for the courts, through their interpretive practice, in determining the precise meaning and effect of the rules in concrete disputes. The guidance and framing functions of the rules and the supplementary principles laid down for their application then have to be reinforced by the authority structures inherent in court hierarchies and systems of precedent. If a superior court gives guidance regarding the concrete application of a constitutional norm, the public is entitled to expect that, absent good reason to the contrary, that guidance will be followed and applied.

The practical effect of this is that a form of common law develops around written constitutions which is not radically distinct from the common law constitutional approach in the United Kingdom. A typical way to express this is to say that a constitution or constitution-like instrument (such as the European Convention on Human Rights) is a living instrument. Its practical meaning and effect vary over time through judicial development of the law under the banner of interpretation.

In relation to the US, this point is made particularly clearly by David Strauss.⁵⁰ He observes that judicial interpretation of the constitution offers a combination of constraint and the possibility of development. This combination can be said to be the essence of the common law. In constitutional terms, it allows the constitution to be framed as a multigenerational project. He cites Thomas Jefferson in support of this idea: '[T]he earth belongs to the living, and not to the dead'.⁵¹

Even a conservative jurist like the former Chief Justice William Rehnquist acknowledged that there is an important sense in which the US Constitution could be seen as a living instrument, provided that this was not pushed too far to give excessive licence to judges to change the rules. As he put it, "The

⁴⁵ Cf the debate in *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491.

⁴⁶ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.

⁴⁷ *R (Begum) v Special Immigration Appeals Commission* [2021] AC 765.

⁴⁸ L. Siedentop, *Democracy in Europe* (2001), chs 4 and 6; N. Johnson, *In Search of the Constitution* (1977), ch 3.

⁴⁹ See eg Johnson, *In Search of the Constitution*, n 47.

⁵⁰ David A Strauss, "Common Law Constitutional Interpretation" (1996) 63 U. Chi. L Rev 877; David A. Strauss, *The Living Constitution* (2010).

⁵¹ Strauss, *Living Constitution*, n 49, 24.

framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live".⁵²

The same point can be made about the extensive jurisprudence developed by the Judicial Committee of the Privy Council in interpreting and applying the constitutions of the various jurisdictions for which it is the apex court. As early as 1930 the Board described the British North America Act in relation to Canada, a constitutional instrument, as "a living tree capable of growth and expansion within its natural limits" and "subject to development through usage and convention".⁵³ In the land-mark decision *Fisher v Minister for Home Affairs*, concerning the interpretation of the Bill of Rights in the constitution of Bermuda, Lord Wilberforce pointed out it was "drafted in a broad and ample style which lays down principles of width and generality"; this called for "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to", while respecting "the language which has been used and ... the traditions and usages which have given meaning to that language".⁵⁴

This approach was powerfully reiterated by Lord Hoffmann in *Matadeen v Pointu*:

"It has often been said ... that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case 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.'"⁵⁵

Another well-known statement is that by Lord Bingham in *Reyes v The Queen*:

"A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society ..."⁵⁶

Similarly, the very extensive jurisprudence of the European Court of Human Rights regarding the meaning and effect of the ECHR is best seen as a form of common law which fleshes out the practical

⁵² William Rehnquist, "The Notion of a Living Constitution" (1976) 54 Texas Law Review 693, 694.

⁵³ *Edwards v Attorney General for Canada* [1930] AC 124, 136.

⁵⁴ [1980] AC 319, 328-329.

⁵⁵ [1999] 1 AC 98, 108.

⁵⁶ [2002] 2 AC 235, para 26.

application of the very broadly drafted Convention rights. The argumentation presented to the court and deployed in its judgments is strongly redolent of common law modes of reasoning. The court has identified the ECHR as “a living instrument”, the meaning and effect of which is capable of being developed over time as social norms and expectations develop. Significant examples of this are the norms in relation to punishment of children⁵⁷ and the recognition of the family life of gay couples.⁵⁸

Since constitutional development of this kind is recognised in the context of written constitutional instruments, it is not surprising that such development should also be possible in relation to the open-textured unwritten common law constitution in the United Kingdom. Development has occurred both in relation to the more positive identification of rights under the rubric of the principle of legality and in relation to the distribution of decision-making power and the extent of judicial control in relation to it. There is not a major distinction to be drawn between these movements. Where positive rights are developed this directly affects the distribution of power, since the effect is that government needs to do more to justify action which interferes with the rights.

In accordance with these ideas the courts have a limited role, interpreting constitutional norms (whether derived from the common law constitution or from a written instrument) in line with underlying constitutional traditions which are perceived to have current vibrancy and life. They are obliged not to legislate to impose the judiciary’s own values, but instead are required to interpret the existing law to give effect to the long-term values of society.

The emergence of constitutional principle through the doctrine and practice of judicial review

I turn to sketch an account of long wave shifts in what can be called common law constitutional principle.

Since the terrain of public law is predominantly occupied by statute, a major context in which shifts in constitutional principle enter law is through the interaction of statute and common law. Statutory interpretation is a practice embedded in common law principles. Over the long term, the courts have gradually adjusted this practice to inject increasingly demanding standards of good administration and of the protection of individual interests against the action of the executive. In doing this the courts may be said to have shifted, to a degree, from a “faithful agent” approach in interpreting the text of a statute towards locating it more in the context of underlying constitutional principles, of which the courts are interpreters and guardians, which come to the surface and affect its meaning.⁵⁹

Major developments in the history of judicial review can be seen in this light, such as with the trilogy of *Ridge v Baldwin* (emphasis given to the obligation of fairness in the exercise of executive power)⁶⁰, *Padfield* (emphasis given to the obligation to use statutory powers for proper purposes)⁶¹ and *Anisminic* (interpretation of statute in the light of the principle of access to justice).⁶² These are regarded as land-mark decisions because they signalled a significant shift in the way in which courts would approach the interpretation of powers in statute.

One can identify earlier examples. Dicey wrote in 1915 about the development of administrative law, noting the application of new standards of administrative fairness to be applied by the courts, against

⁵⁷ *Tyrer v United Kingdom* (1979-80) 2 EHRR 1, para 31 “the Convention is a living instrument which ... must be interpreted in the light of present-day conditions”.

⁵⁸ *Schalk v Austria* (2011) 53 EHRR 20.

⁵⁹ See K. Greenawalt, *Statutory and Common Law Interpretation* (2013), 8.

⁶⁰ [1964] AC 40

⁶¹ [1968] AC 997

⁶² [1969] 2 AC 147.

a background where ministerial responsibility subject to political scrutiny was not perceived to be an adequate safeguard.⁶³

Another significant shift in common law constitutional principle occurred towards the end of the twentieth century in the courts' approach to interpretation of tax statutes. There was a retreat from a highly restrictive interpretive approach which eschewed reference to the "equity" of a statute and was protective of the rights of property-owners to seek to order their affairs, even by artificial adjustment, to avoid tax,⁶⁴ in favour of a far more purposive interpretive approach which gives emphasis to the basic intention of Parliament in imposing a tax (ie a reversion to a form of "equity" of a statute) and is far more hostile to tax avoidance.⁶⁵

Also in the late twentieth century, the courts developed the so-called principle of legality in the interpretation of statutes, to give legal effect to a range of individual rights identified by them with increasing specificity.⁶⁶ In broad terms, this was justified by the courts on the basis that Parliament is taken to legislate for a liberal democracy in a constitutional state which observes the rule of law.⁶⁷ However, if such broad concepts are regarded as capable of injecting determinate content into a statutory rule, the scope for the law to be affected by changes in the understanding of these concepts across time is clear.

As I put it elsewhere:⁶⁸

"The courts thus have a role to identify and give a degree of legal effect to slow waves of constitutional principle, which gradually cohere and form from the disparate materials of political practices and statements by a range of political actors and courts into distilled and concrete norms; and which may be capable of gradual dispersal too."

An example of dispersal is the former constitutional presumption that women do not have the vote, referred to in *Nairn v University of St. Andrews*,⁶⁹ which could not be applied today.

A development parallel to the increasing prominence of the principle of legality is the identification of statutes with enhanced constitutional significance, such that ordinary principles of implied repeal do not apply in relation to them.⁷⁰ Such statutes are not declared to be such by Parliament; they are invested with such significance by the courts, by picking them out as running particularly closely with the grain of underlying constitutional principle.

Other general developments in judicial review reflect a similar process. The courts have to justify doctrinal change and they tend to do so by reference to underlying constitutional principle. The debate about whether or not to adopt proportionality as a general principle of judicial review largely takes place on this plane.⁷¹ Similarly, by reference to arguments of constitutional principle, Jason

⁶³ A.V. Dicey, 'The Development of Administrative Law in England' (1915) 72 LQR 148.

⁶⁴ Exemplified in the *Duke of Westminster* case [1936] AC 1.

⁶⁵ *Furniss v Dawson* [1984] AC 474; *UBS AG v HMRC* [2016] 1 WLR 1005.

⁶⁶ See eg *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539; *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131-132. For discussion see P Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 LQR 598; J Varuhas, "The Principle of Legality" [2020] CLJ 578.

⁶⁷ *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, paras 28-31 (Lord Steyn).

⁶⁸ P Sales, "Legalism", n 12, 968

⁶⁹ [1909] AC 147.

⁷⁰ *Thoburn v Sunderland City Council* [2003] QB 151.

⁷¹ See the essays in H. Wilberg and M. Elliott, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015); P Sales, "Rationality, Proportionality and the Development of the Law" (2013) 129 LQR 223.

Varuhas questions how far it is legitimate for courts to use the principle of legality to introduce a proportionality standard of review of executive action which has a tendency to supplant and undermine established standards of rationality review.⁷²

The doctrine of legitimate expectations also developed in the late twentieth century as the courts gave legal protection to procedural and substantive legitimate expectations based on policies or assurances given by public authorities as to how they would exercise discretionary powers. The underlying justification for this development was increasingly put in terms of constitutional principle. At first emphasis was given to the abuse of power which was said would occur if there was a change of policy in circumstances where a person had relied upon it to their detriment, but this had to be balanced against the constitutional responsibilities of the authority in question.⁷³ Later, a distinct justification was given based on a constitutional principle of equality of treatment and protection against capricious and unjustified differentiation between persons falling within the scope of the policy; this has the effect that detrimental reliance is not required.⁷⁴

Conclusion

Common law constitutional law is something real, even though its precise parameters may be hazy. The courts have to identify and interpret the fundamental principles which constitute and govern the constitution. In doing so, they give effect to and hold in balance the framing and repair functions of constitutional law, to allow the governance system to operate effectively but also with legitimacy. This requires them to work at the tempo of constitutional time, through making incremental changes to constitutional norms to achieve a reasonable level of conformity with public opinion across time. By the courts recognizing then giving effect to changes in public opinion which attain a sufficient degree of weight and force, the governance system embedded in the common law is subject to long waves of change in constitutional principle.

⁷² Varuhas, n 66.

⁷³ See eg *R (Begbie) v Department of Education* [2000] 1 WLR 1115.

⁷⁴ *Mandalia v Secretary of State for the Home Department* [2015] 1 WLR 4546.