The Rule of (Constitutional) Law?

Examining the changing balance between political and legal constitutionalism in post-1997 United Kingdom

by

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Abstract

The last two decades have witnessed a period of constitutional change without precedent in the United Kingdom's contemporary history, and prominent constitutionalists have suggested that these transformations signified primarily a legalisation of the British constitutional settlement. The present research hence offers a review of the most salient and impactful instances of constitutional change since 1997 with the aim of assessing in what ways the UK could be transitioning from a more *political* to a more *legal* constitutional framework.

It highlights a greater reliance on legal devices to regulate constitutional processes and more frequent resort to judicial mechanisms of constitutional control. Indeed, the virtual entrenchment of various classes of norms (ECHR rights, common law constitutional rights and principles, *Thoburn*-'constitutional statutes') suggests the formation in British public law of a '*bloc de constitutionnalité*' that could serve as basis for increasingly genuine forms of constitutional review. Concurrently, British courts are performing more of the functions of constitutional courts and appear willing to assume the role of constitutional guardian ascribed to the judiciary in a legal-constitutional model.

Overall, the political constitution and its core principle of parliamentary sovereignty seem to be under challenge, particularly in judicial and jurisprudential debates grounded in the influential theory of common law constitutionalism. We therefore argue that the British constitution can no longer be described as exclusively 'political' and that there is at least some evidence of a trend towards legal constitutionalism in the UK.

Keywords

Constitutional change, British constitution, legal constitutionalism, political constitutionalism, juridification, codification, constitutional conventions, entrenchment, constitutional review, control mechanisms

Résumé

Les vingt dernières années ont été caractérisées par une période de changement constitutionnel sans précédent dans l'histoire récente du Royaume-Uni, et certains constitutionnalistes ont suggéré que ces transformations signifiaient avant tout une légalisation du régime constitutionnel britannique. La présente recherche propose donc un examen des cas les plus saillants et les plus marquants de changement constitutionnel depuis 1997 dans le but d'évaluer dans quelle mesure la constitution du Royaume-Uni serait en transition d'un cadre davantage *politique* à un cadre proprement *juridique*.

Celle-ci révèle un usage accru de dispositifs juridiques pour encadrer les processus constitutionnels et un recours plus fréquent à des mécanismes judiciaires de contrôle constitutionnel. En effet, le quasi-*entrenchment* de diverses classes de normes (droits de la CEDH, droits et principes constitutionnels reconnus par la common law, "lois constitutionnelles" identifiées dans la décision *Thoburn*) semble suggérer la formation en droit public britannique d'un 'bloc de constitutionnalité' qui pourrait servir de base à une forme de plus en plus substantielle de contrôle judiciaire de constitutionnalité. En parallèle, les tribunaux britanniques exercent de plus en plus des fonctions propres aux juridictions constitutionnelles et semblent bien disposés à endosser le rôle de gardien constitutionnel dévolu au pouvoir judiciaire dans un modèle légal-constitutionnel.

Dans l'ensemble, la constitution politique et son principe central de souveraineté parlementaire sont remis en question. Et ce, notamment dans le cadre de débats judiciaires et jurisprudentiels ancrés dans l'influente théorie du *common law constitutionalism*. Nous arrivons ainsi à la conclusion que la constitution britannique ne peut plus être décrite comme exclusivement "politique" et que certains indicateurs d'une tendance vers le constitutionnalisme juridique au Royaume-Uni sont manifestes.

Mots-clés

Changement constitutionnel, constitution britannique, constitutionnalisme juridique, constitutionnalisme politique, juridification, codification, conventions constitutionnelles, hiérarchie des normes, contrôle de constitutionalité, mécanismes de contrôle

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Chapter I

Introduction and parameters

1. Research *problématique*

Starting with the battery of reforms implemented by New Labour from 1997 onwards, the British Constitution has undergone several transformations in the last two decades, from active reform processes in both Houses of Parliament to the strengthening of the judicial branch and the extension of the scope of judicial review, most saliently revealed in recent times by the two ground-breaking *Miller* decisions[1]. The effects of some of these constitutional reforms, together with increased judicial interference in the political process, appear to challenge the paramount British constitutional principle of parliamentary sovereignty and suggest an erosion of the UK's political constitution. Some constitutionalists (e.g. Bogdanor 2009; Tomkins 2009; Norton 2007; Delaney 2014) have argued that these changes are part of a more general trend towards legal constitutionalism—a shift which for some could ultimately lead to the outright adoption of a codified constitution for the United Kingdom. Indeed, the British Constitution so far has been rather unique in that it constitutes one of the last remaining examples of an unwritten, largely conventional, and fundamentally political constitutional settlements in a modern democracy. In light of the latest developments and the continuing transformations of British constitutional law, we will aim to further assess this thesis.

[1] In *R (Miller) v Secretary of State for Exiting the European Union* ([2017] UKSC 5), the Supreme Court determined that major constitutional changes–such as notifying the country's intention to withdraw from the European Union–could not be implemented under the Royal Prerogative and required the due passage of an authorising Act of Parliament.

In *R (Miller) v The Prime Minister/ Cherry v Advocate General for Scotland* ([2019] UKSC 41), the Court mobilised again the principle of parliamentary sovereignty to invalidate the Prime Minister's advice to the Queen to prorogue Parliament for an unduly long period of time, finding it unjustifiably prevented the legislature from fulfilling its constitutional functions.

Both judgments thus concerned the enforcement of unwritten constitutional norms, elements of the political constitution that were largely deemed non-justiciable by the courts not so long ago.

2. Literature review and theoretical framework

Three themes in particular must be reviewed in the literature: First, we will provide an account of the notion of a political constitution in the United Kingdom. Then, we shall introduce the British literature on political and legal constitutionalism and report the cases made from both sides of the normative debate. That will allow us to set up our conceptual and theoretical framework by more clearly defining the characteristics of both proposed models. Finally, we will review the main proponents of the thesis of a shift in British constitutionalism from a political to a legal framework.

Britain's political constitution

Traditional accounts of the United Kingdom's uncodified constitution have defined it as being largely *political* in nature, in that its core principles and rules of operation are primarily upheld by a set of conventional understandings within the political class that are *politically* sanctionable, by opposition to a set of written, positive legal norms enforceable in courts of law (Dicey 1915; Griffith 1979, Barendt 1997). Eric Barendt (1997) holds that, although legal positivism compels us to consider a proper constitution solely in the form of a written legal document, there is in practice no reason to exclude customary or uncodified constitutions from the category. He maintains that the United Kingdom "clearly [has] a constitution in the sense of a 'power map'" (Barendt 1997, 140) governing the functioning of political institutions, even if it is largely made up of conventions agreed upon by political actors through practice and informed by the political class' evolving understanding of political morality in a context of continuing democratisation. Thus, he argues like J.A.G. Griffith (1979) before him that Britain has a 'political constitution', primarily enforceable within the political arena through political checks, not by judges. The UK constitution would thus stand out from a positivist consensus in public law, represented by the tenants of a now hegemonic (Ginsburg 2008) tradition of legal constitutionalism which sees in a written constitution a necessary entrenchment of political rights and guarantees at the apex of a hierarchy of legal norms closely

guarded by unelected but impartial judges that would transcend the political debate (Bellamy 2007).

The core principle upon which the United Kingdom's political constitution rests is the theoretically absolute sovereignty of Parliament, which can be summed up in the phrase "whatever the Queen-in-Parliament enacts [is law]" (Hart 1961, 99). Traditionally, that legislative supremacy has been understood as unlimited (unless, perhaps, if it is to limit itself[2]). But the premises of constitutionalism raise the question: what then keeps Parliament from enacting legislation depriving Britons of their most fundamental rights? What bars it from passing statutes "to deprive Jews of their nationality, to prohibit Christians from marrying non-Christians, to dissolve marriages between blacks and whites, to confiscate the property of red-haired women, to require all blue-eyed babies to be killed, to deprive large sections of the population of the right to vote [or] to authorize officials to inflict punishment for whatever reason they might choose?" (Bingham 2010, 162-163) For political constitutionalists, the answer is quite simply the unexpectedly tenacious constraints of political principle and public acceptability, and its ultimate enforcement by electoral sanction. They remark indeed that, in practice, Parliament generally does not abuse its legal sovereignty, because politicians know that they are bound by political morality and accountable to the electorate: they cannot get away with anything. Legal constitutionalists retort that this is a rather poor defence against the potential defects of majoritarian democracy and the danger of populist demagoguery. They recall grim historical examples of such laws being decreed with the support of complacent parliamentary majorities, following due process and form, and steering democratic regimes into authoritarian drifts. They thus argue that it is the courts' role in the constitutional order to preserve the rule of law by safeguarding the fundamental rights and freedoms of the individual against abuses of legislative power and a possible tyranny of the majority.

The United Kingdom has not yet settled on a definitive resolution of this dilemma, in part because extreme circumstances such as those described by Lord Bingham have not yet arisen to force constitutional actors to react (Elliott 2019). As

[2] See the brief discussion on that matter in Chapter II, or the arguments made by Hart (1961, 144-150) and Wade (1955).

a consequence, the normative debate is still ongoing, and the UK constitution continues to change.

The case for legal constitutionalism

Criticism of orthodox accounts of the United Kingdom's constitutional settlement is not a new phenomenon. Philip Norton (2007) states that a breakdown of the normative political consensus occurred in the 1960s and the 1970s, with changes in the demographics of the political class and the country's entry into the European Union boosting support for constitutional revisionism. Loughlin (1992) similarly points to a Conservative shift to 'liberal normativism' in reaction to Labour's hegemony during the period. The conventional nature of the constitution was deemed by some as anachronistic and potentially dangerous, as it would provide "no legally enforceable guarantees against tyrannical government" in Britain (Barendt 1997). This has become concerning in a majoritarian model of party government where most of the time the control of the legislature by the executive means that there are little political checks and balances effectively limiting the capacity of the government of the day to impose its agenda unopposed (Laws 1995), a situation which former Conservative Lord Chancellor, Lord Hailsham, famously coined as a regime of "elective dictatorship" in 1976. Moreover, the tacitness of constitutional conventions means that "it is the players themselves, the government of the day, who interpret the way in which the rules are to be applied" (Vernon Bogdanor, quoted in Barendt 1997, 142), warranting further calls for more impartial constitutional arbitration.

As late judge Sir John Laws (1995) puts it, if the Glorious Revolution served to establish the supremacy of the elected Parliament over the unelected Monarch, the convention of responsible government and the contemporary dynamics of party politics have (most of the time) paradoxically given back the reality of power to the executive. He therefore argues that the British model of political accountability is an imperfect constitutional safeguard and requires another counterpower to check the governing parliamentary majority. British legal constitutionalists thus generally claim that judicial controls have become necessary to fill the gap created by the

Westminster model's shortcomings and ensure the protection of the public against eventual abuses of power.

Legal constitutionalism is indeed a normative theory of constitutionalism arguing, in essence, that *law* is the best safeguard against abuses of state power in a liberal democracy. On the ideological plane, it is closely associated with political liberalism (e.g. Hayek) and has various theoretical iterations, being termed at times as 'liberal constitutionalism' or 'liberal normativism' (Loughlin 1992), 'liberal legalism' (Debenhams 2004) or simply as 'constitutionalism' by its tenants (Whittington 2008). For legal constitutionalists, the primary function of a constitution is to provide a regime preserving the rights and freedom of the individual against the state, a function which in their view is best carried out through the enforcement of positive legal provisions by the courts. As such, an independent judiciary, as part of a strict separation of powers, is seen as a necessary condition of genuine democratic government, essential to "preserve a sphere of individual autonomy in the face of state power" (Allan 2015, 3).

That understanding opposes a strictly majoritarian conception of democracy understood as a mode "of government that places ultimate political authority in popular majorities" (Whittington 2008, 284), arguing that "a democratic constitution is in the end undemocratic if it gives all power to its elected government" (Laws 1995, 73) thereby enabling a tyranny of the majority. 'Parliamentary absolutism' (Allan 2015) or legislative supremacy would thus be intrinsically contradictory with the very notion of democracy, as "it is a function of democratic power itself that it be not absolute" (Laws 1995, 81). In that, the theory basically invokes the very premise of constitutionalism, which is that no exercise of power in a constitutional government should go uncontrolled.

For legal—or liberal—constitutionalists, the concept of democracy is not limited to popular representation but is by definition imbued with fundamental moral values of liberty and justice that must be embedded in the constitutional order and upheld by the rule of law in the form of constitutionally protected rights and freedoms (Allan 2015). And only through the enforcement of compulsory law by judges can these rights be effective,

> otherwise the right is not in keeping of the constitution at all; it is not a guaranteed right; it exists […] only because the government chooses to let it exist[.] […] The democratic credentials of an elected government cannot justify its enjoyment of a right to abolish fundamental freedoms. If its power in the state is in the last resort absolute, such fundamental rights […] are only privileges. (Laws 1995, 84)

Legal constitutionalists therefore tend to support the Kelsenian notion of a 'higher law' binding and constraining the legislative power of the representatives of the people (Gee and Webber 2010). They "maintain that constitutional goods are best guaranteed through the articulation of rights-protecting fundamental law, a law that stands superior to and apart from daily political machinations and to which all governmental institutions are bound" (Delaney 2014, 549). That protective legal framework is, in most country, set up in the form an entrenched legal document allocating and constraining the powers of the institutions of the state (Gee and Webber 2010). Those institutions derive their power *from* the constitutional settlement. Indeed, John Laws (1995, 86) argues that, in a constitutional system, "Rules of Law [must be] logically prior to [the Sovereign]", because the Sovereign does not designate himself (or it would be autocracy, not democracy).

In the British context, that argument has been used to support the premise of 'common law constitutionalism', a British brand of legal constitutionalism which has been theorised and advocated for, *inter alia*, by Laws (1995) and legal philosopher Trevor Allan (2015). It is an adaptation of legal constitutional precepts to the UK constitutional settlement and common law tradition. "The essence of the theory of common law constitutionalism", explains Thomas Poole (2003, 439), "is the reconfiguration of public law as a species of constitutional politics centred on the common law court […] acting as primary guardian of a society's fundamental values and rights." It thus supports the judiciary' central role in upholding constitutional values and protecting fundamental rights, but unlike more classical versions of legal constitutionalism does not attach as much importance to the legal precedence of an entrenched, written constitutional document. That role is instead vested in the common law developed by judges as a superior form of law. Indeed, Allan (2015) contends that the common law is better suited for resolving questions of justice and moral dilemmas than the legislative process, because its evolutionary and pragmatic nature would organically allow for the incremental development of moral principles

and just rules (Poole 2003). For common law constitutionalists, the reasoned nature of litigation and adjudication "makes the common law an inherently moral mode of decision-making […] akin to that of democracy itself" and consequently they hold "the courts [to be] the best existing forum for moral/political deliberation" (Poole 2003, 443).

Drawing on an interpretivist approach, Allan (2015) proposes common law constitutionalism as an ideal middle ground between American-style judicial supremacy and British-style parliamentary supremacy: "Legislative supremacy is acknowledged subject to certain assumptions about the equal dignity of every citizen, which demands respect for basic common law rights, definitive of the British tradition of liberal democracy and rule of law" (Allan 2015, 323). Judicial interpretation provides the medium to enforce those rights while preserving the principle of parliamentary sovereignty as a core tenet of British parliamentarism. Common law constitutionalism has therefore been the main jurisprudential theory championed in recent years by supporters of a legal-constitutional model in the UK, including members of the senior judiciary (see Chapter III).

But other strands exist in public and academic debates. Some tenants of legal constitutionalism would prefer the UK to have an outright codified constitution, arguing that the current unwritten constitution is "an anachronism [...] unsuited to [a] social and political democracy of the 21st century" which perhaps "fitted the deferential and class-oriented structure of society in earlier times, but [not] today's more equal society" (House of Commons 2014, 20-21). They also remark that its conventional nature makes it "impenetrable to most people" and call for a single, publicly accessible constitutional document that would at all times "enable everyone to know what the rules and institutions [are] that [govern] and [direct] ministers, civil servants and parliamentarians in performing their public duties" (House of Commons 2014, 19).

They finally point out to the absence of entrenchment as a major problem of the current arrangement. Indeed, as most rules governing the functioning of the British political system do not exist in legal form and theoretically do not enjoy any superior status with regards to other laws, Parliament retains the power to repeal or enact any constitutional provision it wishes at any given time. That means that

lawmakers could hypothetically decide, for instance, to repeal the *Human Rights Act* or to abolish the British Monarchy with a single Act of Parliament passed by simple majority. Similarly, the provisions related to the devolution of powers to national legislatures in Scotland, Wales and Northern Ireland all rely on ordinary Acts of Parliament and as such, unlike most federations, the relations between the UK's different levels of government are not protected by entrenched rules (Trench 2012), the central state constitutionally retaining the balance of power.

The response of political constitutionalism

Political constitutionalism is for its part a normative theory of constitutionalism based on the premise that *political processes* and democratic accountability mechanisms are the best devices to hold those who exercise state power accountable and keep them from engaging in unconstitutional behaviour (Gee and Webber 2010). The term is used in particular by Adam Tomkins (2005) and Richard Bellamy (2007) but, as with legal constitutionalism, it has been variously called 'democratic constitutionalism' or 'popular constitutionalism' (Whittington 2008), 'conservative normativism' (Loughlin 1992) and 'parliamentary constitutionalism' (Tomkins 2009). Unlike a legal constitution, a political constitution is construed as neither written, nor entrenched or even entirely settled, it is simply "what happens" (Griffith 1979) in the political system and, as such, is subject to change with the democratic process itself:

> A political constitution offers no comparable, definitive prescriptions [to legal ones]: no formalized legal instruments, no immutable statement of rights or architectural arrangements, no procedures entrenching the constitution, and no fixed constitutional boundaries to be policed. (Gee and Webber 2010, 286)

Instead, a political constitution becomes 'prescriptive' or effective through the action of political actors, i.e citizens and their institutional representatives (Gee and Webber 2010). Under that conception, the constitution is "the contingent, contested result of reasonable disagreement operating under the circumstances of politics" (Gee and Webber 1010, 283). The constitutional settlement is therefore always open to renegotiation through the ordinary political process. For political constitutionalists, like Bellamy (2007, 174), this evolutionary nature is an advantage,

giving the opportunity to "rebuild the ship at sea". Political-constitutional arrangements thus allow constitutional standards to gradually evolve along with changing political mores and attitudes, instead of permanently entrenching one given conception of constitutional morality that would necessarily be unrepresentative of the plurality of society (Bellamy 2007).

The notion of a political constitution and the premises of political constitutionalism in Britain come from J.A.G. Griffith's Chorley Lecture (1979) and have mostly been articulated in theoretical terms as a response to the growing influence of legal constitutional ideals. Associated with the academic left and aiming to offer an empirical, functionalist and political reading of the British constitution, Griffith rejected romanticising and abstract notions such as the 'State' or the 'sovereignty of the people' being delegated to its rulers in favour of the pragmatical view that "[politicians] are there and they have power. No more. […] The constitution is no more and no less than what happens" (Griffith 1979, 16-19).

He criticised how legalists raise law from a means to an end to an overarching and transcendent set of moral principles, making the concept of the 'rule of law' "sacred and untouchable" (Griffith 1979, 15) in such a way that it can then be invoked to discredit any criticism of the constitutional status quo: "On [the legalist] view, individual rules of law may be good or bad but 'the law' is undeniably good and must be upheld or chaos will come" (Griffith 1979, 15). To him, "laws are [instead] merely statements of a power relationship and nothing more" (Griffith 1979, 19). He further argues that there are no rights inherent to the individual, only several political 'claims' by various people whose success depends on their respective power: We can have varying conceptions of what we ought to be allowed to do and what should be our rights in society, but it is only a matter of whether we are powerful enough to compel rulers to recognise and respect them. In his view, it is therefore constitutionally beneficial that such recognition be provided by elected politicians as, unlike judges, they are dismissible by the electorate.

Griffith (1979, 16) maintains indeed that "law is not and cannot be a substitute for politics." He recognises—and himself criticises—the imperfection of British democratic institutions and the authoritarian tendencies of governments but

maintains that such *political* shortcomings must necessarily be remedied through *political* means:

> The solution to such problems should not lie with the imprecisions of Bills of Rights or the illiberal instincts of judges. […] [Or] political questions of much day-to-day significance would […] be left to decision by the judiciary. […] To require a supreme court to make certain kinds of political decisions does not make those decisions any less political. (Griffith 1979, 14-16)

For him, far from legally constraining the democratic process, we must expand it to allow for open and hopefully fruitful debate and criticism to resolve political problems and hold politicians accountable.

The logic of these arguments has been taken up in the last two decades by those, like Adam Tomkins and Richard Bellamy, who were critical of the liberal-constitutional hegemony they felt was being imported into the UK through the policies of the New Labour government (Loughlin 2019). Bellamy (2007) complains indeed that legal-constitutional standards have become the main and exclusive criterion to assess the genuineness of a liberal democracy. He claims that this vision of constitutionalism is "subversive of the very democratic basis of the constitutional goods [it] seek[s] to secure" (Bellamy 2007, 2) as it paradoxically places unelected judges in the position of democracy's ultimate guarantors. Bellamy challenges two underlying principles of legal constitutionalism: First, (i) that it is possible for a society to agree on a fixed set of values and normative ideals that could be permanently codified in a hardly amendable founding document. He contends that "there are no good grounds for believing that [judges] can succeed where political philosophers from Plato to Rawls have failed" (Bellamy 2007, 4). Secondly, (ii) that judges would be better at identifying and enforcing such ideals than democratic institutions themselves. For him, the latter are both more legitimate and more effective to fulfil that role, because they mirror the pluralism of society and the disagreements that politics must mediate: "[T]he democratic process *is* the constitution. It is both constitutional, offering a due process [to reconcile society's various interests], and constitutive, able to reform itself" (Bellamy 2007, 5).

Bellamy (2007, viii) dismisses the prospect of a 'tyranny of the majority' as "largely mythical" and explains that the democratic competition allows for the operation of a 'balance of power' between the many rival groups, values, and

interests existing in a given society, which serves as the medium to provide them with equal representation and to moderate the risk of oppression:

> Party competition and majority rule on the basis of one person one vote uphold political equality and institutionalise mechanisms of political balance and accountability that provide incentives for politicians to attend to the judgements and interests of those they govern and to recruit a wide range of minorities into any ruling coalition. […] [L]egal constitutionalism subvert[s] these democratic protections. (Bellamy 2007, viii)

In contrasts, he argues, "courts turn out to suffer from many of the same vices legal constitutionalists criticise in legislature, though with fewer of the compensating virtues" (Bellamy 2007, 7). Since judges are not democratically representative or accountable, yet are biased by their own subjectivity and preconceptions as anyone else, their exercise of discretion cannot be regarded as more neutral or sensible, let alone legitimate (Bellamy 2007, 888). In the end, he is critical of what he regards as the oligarchic nature of the model of judicial review—and ultimately judicial supremacy—proposed by legal constitutionalism, in favour of the democratic axiom that "what touches all should surely be decided by all" (Bellamy 2007, 51). Like most political constitutionalists, Bellamy questions indeed the justiciability of questions or disputes that, belonging to the realm of politics, should in their view be resolved by the elected representatives of the people. He denounces legal constitutionalists' attempt to depoliticise constitutional questions through the "use of an idealised non-political politics" (Bellamy 2007, 174), a criticism echoed by Griffith (1979, 16) who maintained that a "society in which government is by laws and not by men [...] is an unattainable ideal."

Although he has since partially retracted (Tomkins 2013)—Adam Tomkins (2005) similarly admires the British constitution's uniqueness in the way it ensures that the government is democratically accountable for its actions (which would be, according to him, the basic function of all constitutions). Indeed, while most democracies have focused in the last century on implementing legal controls on the exercise of state power, the British Westminster model keeps accountability mechanisms within the realm of democratic politics themselves through the overarching principles of parliamentary sovereignty and responsible government, by which all officials in the elected branches of the state are ultimately accountable to the electorate. He favourably compares that system of political accountability—

materialized every week at Prime Minister's Questions—to the relative inefficiency and onerousness of the American impeachment process or the limited control powers the French National Assembly has over the government of the day (Tomkins 2005).

Tomkins was opposed to the enforcement by judges of general principles or transcending common law rights, because their "abstract nature […] leaves too much power in the hands of unelected [and unaccountable] judges" (Allan 2013, 302). He deplored the fact that "[legalist] constitutions turn their backs on politics [...] as if they regard[ed] politics as part of the problem—as something that requires to be checked—rather than as part of the solution." (Tomkins 2005, 3). For him, if political controls appear to be deficient, we must simply reinforce them through political reform. An open government, along with a reinvigorated 'republicanism' giving back their independence to MPs will in his view restore the efficiency of democratic accountability mechanisms.

According to an outline of the main arguments by a report commanded by the House of Commons (2014) other tenants of the constitutional status quo stress more pragmatically the disruptive effects the adoption of a brand-new legal constitution would have on the legal and political systems and the unavoidable changes to the rules any kind of codification would entail. Indeed, since conventions are by nature evolving and flexibly interpretable, fixing their meaning based on a static definition would necessarily alter their original normativity (Blick 2014). They maintain that "the United Kingdom [currently] has an evolutionary system of government that adapts smoothly to changing social and political conditions, whereas a written constitution [...] would be more rigid and difficult to change with a danger that it might fossilise and become out of date" (House of Commons 2014, 24-25). They further argue that a legal-constitutional settlement would "increase politically motivated litigation in the courts", opening the door to judicial politics and the implementation of policy changes by an unelected judiciary instead of the elected representatives of the people.

The 'shift' thesis

Vernon Bogdanor (2009), Adam Tomkins (2005, 2009) and Erin Delaney (2014) all point to evidence of a 'shift' (Tomkins 2009) from the traditional political-constitutional model to an increasingly legalist approach to constitutional accountability. Undergoing a vast series of reform under New Labour, the constitution would now be under strain. Indeed, Tony Blair's government (1997-2007) implemented an unparalleled programme of constitutional change that some have termed a British 'constitutional renaissance' (Delaney 2014) or 'constitutional revolution' (Hazell 2015; Norton 2007; McDonald 2007): the *Human Rights Act 1998* implemented and virtually entrenched the *European Convention on Human Rights* (ECHR) in UK law, strengthening and extending the scope of judicial review; a new, independent Supreme Court was created (2005) to replace the House of Lords as the UK's apex court; powers were devolved to elected national assemblies in Scotland (1998) and Wales (1998, 2006), local government was reformed (2000); freedom of information regulations were enacted (2000); proportional representation was introduced for elections to the European Parliament (1999) and the devolved assemblies; a new Electoral Commission was created (2000) and hereditary aristocrats were largely removed from the House of Lords (1999). For Vernon Bogdanor (2009), the result of this vast overhaul would amount to nothing less than the demise of the historical constitution and the advent of a "new British constitution", with the *Human Rights Act 1998* as its 'cornerstone'. For him, the effect of the HRA has been to undermine the notion of parliamentary sovereignty in such a way that it is "no longer the governing principle of the British constitution" (Bogdanor 2009, 23) and to transform the relationship between the government and the judiciary, the latter being bound to take on a more prominent and powerful role in the constitution. In his view, these reforms embody a "constitutional moment" that could even open the way for the adoption of a written constitution and the full embracing of legal constitutionalism as implemented in other contemporary democracies.

Norton (2007) and Walker (2014) remark however that New Labour's reforms were piecemeal, that they were not informed by any kind of coherent vision of what

the constitution ought to be and rather represented a series of contingent, party-interested constitutional policies. These reforms had nevertheless a profound impact on Britain's political dynamics, often triggering unintended consequences in the political system and producing a domino effect that resulted, ultimately, in what Walker (2014) calls a perpetual state of 'constitutional unsettlement'. McDonald (2007, 27) concurs with Walker *contra* Bogdanor, stating that "[in the UK], we have not (yet) witnessed a new [constitutional] settlement. [...] The very nature of radical, multi-dimensional constitutional reform [means] that it creates a dynamic which encourages further change". The Pandora box of constitutional reform having been open, it has so far proven difficult to close.

3. Research question

Prominent British constitutionalists have thus suggested that the transformations experienced by the UK constitutional order since the election of the Blair government in 1997 signified an apparent and ongoing movement away from political constitutionalism and towards legal constitutionalism. Evidence of a 'shift' seems indeed to abound: the growing prevalence of statutory constitutional reform (McDonald 2007), the implementation in national law of the ECHR to serve as a new Bill of Rights, the creation of a new Supreme Court and the emboldening of a more assertive judiciary when it comes to constitutional review (Delaney 2014, Elliott 2017a) all being salient aspects. Nevertheless, the nature of constitutional change in the United Kingdom makes it a permanent and ever-evolving phenomenon, which justifies a reassessment of this thesis. Large portions of the scholarship examining the question have indeed tended to concentrate their attention on the constitutionally effervescent New Labour era. But constitutional change didn't stop with the government change in 2010: the Conservative-Liberal coalition agreement also included an agenda for constitutional reform—such as the continuation of the process of codifying constitutional conventions in a Cabinet Manual or the enactment of the Fixed-term Parliament Act 2011—and the recent debates around the process of withdrawal from the European Union entailed its own lot of events and decisions of constitutional importance, such as the above-

mentioned Miller decisions by the Supreme Court. Therefore, starting from this thesis, and with the aim of further assessing it in light of more recent constitutional developments, my research will ask: *In what ways is the United Kingdom transitioning from a political to a legal constitutional framework since 1997?* In other words, *how is the UK's political constitution being legalised?*

4. Methodology

Aims and scope

The proposed research engages rather modestly with an especially vast academic conversation and with overarching normative debates that underpin both constitutional theory in general and British constitutional reform in particular. Our object of study has been, directly or indirectly, the topic of an abundant literature in both political and legal literatures. The period under study is itself marked by an impressive surge in public law scholarship in the United Kingdom. For this reason, in spite of the rather broad framing that the wording of our research question might suggest, this thesis does not by any means pretend to offer a comprehensive study of such debates' ramifications, nor a discussion of the fundamental philosophical questions that underpin them.

Instead, we simply propose an overlook of key transformations that have occurred in the British constitutional order since 1997 and which are embedded in a dialectic between political and legal constitutionalism. The question is thus not a new one, but it concerns dynamics that are still in a state of flux, warranting regular reassessment. To carry it out, we more specifically aim to unravel the process of this alleged transition through the review of a series of cases representing the most salient and impactful instances of constitutional change during this period. Together, these case studies will then serve to highlight the main trends and observable patterns of legalisation and judicialisation of the constitutional framework in the contemporary United Kingdom.

Nevertheless, it is conceded that this academic endeavour will inevitably exhibit some blind spots, as it would be realistically impossible to carry out a systematic

examination of all aspects of British constitutional law within the limited confines of this thesis. In the end, the originality of the thesis' contribution lies first in its operationalisation, discussing jointly the phenomena of constitutional codification, entrenchment and judicialisation and, secondly, in its assemblage of retained cases, some of which had not hitherto been brought into direct dialogue in the literature.

Case selection

The cases selected for the analysis represent the most salient constitutional reforms and observable instances of constitutional change in Britain in the period of study. For the most part, they figure prominently in the recent literature in both British public law and political science, being identified by the scientific consensus as key developments in the field. Their scale and visibility are a necessary indication of their political significance and of their effect on the constitutional framework. In terms of legislative reforms, we discuss the *Human Rights Act 1998*, the *Constitutional Reform Act 2005,* the *Fixed-term Parliaments Act 2011* and, in their more limited effects for our purposes, the devolution settlements. We also examine thoroughly the impact of the *Cabinet Manual*'s publication by the Civil Service on constitutional legalisation. Additionally, while we cite various important constitutional law decisions, we devote particular attention to the significant *obiter dicta* found in House of Lords' *Jackson* decision and ensuing doctrinal trends, as well as the recent UK Supreme Court decision in *Miller II/Cherry*.

One element that would otherwise have had an important place in the examination of the dynamics under study and that we have chosen to leave out of its scope are the legal effects on the UK constitution of European integration. Indeed, those effects begin with the enactment of the *European Communities Act 1972*, a statutory change falling far out of this thesis' timeframe, and which has been the subject of thorough discussion already. Moreover, if these effects are not completely erased by the United Kingdom's withdrawal from the European Union, the trend they represented for our purposes is arguably halted by Brexit and effectively ceases to be an ongoing dynamic of constitutional change in Britain.

Approach

Scholarship on questions pertaining to constitutionalism or constitutional theory often engages in normative efforts to philosophically substantiate a given conception of the 'good' constitution or a particular view on the form constitutional change in a country should take. It is not our approach. While this research is informed by, and explicitly takes as its object of study, normative theories of constitutionalism, our approach is epistemologically neither normative nor prescriptive[3]. The methodological aim of the thesis is rather to provide a theoretically informed, descriptive account of constitutional change, using political and legal constitutionalism only as analytical categories or as the underlying narratives of the political debates it surveys. The approach could therefore be described as 'empirical constitutionalism', entailing the study of both formal and informal processes of constitutional change (Whittington 2008).

To do so, we have deduced observable features from the constitutional models advocated by the two theories, which we use as ideal-types (Weber 2011 [1922]) to categorise practices, discourses, and phenomena. By extension, this political/legal constitutionalism axis becomes a variable to gauge the transition from one model to the other. These features are thus vertically associated with either political or legal constitutionalism, and horizontally constitute the two dimensions that make up our operationalisation (see the table below).

Using these analytical categories, we will first examine the material and practical effects of significant statutory and non-statutory reforms on the normative nature of the constitutional framework. However, assuming a constructivist stance, we will also consider the ideational effects of 'material' legal changes on shared constitutional understandings in the UK political-legal system, which in turn determines the nature of constitutional law as a social construct. This approach is rooted in a Hartian conception of law as the product of a consensus among the senior officials of a given legal system about what counts as valid law (Hart 1961).

[3] The mere acknowledgement of an opposition between political and legal models of constitutionalism could be considered by some as a political-constitutional stance in itself, since this divide, and the thesis of a shift between, has first been advanced by political constitutionalists (Tomkins 2005; Tomkins 2009; Bellamy 2007). We reject that affiliation and purport to maintain an ethically neutral (Weber 2011 [1922]) posture.

Although positivistic, this theoretical premise is paradoxically well suited to the context of an unwritten constitution based largely on conventional and jurisprudential understandings. We will engage further with this constructivist approach when we investigate the second dimension in Chapter 2, looking for evidence of changes in the normative consensus in the form of observable shifts in doctrinal trends. In practical terms, this part of the enquiry will therefore consist of a survey in relevant case law of curial interventions suggesting such a change.

Methodologically, apart from the actual text of legislative (or quasi-legislative) reforms and judicial decisions, the analysis will rely substantially on secondary literature drawn primarily from the interdisciplinary corpus of British constitutional studies, obviously including constitutional theory and political philosophy. In the UK, the disciplinary divide between public law scholars and political scientists is indeed rather blurred and permeable. The properly 'political' nature of British constitutional law as an object of study certainly helps to explain the necessity of such an interdisciplinary effort. As a political scientist, I resolutely subscribe to this interdisciplinary method, which combines the perspectives of the two disciplines, both in our ways of conceiving the object of study and in our analytical reflexes.

Operationalisation

The assessment of a change from political to legal constitutionalism implies two main empirical dimensions:

	Political constitutionalism	Legal constitutionalism
Nature of norms	Unwritten political conventions and institutional practices Constitutional norms are contingent on political actors' interpretation of them at any given time	Written, positive legal norms Constitutional norms and political rights are entrenched by an extraordinary amendment procedure
Enforcement mechanism	Implicit self-regulation of political behaviour Unconstitutional actions are politically-sanctioned	Compulsory constitutional rules are enforced in courts of law Unconstitutional actions are judicially-sanctioned

The first will be a passage from unwritten, conventional norms of constitutional behaviour to written, legal provisions of positive constitutional law. This phenomenon of **legalisation of constitutional rules** may take the form of a

greater reliance on legislative regulation of constitutional processes, the codification of political conventions or attempts to legally entrench elements of the constitutional framework. The analysis must therefore pay attention to statutory constitutional reform since 1997 and look at the dynamics surrounding attempts at the (i) formal and informal codification and the (ii) entrenchment of constitutional norms (Blick 2016; Blick 2017). The literature points to increasing instances of constitutional legalisation through both Acts of Parliament of a constitutional nature (Oliver 2018) and ministerial guidance (e.g. *Cabinet Manual*, *Ministerial Code*, *Civil Service Code*, etc.) (Blick 2016).

The second dimension will be a passage from political to judicial control mechanisms for the enforcement of constitutional norms and the settlement of constitutional disputes. Such a process of **judicialisation of constitutional control** can be studied by observing the evolving position of the judiciary in the constitutional system with respect to the other branches of the state and an eventual expansion of its powers in terms of constitutional enforcement. The role of the judiciary is of special importance for our purposes and judicial review appears to be both a fast-developing dimension of constitutional change in today's United Kingdom (Elliott 2017a; Delaney 2014) and a central element of any legal-constitutional framework. The creation of an independent Supreme Court in 2005, together with the corollary removal of the House of Lords' and the Lord Chancellor's judicial powers, have aimed at the further separation of the three powers and visibly seem to have had consequences regarding both the judiciary's constitutional functions and the broader balance of power in the British political system (Elliott 2017a, Tomkins 2009). The examination of constitutional cases laid before the UK Supreme Court in recent years would allow us to further assess the 'shift' thesis in terms of changing curial attitudes in light of these recent developments. While the legal and political impacts of judicial decisions will be telling in themselves, we must also pay attention to the arguments mobilised by constitutional actors to uncover narratives that would reflect an evolving conception of the judiciary's role in the constitution. Let us now proceed, in turn, to the more attentive examination of these two dimensions.

Chapter II

The legalisation of constitutional norms

1. The written and unwritten constitutions

The Constitution of the United Kingdom cannot be found in a single written document, and some of its most essential components remain largely uncodified. However, that is not to say that significant portions of English constitutional law have not been laid down in the statute book. The famous *Magna Carta* of 1215, the *Bill of Rights* of 1689, the *Act of Settlement* of 1701, the two *Acts of Union* of 1707 and 1801, the six *Reform Acts* (1832-1969) and the *Parliament Acts* of 1911 and 1949—to name only those—are all prominent written elements of the British Constitution that predate the period of study of this thesis. Nevertheless, the most important rules and fundamental principles governing the operation of the various institutions making up the British state remain, for the most part, in the form of unwritten political conventions—theoretically falling outside the jurisdiction of any court of law—whose effect is essentially contingent on the political actors' own interpretation and goodwill.

However, the last twenty-three years have seen an unprecedented surge in recourse to legislation to implement constitutional change. New Labour governments, throughout the premierships of Tony Blair (1997-2007) and Gordon Brown (2007-2010), introduced a series of major constitutional bills to radically alter the British political system (Bogdanor 2009; McDonald 2007). The reforms, while frequently described as "piecemeal" (Gamble 2006, 29) or "incremental" (McHarg 2008, 874), were coherent with New Labour's larger programme of "national renewal" and were framed as a modernisation of the UK's democratic institutions (Labour Party 1997). Relying on a comfortable majority and supported for its constitutional programme by the Liberal Democrats, the Blair Government alone implemented devolution in Scotland and Wales (*Scotland Act 1998*; *Government of Wales Acts 1998* and *2006*); provided fundamental rights protection in domestic law (*Human Rights Act 1998*); removed most hereditary peers from the House of Lords (*House of Lords 1999*); restored local government in Greater London (*Greater*

London Authority Acts 1999 and *2007*) and reformed it in the rest of the country (*Local Government Act 2000*); introduced a statutory right of access to information (*Freedom of Information Act 2000*); established an Electoral Commission (*Political Parties, Elections and Referendums Act 2000*); created a new Supreme Court, reformed judicial appointments and further separated the three branches of government by removing some of the Lord Chancellor's functions (*Constitutional Reform Act 2005*); and implemented various other changes through some fifty statutes of constitutional character in total (McDonald 2007)[4]. Given their scope and impact, the reforms have been termed a 'constitutional revolution' (Hazell 2015; Gamble 2006) having shaped a 'new British constitution' (Bogdanor 2009).

The succeeding Conservative governments did not refrain from using legislation to implement constitutional reforms either, passing at least fifteen Acts related to clearly constitutional subject-matter since 2010[5]. Examples include the *Public Bodies Act 2011*, the *Sovereign Grant Act 2011*, the *Fixed-term Parliaments Act 2011*, the *Scotland Acts 2012* and *2016*, the *Wales Acts 2014* and *2017*, the *Succession to the Crown Act 2013*, the *Recall of MPs Act 2014* or the *Cities and Local Government Devolution Act 2016*—not to mention of course the legislative changes implemented as a result of Brexit. The outcome of this increased use of statutory means to reform the rules of the political system is that a growing proportion of British constitutional law is taking on a written and legal form. The purpose, and the effect, of these reforms was to institute new legal regimes to transform the way different elements of the state work and to constrain the exercise of political power in accordance with changing democratic ideals and an evolving understanding of constitutionalism.

This chapter examines more closely some of these changes—where they relate to the legalisation of constitutional norms—to assess their impact on the political constitution. The concept of 'legalisation' first entails the codification of constitutional rules, which goes beyond the enactment of constitutional legislation. The 2011 *Cabinet Manual*, certainly the most consolidated written account of UK constitutional arrangements ever published by the British Government, serves as

[4] Supplemented by our own review of the National Archives' index of UK Public General Acts on *Legislation.gov.uk* for the 2006-2010 period, not covered by McDonald.
[5] According to our review of the National Archives' index of UK Public General Acts on *Legislation.gov.uk* for the 2010-2020 period.

our first case-study on the matter. Another prominent feature of legal constitutions is their entrenchment, and while the question of whether or not constitutional entrenchment is legally possible in the United Kingdom is still the subject of jurisprudential debate, both Parliament and the Courts have taken clear steps in that direction in the last two decades. The *Human Rights Act 1998* and its implications for the application of legislation and the law-making process are notably discussed in that light. We then examine how the legal regime of the *Fixed-term Parliaments Act 2011* has impacted the political-constitutional processes it was intended to regulate, along with recent calls for a return to the previous arrangements under the political constitution.

2. Codifying conventions: The *Cabinet Manual*

In addition to statutory constitutional reform, the phenomenon of the codification of constitutional rules can also be construed to include the formalisation of conventions and principles in non-legal but nonetheless official texts[6]. The UK Government has issued in recent decades many such publications recording constitutional practices and conventions in writing (Blick 2016), yet the matter remains under-researched. The most significant instance of this type of constitutional codification in the UK has been the publication in 2011 of the *Cabinet Manual*. Per its description on the Cabinet Office's (2011b) website, the *Manual* is:

> [A government document] which sets out the main laws, rules and conventions affecting the conduct and operation of Government […] [and] gives an overview of the UK system of government […]. The Manual is primarily intended to provide a guide for members of Cabinet, other ministers and civil servants in the carrying out of government business, but will also serve to bring about greater transparency about the mechanisms of government [for the general public].

As we can already see from this description, the *Manual's* scope is extensive. It encompasses most areas of the British constitutional settlement, from the role of

[6] This broad conceptual definition of codification is shared by Andrew Blick (2014, 2016) and Peter Hennessy (2011). Yet others, such as Bowden and Macdonald (2012), prefer to confine it to statutory codification, rather arguing that cabinet manuals merely "officialize" conventions. They reject the thesis (that we develop in this section) that such officialization would lead to a crystallisation of conventions and strip them of their conventional character but offer no argument to support their reasoning other than what the British *Cabinet Manual*, in its own description, pretends to be and not to be. It is our view, as set out below, that this demonstration is insufficient.

the Sovereign to the relationship between the three branches of government, through the basic rules and conventions relating to the Cabinet, the Civil Service, general elections, devolution, the (now obsolete) relations with the European Union, the governance of public finances and access to information. It is constitutionally ground-breaking because it is the first publicly-available official document to compile some of the most central principles and—until then—unwritten conventions of the UK Constitution, such as the ones concerning government formation. It is this public character and this comprehensiveness that lend such significance to the document. While it remains a non-legal piece of executive guidance, it arguably comes unprecedentedly close, in substance, use and format, to serve as a form of surrogate constitution. Indeed, as there is yet no other government-endorsed source available to provide a similarly consolidated account of Britain's both written and unwritten constitutional arrangements, the *Cabinet Manual* is bound to serve as a reference for practitioners, commentators and interested citizens alike.

As with constitutional legislation, the *Cabinet Manual* is not the first instance of a written set of guidelines for ministers and civil servants on government operation. Several executive directives and other similar codes of conduct regulating matters and practices of a constitutional nature predate the *Manual* (Blick and Hennessy 2011; Blick 2014). Notable examples include the *Ministerial Codes* (declassified since 1992), by which each new Prime Minister sets the standards of conduct they expect from their ministers; the *Civil Service Code* (1996) containing the standards of conduct for civil servants, since put on a statutory footing by the *Constitutional Reform and Governance Act 2010*; or the *Code of Practice on Access to Government Information* (1994), which served as the basis for the latter *Freedom of Information Act 2000*. The Cabinet Office has also made internal use of an informal, loose-leaf "Precedent Book" since 1954, which served a much more limited but comparable purpose to the *Manual* as a reference for Cabinet procedures (Cabinet Office 1954). All this documentation served as a basis for some of the *Cabinet Manual's* contents, which is why Andrew Blick and Peter Hennessy (2011) describe it as a "code of codes" synthesising in a single official piece institutional knowledge

and constitutional practices that were previously scattered or unavailable outside Whitehall.

The inspiration for such a single document compiling the unwritten conventions of the constitution came from New Zealand—a Westminster-created parliamentary monarchy that inherited part of Britain's unwritten constitutional framework—where such a Cabinet Manual has existed since 1979 (Department of the Prime Minister 1979) and was made public in 1996. Two prominent London-based constitutional research centres—UCL's Constitution Unit and the Institute for Government—were instrumental in recommending the model to senior Cabinet Office staff (Blick and Hennessy 2011). However, the political impulse for drafting a British equivalent came from then-Prime Minister Gordon Brown, whose government anticipated from the polls a split result in the upcoming election that would make the process of government formation uncertain and thus calling, in their view, for public clarification of the relevant conventions (Blick 2014). Another express intention of the Prime Minister was for the process to serve as the basis for a more fundamental debate on the adoption of a written UK Constitution (Gordon Brown, cited in Blick and Hennessy 2011, 12), in line with his government's constitutional reform agenda. That part of the project was abandoned with the demise of the Brown Government in the 2010 general election (Blick 2014), but the succeeding Conservative-Liberal Democrat Coalition endorsed the idea of a Cabinet Manual and allowed the drafting process to continue (Cabinet Office 2011a, iv-v).

The arguments for codifying constitutional conventions into a Cabinet Manual remained essentially similar to the ones generally offered in support of the idea of an outright written constitution. The document, officially serving as guidelines for ministers and civil servants, would most of all make the political system's rules clearer, more transparent and more accessible to both policymakers and the general public (David Cameron, cited in Cabinet Office 2011a, iii). That would be particularly useful in a context of political uncertainty—like the anticipated 2010 hung parliament—or a graver constitutional crisis, providing all parties with a seemingly objective version of the applicable conventions for reference. Given that politically sensitive purpose, the draft of the *Manual* was closely scrutinised by three parliamentary committees (the Political and Constitutional Reform Committee and

the Public Administration Select Committee in the Commons, and the Lords' Constitution Committee), each of which published a report making various recommendations to the Government. The status and ownership of the document were some of the key questions considered by their inquiries. The Lords' Constitution Committee (House of Lords 2011) believed it should be owned by the Civil Service alone and not be endorsed by political institutions—whether Cabinet or Parliament itself—to avoid giving it any pre-eminent or authoritative status. The Commons' Political and Constitutional Reform Committee (House of Commons 2011, 14), however, inversely noted that the *Cabinet Manual* "seem[ed] in part to be intended as—or might become, whatever the intention—the basis for a shared understanding beyond the Executive of important parts of the United Kingdom's previously uncodified constitution" and, as such, that it deserved to be put up for debate in the House of Commons on a regular basis and possibly subject to parliamentary endorsement. In its response to the reports, Her Majesty's Government (2011, 20-22) highlighted the disagreement and reiterated its intention that the document should remain a guideline from the executive, for the executive, and that Parliament's role in the matter should remain consultative.

Nonetheless, despite its intendedly limited status, the *Manual* has effectively—as the Committee anticipated—evolved into a sourcebook on the most important conventions of the British Constitution. Blick (2014) remarks that it has been regularly cited, after the publication of its first draft, by experts and commentators in the media during the 2010 general election and the ensuing negotiations on the formation of the Coalition Government. Our own research found it was mentioned some 44 times in parliamentary debates since its definitive publication[7] and referenced by the British press in over 500 articles discussing constitutional matters since the full draft publication in December 2010[8]. It has thus arguably, like its New Zealand counterpart (Duncan 2015), become a public reference on constitutional matters. The *Cabinet Manual*'s authority as a code of conventions, which can be

[7] Based on a research in *Hansard Parliamentary Debates* for the occurrence of the words "cabinet manual" in debates in both Houses of the British Parliament between October 2011 and February 2021.
[8] Based on a research in Dow Jones' *Factiva* database for the keyword "cabinet manual" in the full text of articles from written news sources in the United Kingdom published between 14 December 2010 and 1 February 2021, excluding 'similar' duplicates and republished news.

likened to a form of soft law[9] (McHarg 2008), has a number of important implications.

First, codifying in writing conventions that are amorphous and flexible by nature will likely have the effect of fixing their meaning, thus essentially stripping them of their conventional nature in favour of a more legalist form. By definition, constitutional conventions are the normative expression of a shared understanding of the expected political behaviour by constitutional actors themselves (Wheare 1951; Barendt 1997; Feldman 2013). They are contingent on this understanding and, therefore, sensitive to the evolving political context in which they operate. Their adaptability is one feature of unwritten conventions that advocates of the British model of constitutionalism often praise (House of Commons 2014): as the British polity evolved from absolute monarchy, to aristocratic parliamentarianism, to more genuine forms of democracy, constitutional conventions gradually took form to smoothly provide the corresponding adjustments to the operation of political institutions that themselves remained. However, the versatility of conventions should be regarded as a corollary of their immateriality. Blick and Hennessy (2011, 32) warn that "the discreet way in which conventions have often developed in the UK will be inhibited if their legitimacy or expiry depends to a significant extent upon recognition in this official public document". Similarly, a committee reporting on parliamentary conventions in 2006 noted this risk codification entailed and accordingly did "not recommend legislation, or any other form of codification which would turn conventions into rules, remove flexibility, exclude exceptions and inhibit evolution response to political circumstances" (Parliament 2006, 4-5).

Now that most British constitutional conventions have been laid out in a written code which, however unofficial, is authoritative by default, it is likely to fix their meaning in both time and words in such a way that they risk losing, to a significant degree, that flexibility and evolutionary nature. In his foreword to the *Manual*, then-Cabinet Secretary Gus O'Donnell maintains that the document

> is not intended to be legally binding or to set issues in stone. The Cabinet Manual records rules and practices, but is not intended to be the source of any rule […]. The content of the Cabinet Manual is not static, and the passage of

[9] Aileen McHarg (2008) argues that 'declaring' new or existing conventions is a form of 'constitutional soft law' in that it does not create binding rules *per* se, but nevertheless attempts to influence constitutional behaviour.

> new legislation, the evolution of conventions or changes to the internal procedures of government will mean that the practices and processes it describes will evolve over time. […] [I]t will need to be updated periodically to reflect such developments. (Cabinet Office 2011a, iv)

Despite this wish for the *Cabinet Manual* to mirror the natural evolution of conventions, it is more probable that any change in what is commonly accepted as a constitutional convention will be dependent on whether or not the modifications are made to the *Manual* in the first place. Furthermore—and perhaps most importantly—by serving as an official guideline for the civil servants and political officeholders directly involved in the operation of government and responsible for the application of these conventions, the *Cabinet Manual* will condition how conventions are construed by the very actors whose 'shared understanding' their existence and shape depend upon. Blick (2014, 197) also notes that the *Manual's* impact on the public's comprehension of the constitution will also act as a constraint on the constitutional behaviour of political actors:

> [I]ndividual beliefs about what constitutional conventions are can be influenced by a number of concerns, including what is seen as being the established position […]. For those directly involved in working the constitution in particular, a judgement of what is the prevailing public interpretation—or to put it another way, what can and cannot be got away with—is likely to be important. [By being a public document,] [t]he Cabinet Manual was intended to impact upon such opinions.

It is what the people involved in the day-to-day operation of the constitution believe the applicable rules and appropriate ways to do things are that conditions the formation, persistence and evolution of constitutional conventions (Wheare 1951; Feldman 2013; Barendt 1997). By purposely serving as a reference book for both the British public and the Constitution's practitioners, the *Manual* should now be expected to set the official version of this understanding and thus contribute to its crystallisation. In the words of Grant Duncan (2015, 753), the *Manual* might be "described as 'descriptive'" but is "performatively 'prescriptive'". The potential effect is, in essence, that positive guidelines written in the *Cabinet Manual* in time come to replace the tacit conventions of the Constitution.

This step towards the legalisation of conventions comprising the most fundamental tenets of the British constitutional order should, however, make them more enforceable—both politically and judicially. It is indeed the overarching goal

of the proponents of legal constitutionalism to make the constitution more binding by replacing what they regard as the feeble constraint of conventional norms with clearer rules. The *Manual* does fulfil its intended goal of making the political system's rules more transparent and thus makes it easier for parliamentarians and other watchdogs to hold the government accountable in the eye of the public. The codification of conventions in a publicly accessible document also makes their use in judicial review cases both more likely and more practical, as they are now available to both claimants and judges in a single, clear and written form (Blick 2014). To date, we have found references to the *Cabinet Manual* in five court decisions[10], including the landmark 2019 *Miller/Cherry* decision by the UK Supreme Court, which we will examine more closely in chapter 2.

A further concern arising from this codification of constitutional conventions in the *Cabinet Manual* pertains to its drafting and ownership. Being a set of executive guidelines, it was primarily intended for, and written by, members of the executive. While the Government held public consultations and considered parliamentary committees' recommendations, it remained the sole owner of the document and had the last word over its contents. Constitutionalists have remarked that this situation—in which one branch of government appears to be in a position to impose its own conception of conventional rules among the most central of the British Constitution—is problematic (Blick 2014). Blick and Hennessy (2011, 21) argue that

> […] the manual will potentially provide Cabinet with an instrument it did not previously possess, creating opportunities to impose definitions upon the more amorphous parts of the UK constitution. […] It is inappropriate for one constitutional player to seek to define features of the UK settlement largely unilaterally through the manual, and in doing so it may undermine their effectiveness as instruments of political management, which draws in part on their nature as shared understandings.

In sum, if the *Cabinet Manual* becomes the reference for the recognition and the interpretation of constitutional conventions, the Government will virtually hold a form of monopolistic constituent power over that very significant part of the UK Constitution.

[10] Among the decisions by UK courts and tribunals indexed in the British and Irish Legal Information Institute's (BAILII) database as of 1 February 2021.

This is especially controversial given that views on the existence, scope and meaning of constitutional conventions are not always universal. Yet, the inclusion of a given convention in the *Cabinet Manual* would certainly provide it with an enhanced status, while its omission would directly downgrade its constitutional importance. The executive would thereby become the sole assessor of the validity of the conventions to which it—along with the other actors in the political system—is subject. In some instances, it might even be able to conjure new rules out of thin air through their unilateral inclusion in the *Cabinet Manual*. Indeed, although the *Manual's* purpose is said to be "recording the current position rather than driving change" (Cabinet Office 2011a, iv), Blick and Hennessy (2011) point to occasions where it has, in fact, served as an instrument of change by establishing arguably novel conventional practices. The chapter on the formation of a new government following a general election, for example, was more innovative about caretaker conventions in anticipation of the 2010 election, which did end up in a hung parliament where these conventions were at play. The authors inversely note other conventions which were not included in the *Manual* but that some constitutionalists have claimed to exist.

The phrasing of the *Manual's* provisions is equally critical, as it conveys only the executive's interpretation of conventions. The *Cabinet Manual* partly deals with this problem in different ways (Blick 2014). At certain times, its wording remains vague as to allow a broad construal of the reported convention. At other times, it expressly admits the possible existence of alternative interpretations by stating that it only reports "modern practice" (Cabinet Office 2011a, s. 2.24) or what "recent examples suggest" (Cabinet Office 2011a, s. 2.10). Andrew Blick (2014) nonetheless points to other passages where the *Manual* more assertively proposes a particular reading of conventions that remain the subject of debate among legal scholars, further demonstrating that conventions can be construed in varying ways.

In short, the *Manual* may work to slowly substitute the political conventions of the UK Constitution with written soft law rules, potentially causing them to lose their tacit, inter-institutional character for a more legal and prescriptive form. As a result, these rules will become more imperative, and therefore more enforceable. Remaining the creature of the sole executive, the *Manual* also vests an unintended

form of proxy constituent power in the Government, which may be problematic. As the most comprehensive written and public compendium of constitutional rules in the UK, the *Cabinet Manual*—although falling short of embodying a full shift from a political to a legal constitution—assuredly represents one of the most important instances of constitutional codification in recent British history.

3. Constitutional entrenchment

Giving precedence in the legal hierarchy to constitutional laws is a core tenet of the Kelsenian theory of the rule of law (Kelsen 1945), which we associate with legal constitutionalism. It generally entails two things: "First, [that] the constitution will enjoy a degree of *permanence* — that is, it will be capable of amendment only if the appropriate constitutional process is fulfilled. Second, [that] other law will exist *in the shadow of the constitution* — that is, it will be valid only if it is consistent with the constitution" (Elliott and Thomas 2020, 26). This type of arrangement is known as constitutional entrenchment.

In line with globally prevailing legal constitutionalist principles, it has been common for contemporary liberal democracies to entrench at least part of their constitutions, protecting them with an extraordinary amendment procedure and subordinating ordinary legislation to constitutionally guaranteed norms and rights. The constitutions of the United States and Canada, for example, both include an entrenched bill of rights that their legislatures cannot override and are only amendable through a sophisticated procedure that makes constitutional change exceptionally hard even for a comfortable governing majority. As constitutionalists Mark Elliott and Robert Thomas (2014, 25) explain: "In most countries, constitutional reform is a big deal. Changing constitutions is usually hard. […] [But] the difficulties, formality, and momentousness that usually attend attempts to change and reform constitutions elsewhere are normally absent in the UK. It is often relatively easy for the Government to reform the UK constitution." In fact, the

United Kingdom's is one of the most easily amendable democratic constitutions in the world[11].

Indeed, it is worth reminding that, in the UK, orthodox position is that no matter how historically and constitutionally significant some pieces of legislation might be, none of them enjoys a special or higher legal status than any other Act of Parliament. As Dicey (1915, 141) vividly put it: "neither the Act of Union with Scotland nor the Dentists Act, 1878, has more claim than the other to be considered a supreme law". That statement is still, in most part, true today. By the doctrine of implied repeal[12], the British Parliament is regarded as unable to bind itself and retains the power to repeal any previous legislation with a simple Act adopted by a majority of both[13] Houses. The theoretical grounding of this doctrine is in the view that Parliament would possess a *continuing* sovereignty rather than *self-embracing* sovereignty, which could extend to destroying itself (Hart 1961, 144-150). That is because "[the sovereignty of Parliament] is the ultimate *political* fact upon which the whole system of legislation hangs", explains Wade (1955, 188). That political fact is at the foundation of the United Kingdom's 'rule of recognition'[14] of what counts as law in the country (i.e. an Act of the Crown-in-Parliament): "Legislation owes its authority to the [political] rule: the rule does not owe its authority to legislation. To say that Parliament can change the rule [of recognition], merely because it can change any other [legal] rule, is to put the cart before the horse" (Wade 1955, 188). In other words, Parliament could not decree limitations to its own sovereignty to enact or repeal any legislation it so chooses. "Why?", ask Elliott and Thomas (2020, 252). "Because whereas, in most countries, that rule is to be found in some shape or form in a written constitution […], in the UK, it exists only in the form of Wade's 'political fact' that emerged because of the Glorious Revolution. […] [T]he rule of

[11] The United Kingdom, together with New Zealand, ranks as the country with the less constitutional rigidity out of the thirty-nine consolidated democracies analysed by Astrid Lorenz (2005), based on the previous works of Arend Lijphart, Donald Lutz, Dag Anckar and Lauri Karvonen.

[12] According to the doctrine of implied repeal, courts give effect to the latest Act of Parliament even if it is inconsistent with earlier ones, which means that no Parliament can bind its successors with permanent, unamendable legislative provisions. The doctrine is a corollary to an orthodox understanding of the principle of parliamentary sovereignty, although that view is debated (Elliott and Thomas 2020, 249-257).

[13] Or only the House of Commons, under the provisions of the *Parliament Acts 1911 and 1949*.

[14] The concept is developed by H.L.A. Hart in *The Concept of Law* (1961, Oxford University Press) and refers to the meta-rule of any legal system used to identify what is recognised as law. It is often found, in written form, in a constitutional document. The United Kingdom obviously lacks such a document.

recognition is *not* a law. It exists only in the political realm, and changing it is therefore beyond Parliament's legislative reach." There is evidence, however, that this orthodox position regarding the impossibility for Parliament to entrench legislation is increasingly being challenged (Oliver 2003). While the United Kingdom still has not outright entrenched any kind of constitutional provision so far, both Parliament and judges have taken steps in recent years to give special importance to select legal provisions of constitutional importance.

On the judicial front, the High Court has most notably suggested in *Thoburn v Sunderland City Council* ([2002] EWHC 195 (Admin)) that the constitutional character of certain statutes would confer them an implicitly pre-eminent status rendering them immune to the doctrine of implied repeal. Writing the decision in *Thoburn,* Laws LJ explained his reasoning in a momentous *obiter dictum* (para. 62):

> In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional […] and from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. […] In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.

Laws LJ provides several examples of what he considers to be constitutional statutes, most of which were listed in the first section of the present chapter. He also places the *Human Rights Act 1998*, the *European Communities Act 1972* (when it was still in force) and the Acts relating to devolution in this category. His interpretation is that, because of their constitutional importance, the courts would assume that these Acts take precedence over ordinary legislation that would happen to be inconsistent with them—unless Parliament included an express clause for the repeal of a constitutional provision. That view was directly echoed by Supreme Court justices in *BH. v Lord Advocate* ([2012] UKSC 24, para. 30)[15] and *R (HS2 Action*

[15] Lord Hope writes: "…in my opinion only an express provision [for the repeal of the relevant provisions of the Scotland Act] could be held to lead to such a result. This is because of the fundamental constitutional nature of the settlement that was achieved by the Scotland Act. This in itself must be held to render it incapable of being altered otherwise than by an express enactment. Its provisions cannot be regarded as vulnerable to alteration by implication from some other enactment in which an intention to alter the Scotland Act is not set forth expressly on the face of the statute. In any event, the courts presume that Parliament does not intend an implied repeal."

Alliance Ltd) v Secretary of State for Transport ([2014] UKSC 3, para. 207)[16]. For Elliott and Thomas (2020, 60), it "suggests that there is now a special category of *harder*-to-amend constitutional legislation in the UK. But such legislation is not *hard* to amend: all that is needed is express words of repeal." The interpretation nevertheless represents "a notable departure from the Diceyan orthodoxy that all Acts of Parliament are of equal status." (Elliott 2017a, 279).

More recently, in its high-profile decision in *R (Miller) v Secretary of State for Exiting the European Union* ([2017] UKSC 5), the Supreme Court made reference to *Thoburn*'s classification of the *European Communities Act 1972* among constitutional statutes and ruled accordingly that the Crown's power under the royal prerogative to make and unmake international treaties could not extend to instances where its exercise would entail significant constitutional changes—here referring to the notification to the European Council of the UK's withdrawal from the European Union: "It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone", declared the majority (para. 81). The Court makes clear it does not accept that "a major change to UK constitutional arrangements can be achieved by a minister alone" (para. 82). It follows that 'major' constitutional changes cannot be implemented through the sole exercise of the royal prerogative—although the confines of what constitutes a 'major' constitutional change are not clearly outlined by the Court (Elliott 2017b).

While some of these judicial statements were made *obiter dictum*, the judgements nevertheless show that the opinion of Britain's highest courts is developing into a novel interpretation whereby the UK Constitution would be afforded an—albeit limited—degree of entrenchment with respect to other bodies of the law.

[16] Lord Neuberger and Lord Mance write: "The United Kingdom has no written constitution, but we have a number of constitutional instruments. […] The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in [earlier] constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation."

The Human Rights Act 1998

On the legislative front, one of the most notable attempts at constitutional entrenchment was Parliament's adoption in 1998, under the Blair Government, of the *Human Rights Act 1998* (HRA). Political and legal scholars widely recognise the Act as one of the most impactful pieces of legislation adopted by the Westminster Parliament in recent decades, with Vernon Bogdanor (2009, 49) terming it "a cornerstone of the new [British] constitution." It undoubtedly marks a major milestone in the British legal system's transition from political to legal constitutionalism regarding the constitutional protection of fundamental rights and has subsequently been a main driver of this trend.

The purpose of the HRA was to implement in British domestic law the rights and protections contained in the *European Convention on Human Rights* (ECHR), an international agreement drafted in 1950—shortly after the *Universal Declaration of Human Rights*—as a response to the mass violence perpetrated by European governments during the Second World War and the Shoah (Bogdanor 2009). It was meant to bind European party-states to an international legal regime protecting fundamental rights and freedoms and created a supranational European Court of Human Rights (ECtHR) to do so. The United Kingdom played a central part in drafting the ECHR and was the first country to ratify it (Bogdanor 2009; Home Office 1999). In 1965, the UK opted into the right to individual petition allowing its citizens to directly introduce proceedings against the British Government before the ECtHR in Strasbourg (Elliott and Thomas 2020). However, the Convention remained no more than an international treaty. It bound the UK in international law but could not be invoked in British domestic courts. Therefore, when they considered that their Convention rights had been infringed upon, British citizens had to go all the way to Strasbourg to make their case before the ECtHR—a process which, given the Court's heavy caseload, was particularly lengthy and costly (Bogdanor 2009; Home Office 1999).

The Blair Government was therefore not the first to propose incorporating the ECHR in British law. Between 1970 and 1996, a dozen private member's bills to that effect were unsuccessfully introduced in the House of Commons. Those also

notably followed an ambitious initial proposal for a British Declaration of Human Rights[17], presented by Labour MP Fenner Brockway (later Lord Brockway) as soon as 1951, which included an explicit entrenchment clause unequivocally rendering any law "contrary to the provisions of this Act […] absolutely null and void" (s. 25) and making it a criminal offence to infringe on a citizen's rights (s. 26).

The 1970 bill[18] presented by Labour MP Samuel Silkin (later Lord Silkin of Dulwich) stated for its part the intention to preserve the "constitutional supremacy of Parliament" by proposing the creation of an independent Human Rights Commission to examine complaints relating to Convention rights and to report necessary legislative changes to Parliament—an arrangement reminiscent of the present regime. Another bill from 1975[19] drafted by Liberal MPs proposed some form of entrenchment again, providing for the implied repeal of any previous statutory provision contradicting Convention rights and requiring any subsequent Act of Parliament to explicitly state an intended derogation, or provisions conflicting with Convention rights would be deemed invalid as well. Two bills from 1983 and 1985[20] projected similar arrangements. A series of four Human Rights bills introduced by Labour MP Graham Allen between 1990 and 1994[21] included comparable dispositions regarding rights entrenchment. The last three even mentioned in their long titles that "to entrench [Convention] right and freedoms" was among their express purposes. The last one went as far as to explicitly confer on courts the power to strike down Acts of Parliament that would conflict with guaranteed rights while also providing for the creation of a special commission charged with drafting a new UK Bill of Rights.

The *Human Rights Act 1998* appears to serve as a compromise between these successive proposals and an attempt to reconcile rights protection with

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[17] *Declaration of Human Rights Bill* (1951). House of Commons (UK). Bill no. 32 (40th Parl., 1st sess.)
[18] *Protection of Human Rights Bill* (1970). House of Commons (UK). Bill no. 52 (45th Parl., 1st sess.)
[19] *Bill of Rights Bill* (1975). House of Commons (UK). Bill no. 214 (47th Parl., 1st sess.)
[20] *European Human Rights Convention Bill* (1983). House of Commons (UK). Bill no. 73 (49th Parl., 1st sess.) and *Human Rights and Fundamental Freedoms Bill* (1985). House of Commons (UK). Bill no. 175 (49th Parl., 3rd sess.)
[21] *Human Rights Bill* (1990). House of Commons (UK). Bill no. 50 (50th Parl., 4th sess.);
Human Rights (no. 2) Bill (1993). House of Commons (UK). Bill no. 219 (51st Parl., 1st sess.);
Human Rights (no. 3) Bill (1993). House of Commons (UK). Bill no. 251 (51st Parl., 1st sess.); and
Human Rights Bill (1994). House of Commons (UK). Bill no. 30 (51st Parl., 2nd sess.).

parliamentary sovereignty. It finally implements domestically the fundamental rights contained in the *European Convention on Human Rights*, giving the treaty a similar function in British law to that of a constitutional bill of rights. As such, it has come to be one of the most significant pieces of legislation governing the relation of citizens vis-à-vis the British state. The HRA compels all public authorities in the UK to act in respect of Convention rights, which means that judges have the power to quash administrative decisions that would disregard them. But most importantly, it introduces novel legal procedures that come unprecedentedly close to entrenching those rights.

First, section 3 provides that the courts shall interpret any other legal provision—including Acts of Parliament—in light of the ECHR: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights" (Human Rights Act 1998, s.3[1]). This section thus gives judges a considerable degree of leeway in their interpretation of the law and allows them to substantially stretch the meaning of some provisions in such a way that they become consistent with the rights guaranteed by the Convention. Since the enactment of the HRA, the courts did use section 3 to indirectly amend the sense or scope of statutory provisions. In *Ghaidan v Godin-Mendoza*, for instance, the Court of Appeal ([2002] EWCA Civ 1533) and then the House of Lords ([2004] UKHL 30) reinterpreted a provision referring in heteronormative words to "his wife or her husband" as to make it applicable to same-sex couples despite the wording, judging the law would be otherwise discriminatory under the ECHR.

The HRA shares that feature with constitutionally entrenched bills of rights in other jurisdictions, such as Canada, where judges have routinely given legislation larger interpretations to make it compatible with constitutional rights (Beaudoin 2003). Unlike the Canadian *Charter of Rights and Freedoms*, however, the British HRA does not render a statutory provision that would be deemed incompatible with Convention rights invalid. It makes clear that nothing in the Act shall "affect the validity, continuing operation or enforcement of any incompatible primary legislation" (Human Rights Act 1998, s.3[2]). Section 3 hence does not empower British judges with the ability to strike down the laws made by Parliament, but

nonetheless "marks a significant shift of power from Parliament to judges, since the courts are able to rewrite sections of Acts by reading them into words that are not [originally] there" (Leyland 2012, 224). The *Human Rights Act* is thus entirely immune to implied repeal and can ultimately affect all Acts of Parliament by subordinating their legal significance to the ECHR.

If judges find themselves unable to reinterpret a statutory provision to fit Convention rights, section 4 of the HRA creates a new type of remedy in the form of a 'declaration of incompatibility': "If the court is satisfied that [a] provision is incompatible with a Convention right, it may make a declaration of that incompatibility" (Human Rights Act 1998, s.4[2]). Again, such a declaration does not affect the provision's legal operation *per se*, but it sends a clear signal to Parliament that the legislation ought to be reviewed:

> far from the anodyne non-remedy that it may appear to be, [the declaration of incompatibility] is in fact a potent device that invokes at least the prospect of binding adjudication by the European Court of Human Rights […], thereby enabling British judges denied strike-down powers by the doctrine of parliamentary sovereignty to appropriate for domestic purposes the constraining forces to which the UK is subject in international law by dint of its treaty obligations. (Elliott 2017a, 277)

The HRA even provides for fast-tracked remedial action by giving ministers the statutory power to amend primary legislation that would have been declared incompatible themselves (Human Rights Act 1998, s.10[2])—a procedure closely scrutinised by a dedicated parliamentary committee. A landmark early example of a declaration of incompatibility is the *Belmarsh* case ([2004] UKHL 56). In their decision, the Law Lords found sections of the *Anti-terrorism, Crime and Security Act 2001* allowing for the indefinite detention without trial of suspected foreign terrorists to be incompatible with the ECHR and made a declaration to that effect. Despite lamenting the judicial interference with its counter-terrorism agenda in a time of public anxiousness, the Blair Government honoured its own Act by promptly introducing and passing the necessary amendments in Parliament (Elliott and Thomas 2020). As of July 2020, out of thirty-three declarations of incompatibility upheld by the courts since the HRA's entry into force in 2000, twenty-one had been resolved by legislative changes, eight through section 10 remedial orders and four were under consideration by the Government (Ministry of

Justice 2020). Overall, none was left unaddressed. This evidence shows that declarations of incompatibility serve as potent moral and political injunctions compelling lawmakers to be deferential towards the ECHR, furthering in practice the quasi-entrenchment of Convention rights. Some scholars have in fact suggested that complying with declarations of incompatibility has now become a constitutional convention in its own right (Hazell 2015; Blick 2017).

But to pre-empt legislation from being declared incompatible by the courts, the HRA goes as far as to require ministers introducing any bill in Parliament to make a statement of its compatibility—or not—with Convention rights before its second reading (Human Rights Act 1998, s.19). It forces the Government to clearly indicate whether or not it believes a proposed bill would infringe on rights guaranteed by the ECHR and to expressly state its intention of going forward with it even if it does. Thus, the procedure adds significant pressure on the legislative process to comply with the *Human Rights Act* and—even if it does not tie lawmakers' hands entirely—serves as a constant reminder of its intended moral precedence.

The *Human Rights Act* represents a notable instance of globalisation of constitutional norms, a trend that has been particularly marked with regard to fundamental rights (Anderson 2005). It weaves into the fabric of British public law a set of rights and freedoms reflecting the continental normative consensus which otherwise only exists in international law. Those rights were agreed upon by the member-states of the Council of Europe in the wake of a global human rights movement and, as provisions of an international convention, can only be amended with their collective agreement. Moreover, the scope and meaning of Convention rights are similarly dependent on the expression of the same normative consensus among judges nominated by Council of Europe member-states. Indeed, section 2(1) of the HRA requires that British courts take ECtHR jurisprudence into account when interpreting Convention rights.

Consequently, British citizens find themselves protected not by a bill of rights written by their national Parliament but by one existing only under international law. This has been one of the main critiques made against the HRA in the last decades, with the Conservative Party promising in 2015 to replace the Act with a proper 'British Bill of Rights' drafted—and amendable—at Westminster by British

lawmakers (Conservative Party 2015). Although the replacement has not yet occurred, the proposal raises important considerations regarding the entrenchment of human rights in Britain. Indeed, even if the current regime under the HRA leaves, in theory, to Parliament its prerogative to disregard judicial declarations of incompatibility of legislation with Convention rights or to repeal the HRA altogether, it does not explicitly confer on Parliament the power to directly amend or abrogate individual rights contained in the ECHR. Therefore, one could argue that the legal nature of Convention rights as international law rules also provides them with some form of entrenchment. While it is true that an international treaty does not bear the same legal force as national legislation—and that it is in this case applicable in British law only through means of a (revocable) Act of Parliament—the fact that Westminster cannot unilaterally amend Convention rights gives them a higher degree of permanence, in substance, than they would possibly have under an (amendable) domestic 'British Bill of Rights'. The current Government seems to have abandoned the project for now, committing instead to "updating the Act, not repealing it"[22] with the instalment of an independent review of the HRA in December 2020.

Whether or not the *Human Rights Act* is replaced or revised in the near future, its impact on British constitutionalism and its understanding of fundamental rights will be lasting. The HRA is consistent with a global trend towards the constitutionalisation and entrenchment of basic rights and political freedoms, and it is unlikely that these rights would lose their pre-eminent character under any future regime. It so remains the most impactful, and arguably the most permanent, form of constitutional entrenchment the United Kingdom has known thus far.

Entrenching devolution settlements

A more recent and overt attempt to entrench constitutional arrangements can be found in the *Scotland Act 2016* and the *Wales Act 2017*, which amend the original legislation implementing devolution in Scotland and Wales. Both declare in identical

[22] House of Commons (UK). *Hansard Parliamentary Debates,* vol. 669, col. 879. 14 January 2020. (Rt. Hon. Robert Buckland MP, Lord Chancellor and Secretary of State for Justice).

terms, under their very first sections, that devolved governments and legislatures "are a permanent part of the United Kingdom's constitutional arrangements […] [which] are not to be abolished except on the basis of a decision of the people of Scotland [or Wales] voting in a referendum" (Scotland Act 2016, s.1; Wales Act 2017, s.1). The legal effectiveness of this clause is, however, disputed. Orthodox interpretations of the doctrine of parliamentary sovereignty abide by the principle that no Parliament can bind its successors and thus contend that the Acts themselves could simply be repealed with a simple majority in both Houses (or ultimately even just one, using the *Parliament Acts* procedure) (Elliott and Thomas 2020).

Although it does not *legally* entrench them against repeal, the provisions certainly provide a robust form of *political* entrenchment to the devolution settlement. Most scholars (e.g. Bogdanor 2009; Delaney 2014) acknowledge the fact that, even before the enactment of these provisions, devolution was in practice secured by what Aileen McHarg and James Mitchell (2017, 515) called 'path-dependent entrenchment' and that, "politically, the referendum[s][23] and continuing public support for a Scottish Parliament [and a Welsh Assembly] gave it protection." We can therefore argue that, while the *Scotland Act 2016* and the *Wales Act 2017* evidently mark one of the most express and apparent attempts at statutory constitutional entrenchment in the UK, political safeguards remain the principal control mechanisms to enforce and uphold constitutional rules relating to devolution (Blick 2017). In essence, the new arrangements certainly head towards legal constitutionalism but do not entirely depart from the political constitution.

4. Uncodification? The Fixed-term Parliaments Act 2011

A prominent reform more directly related to the functioning of political institutions and the relationship between the branches of government has been the introduction of the *Fixed-term Parliaments Act 2011* (FTPA) by the Coalition Government. The FTPA's main effect is to replace central unwritten elements of

[23] The argument could refer here to both the 1997 referendum that endorsed Scottish devolution and the 2014 referendum of the independence of Scotland, in which the majority voted to remain a part of the United Kingdom. It is also applicable to the 1997 Welsh devolution referendum.

the UK Constitution—the rules governing the dissolution of Parliament and calling of elections—with more restrictive written arrangements. It was conceived partly out of immediate political motives, but also in response to a situation—in which the Prime Minister could virtually dissolve the legislature and call snap elections at any time—that was regarded as a constitutional problem.

Before the entry into force of the FTPA, Parliament could be dissolved, and a general election called, at the Sovereign's pleasure by exercise of the Royal Prerogative. In practice, it meant that a sitting Prime Minister, as the Crown's principal adviser, could trigger a general election whenever he or she wanted before the statutory end of a Parliament's life, fixed at five years by the *Parliament Act 1911*. The Prime Minister was otherwise bound, by constitutional convention, to resign or to advise such a dissolution if his or her Government lost a vote of confidence in the House of Commons (Hazell 2010). Yet the dissolution prerogative was mostly used to call elections at times when it advantaged the governing party (for example, when it enjoyed high ratings in opinion polls) and disadvantaged the Opposition (who could at times be unprepared for a surprise electoral campaign) (Norton 2020a). Petra Schleiter and Valerie Belu (2018) found that almost 60% of elections held between 1945 and 2010 had been timed by the incumbent Prime Minister for partisan advantage. They calculated that the party in power was able in this way to gain a bonus of 3.5% of the vote and 11.3% of the seats on average. Another effect of the dissolution power was to systematically shorten the intervals between elections: the average duration of Parliaments between 1945 and 2010 was 3 years and 10 months (House of Lords 2010, 16). A dissolution would often put an abrupt end to the parliamentary session, forcing a legislative 'wash-up' of unfinished business, which either accelerated the rushed passage of pending bills or sounded their death knell (Norton 2020a).

By the end of the twentieth century, this was increasingly pointed out as a constitutional problem, especially by members of the then-opposition Labour Party and Liberal Democrats. In the 1980s and 1990s, several private member's bills were introduced to remove the Crown's power to dissolve Parliament and replace it with

statutory dispositions for more regular elections[24]. Conservative governments had of course little interest to legislate on the matter and none of these proposals passed. A commitment to introduce a bill to the same effect was included in Labour's manifesto in 1992 but had been dropped by the time the party formed a government five years later (Norton 2020a; House of Lords 2010). The window of opportunity opened with the formation of the Conservative-Liberal Democrat Coalition Government in 2010, which gave the Liberal Democrats leverage to push their long-standing constitutional reform agenda. Having become a third party at Westminster, LibDems did not have the same incentives as governing parties for preserving the dissolution prerogative. The Conservatives, for their part, needed the party's support to form a government and saw a Fixed-term Parliaments bill as a good way to convey a sense that the Coalition would last the full parliamentary term (Norton 2020a).

The *Fixed-term Parliaments Act 2011* was thus introduced and, in due time, adopted. The FTPA is a prominent instance of an attempt to replace unwritten constitutional arrangements with statutory legal provisions, and to constrain the growing powers of the executive. It provides for fixed-term Parliaments, with regular fixed-date elections every five years, except for two exceptions. The first provides for the possibility that the Commons pass a motion "That this House has no confidence in Her Majesty's Government", after which another government commanding the confidence of the House of Commons must be formed within fourteen days, or Parliament is dissolved (FTPA 2011, s.2.3-2.5). The Act therefore codifies the pre-existing convention on votes of confidence but imposes narrow statutory limits on its operation. It removes the possibility of implicit confidence votes, such as Budget votes and motions on Queen's Speeches, or for the Prime Minister to designate certain votes as a matter of confidence to facilitate their passage with the threat of an election (Norton 2016). The second exception is a procedure by which an early general election can be called by a vote of the two-thirds of all Members of Parliament (FTPA 2011, s. 2.1-2.2). The Act thus

[24] Norton (2020, 117-118) lists private members' bills on the matter introduced by Labour MPs Austin Mitchell in 1983, Tony Banks in 1987 and 1992, Jeff Rooker in 1994 and Tony Wright in 2001, and by Liberal Democrat MPs David Howarth and Nick Clegg in 2007. He also notes that a commitment to introduce fixed-term Parliaments was included in both parties' 1992 election manifestos.

transferred the Crown's dissolution powers to the House of Commons itself and attempted to entrench its provisions behind a super-majority.

After ten years since its entry into force, however, the operation of the FTPA has been faulty. While it provided in theory for only one election to be held between 2011 and 2020 (which was indeed held in 2015), the UK had three elections during the period. In 2017, after the 2016 Brexit referendum and Prime Minister David Cameron's resignation, his successor Theresa May managed to secure the necessary two-thirds majority to call an early election. However, she failed to obtain a majority and a graver situation later occurred from the FTPA's attempted codification of confidence conventions. Indeed, when the Leader of the Opposition tabled non-statutory motions of no-confidence[25] in the premiership of Theresa May in late 2018, the Government did not allot time for them on the parliamentary agenda, calling instead on minor opposition parties to table formal, statutory motions of no-confidence in Her Majesty's Government. The conventional understanding had previously been that the Official Opposition could bring any motion of no-confidence to the floor of the House of Commons whenever it deemed necessary and that it would be considered urgently (Parliament 2021, 21-23). Yet, it appears that the FTPA altered this understanding of the convention when it codified it. The incident shows that the codification of conventions can change their normativity and is an example of the intricacies of legalising a primarily political constitution.

Following Theresa May's own resignation two years later over difficulties to pass a withdrawal agreement through Parliament, new Prime Minister Boris Johnson also sought another election that would return his government with a governing majority. Indeed, the FTPA no longer recognised implicit votes of confidence and, despite losing every single division in the Commons from 3 September to 15 October (evidence by Anne Twomey in Parliament 2021, 22), the Prime Minister would not resign and risk seeing the Opposition forming a coalition to prevent a 'no-deal Brexit'. After three unsuccessful attempts to gather a two-thirds majority, Conservatives decried that the FTPA trapped the Government into an unviable position in Parliament (Norton 2020a), yet the Act was operating as intended. In the

[25] That is, that were not phrased in the wording set out under section 2(4) of the *Fixed-term Parliaments Act 2011*.

end, Johnson managed to bypass the FTPA by passing an *Early Parliamentary General Election Act* with a simple majority. A second early election was therefore called for December 12th, 2019. Parliamentary sovereignty trumped the super-majority requirement set by the FTPA.

The FTPA had been criticised since its inception by constitutionalists and parliamentary committees, who disapproved at the time the rushed passage of such an important constitutional reform without a draft version or prior consultations. The Lords' Constitution Committee deplored that the proposal appeared to be mainly motivated by short-term political considerations, noting that "the policy behind the Bill show[ed] little sign of being developed with constitutional principles in mind." (House of Lords 2010, 8). As a result, the Act included a provision for its own review planned for 2020 (FTPA 2011, s. 7.4-7.6). Both the Labour opposition and the governing Conservatives have since committed to the repeal of the FTPA, and the process appears to be underway. The Government introduced in May 2021 a bill to that purpose expressly reviving the Crown's dissolution prerogative power, thereby signalling a clear return to the *status quo ante* (House of Commons 2021a).

The *Fixed-term Parliaments Act 2011*, mostly the product of the Liberal Democrats' reformist constitutional agenda, was devised as an effort to place more legal constraints on the exercise of a hitherto political power by the executive. It aimed to tighten the separation of powers through the use of statutory instruments to replace unwritten prerogative powers and conventions. The Act was also innovative in its attempt to entrench its constitutional measures by requiring a supermajority to derogate from them. The exercise, however, proved to be complex and produced discrepancies and ambiguities that hampered the operation of the new dissolution regime in relation to the fundamental principles of British democracy, especially regarding responsible government. In the end, the FTPA has appeared to be too rigid a legal straitjacket for the unusual political developments of the recent years and has therefore been subject to pushbacks. At once an example of statutory constitutional reform, codification of conventions and an attempt at entrenchment, the FTPA could soon be the first casualty of a backlash in political constitutionalism.

5. Conclusion

These cases vividly capture the dialectics between political and legal constitutionalism in recent British constitutional law developments. On the one hand, clear steps are being taken towards the legalisation of constitutional arrangements. On the other, deep-rooted principles of the political constitution continue to confine the scope of the changes. The *Human Rights Act 1998* emulates legal constitutions in subordinating other legislation to Convention rights as far as can be done without infringing on the sacrosanct principle of parliamentary sovereignty. Yet, it falls short of actual entrenchment and does not confer on judges the power to strike down Acts of Parliament, leaving the institution's constitutional supremacy largely intact. The *Cabinet Manual* provides an unprecedented official codification of the UK's most essential constitutional conventions and is likely to contribute to the crystallisation of their meaning. While it comes very close, given its purpose and position, to serve as a form of surrogate written constitution, its drafters have been careful to avoid suggesting so and insisted that it should remain only a reference document. Ultimately, it has not served as the basis for the adoption of a written constitution so far. Entrenchment clauses included in the *Scotland Act 2016* and *Wales Act 2017* mark an unequivocal attempt to imitate the legal arrangements of federal constitutions but, given enduring orthodox conceptions of parliamentary sovereignty, act mostly as additional symbolic constraints on *politically* entrenched devolution settlements. The *Fixed-term Parliaments Act 2011* has revealed the difficulties of superseding tacit political arrangements with legal provisions in the larger context of a Westminster-style political constitution. Its circumvention by the *Early Parliamentary General Election Act 2019* proves that no constitutional arrangement is completely shielded from abuses of parliamentary sovereignty and that legislative entrenchment therefore seems to remain impossible in the United Kingdom. In the end, commitments to its repeal by both major British political parties and the commencement of the process to do so could also indicate a resurgence of political constitutionalism in this particular case.

Chapter III

The judicialisation of constitutional controls

1. Courts and constitutional review

In most polities today, the judiciary serves as the primary constitutional guardian. Judicial bodies will often monitor and control the procedural aspects of the democratic process and, in some countries, have even taken on a central role in the settlement of some of the most controversial political debates (Hirschl 2008). It is indeed a core tenet of the globally prevalent model of legal (or liberal) constitutionalism to have as basic law a set of preeminent written rules which, given their legal nature, are to be enforced through judicial means. In states functioning under that model, the upholding of the rule of law in the form of constitutional adjudication by the courts is often regarded and resorted to as the ultimate bulwark against unconstitutional behaviour. The constitutionalisation of fundamental rights and freedoms following the post-WWII global movement for human rights considerably extended the courts' remit in that regard and constitutional review remains closely connected to rights litigation to this day (Hirschl 2008). As a result, some form of judicial constitutional control by specialised or generalist courts has now become the standard in most democracies and even some authoritarian regimes, with 158 out of 191 national constitutions including formal provisions to that effect in 2008 (Ginsburg 2008).

The idea of constitutional review originates in the early-years United States, where in 1803 the US Supreme Court claimed in its landmark *Marbury v Madison* decision the power to strike down statutes and governmental decisions violating the constitution. That established in the American constitutional order the foundation of what Peter Leyland (2012, 194) calls—in explicit contrast with the UK—a "principle of judicial sovereignty": The judiciary being the final and exclusive interpreter of the Constitution ultimately holds the power to invalidate acts of the others branches of government. As a result, judicial politics are now a salient feature of American political life (Friedman and Delaney 2011).

At first, constitutional review remained mostly confined to common law federal polities like the US, Canada, and Australia, where the presence of multiple law-making authorities called for the arbitration of the courts (Ginsburg 2008). In the early twentieth century, the integration of Hans Kelsen's hierarchy of norms model into the Austrian constitution of 1920 launched a second wave of constitutional review in Europe. Following the civilist legal tradition of continental Europe where 'low status' judiciaries remained subordinate to the legislature, this model generally called for separate, dedicated constitutional courts and was implemented first in post-Fascist states like Italy, Germany or Spain (Ginsburg 2008). In other countries where explicit provisions for constitutional review were not included in the constitution, courts were often able to claim the power for themselves (e.g. in India or Israel). A final wave coincided with the third wave of democratisation, with a majority of the newly independent countries including some form of judicial review in their constitutional settlements—in particular in post-Soviet states (Ginsburg 2008).

"Given the dramatic influence of theories of fundamental rights and the rise of court-centered constitutional systems over the past fifty years, in a global context the political constitutionalists are outnumbered", sums up Erin Delaney (2014, 549). Judicial constitutional review—a corollary of legal constitutionalism—has therefore become a global standard, which the United Kingdom continued until recently to resist to a large extent. For Tom Ginsburg (2008), it is precisely through struggles between the political and judicial branches of the state that further expansions of constitutional review jurisdictions will occur. It is therefore towards the manifestations of such power dynamics in the British constitutional order that we will turn our attention in the present chapter.

We will first briefly survey the evolution of British administrative law and the advent of contemporary judicial review practices to provide the context in which more recent developments are taking place. The exercise will also be an occasion to highlight patterns in the historical relationship between judicial, legislative, and executive power in the UK political system. We will then consider the effects of some of New Labour's reforms on that balance of power after 1997, and notably how the regimes of the *Human Rights Act 1998* and devolution have expanded the

courts' constitutional jurisdiction in a way that begins to resemble the usual remit of constitutional courts. We will argue that this position is further enhanced by the creation of an independent UK Supreme Court under the *Constitutional Reform Act 2005*.

The chapter will then investigate observable new trends in judicial doctrine, beginning with *obiter dicta* found in the House of Lords' *Jackson* decision, which rely on a reinterpretation of the fundamental principles of the UK constitution to propose a departure from political-constitutional orthodoxy to espouse the precepts of common law constitutionalism (a British brand of legal constitutionalism). Finally, we will consider whether the Supreme Court's recent decision in *Miller II/Cherry* could signify a turning point in the dialectic between political and legal constitutionalism as regards constitutional control.

2. Judicial review in the United Kingdom

A brief history of British administrative justice

During the revolutionary 17th century, English courts mainly sided with Parliament in resisting royal absolutism, and as such played throughout the period a prominent role in the transformation of the country's constitution. In turn, the *Act of Settlement 1701* was the first to introduce provisions to guarantee the independence of the judiciary, stipulating that His Majesty's judges shall serve 'during good behaviour' with secured salaries, and could only be removed on an address from both Houses of Parliament (s. 3). However, as the political system underwent in the following centuries further waves of democratisation, the interference of largely oligarchic magistrates in public affairs—and therefore in the area of public law—came to be increasingly perceived as improper (Stevens 2004). Hence, when A.V. Dicey (1915 [1885]) published his seminal account of the British constitutional settlement at the turn of the 20th century, he "seemed to leave [in his theorisation of the concept of 'Rule of Law'] no room for judicial discretion" in constitutional matters, writes Robert Stevens (2004, 336), as for him "democracy was to be protected by Acts of Parliament, but not by the judges." That view, along with the rest of Dicey's

interpretations of the core principles of the UK Constitution, were to prevail at least until the 1960s (Hale 2019), with most "standard constitutional law books […] assum[ing] no serious constitutional role for judges" (Stevens 2004, 371).

One of the reasons for this reticence regarding constitutional adjudication was that the judiciary was, at the time, neither politically independent nor indubitably impartial, as judicial appointments remained an integral part of the partisan spoils system (Griffith 1985, 21-24). Judges were indeed selected not on their merit as lawyers, but according to party loyalty, with "undistinguished backbenchers" or "MPs manqués" being usual appointees to the bench (Stevens 2004, 335-337). The result was that the judiciary quickly came to be dominated by an Oxbridge-educated Conservative elite in a political system that was slowly evolving towards a more genuine form of liberal democracy (Griffith 1985).

As with the other parts of the British state, the judiciary had slowly evolved from a medieval regime of monarchical fusion of powers centred around the institution of the *curia regis*. As a consequence, until the reforms of the 21st century, the highest court in the realm was also Parliament's upper chamber, the House of Lords, whose presiding officer was the Crown-appointed, generally unelected Lord Chancellor, who was also the Cabinet minister responsible for the administration of the justice system. If from 1876 a compromise was adopted by which only professional judges appointed to the House for that purpose would hear judicial appeals as members of the House's 'Appellate Committee' (*Appellate Jurisdiction Act 1876*)[26], the Lord Chancellor still appointed all judges, could personally preside over hearings, and composed the panels of Law Lords assigned to cases. His position therefore allowed him—a government minister—to instrumentalise the House of Lords' judicial powers to overturn lower courts' decisions for political purposes when needed (Stevens 2004). Conversely, Britain's most senior judges were also parliamentarians and could openly participate in legislative debates, although they eventually tended to abstain on politically sensitive matters (Griffith 1985, 45-50; Norton 2020b, 83-99).

[26] Before the enactment of the *Appellate Jurisdiction Act 1876*, all members of the House of Lords could vote on appeals from lower courts. Contrary to any kind of separation of powers, legislators thus acted as judges of last resort.

With the advent of social democracy, the party-political character of judicial appointments was questioned, as the hostility of Conservative judges to the social policies of Liberal and Labour governments frustrated important reforms and jeopardised the construction of the British welfare state[27]. Indeed, the judiciary's resistance was particularly marked in rulings against trade unions (Griffith 1985, 53-82), which was a contributing factor to the election of a Liberal government in 1906 and the subsequent rise of the Labour Party (Stevens 2004, 338). "The conflict between the courts and trade unions showed itself […] as an expression of class conflict", explains J.A.G. Griffith (1985, 68). The new governments therefore worked to keep the judiciary out of the developing welfare state and to remove judges from the political arena altogether by curtailing their power of judicial review. From 1905 onwards, legislation relating to social policy was frequently removed from the jurisdiction of the ordinary courts by means of ouster clauses[28] (Steven 2004, 342). Instead, the arbitration of welfare disputes was entrusted to specialised, independent administrative tribunals as to avoid 'judicial sabotage' of social legislation (Jowell 2019, 7). Liberal Lord Chancellors, through their position in the judiciary, "worked to ensure that the elements of administrative law would be excised" from British law and so "British administrative law was to sleep for the next fifty years" (Stevens 2004, 340). Judicial appointments subsequently evolved away from partisanship, with the new policy being to appoint judges based on their performance at the Bar (Griffith 1985, 23). Yet, Lord Chancellors remained simultaneously judges and politicians and, as they continued to frequently sit on the bench in the Lords or on the Judicial Committee of the Privy Council, "it was they who set the judicial tone" in the UK's apex courts, maintains Stevens (2004, 341).

The growth of the administrative and welfare state eventually prompted a new rise of judicial review (Elliott and Thomas 2020, 493-499; Norton 2020b, 83-99), as political control mechanisms appeared insufficient to properly scrutinise the

[27] An analogous situation can be found around the same period in the United States, where the New Deal era was marked by a prominent debate between American iterations of political and legal constitutionalism (Whittington 2008).

[28] An 'ouster clause' is a statutory provision included in an Act of Parliament removing the courts' power to review actions or decisions made under the Act, or part of it (Elliott and Thomas 2020, 570-571). The ability of such clauses to effectively prohibit judicial review has been put into question by the House of Lords' decision in *Anisminic*, when it interpreted an ouster clause in the *Foreign Compensation Act 1950* in such a way as to deprive it of its full legal effect.

increasingly ubiquitous interventions of government in all areas of society. The potential infringement on citizen's rights and liberties "called for the protection of the law" (Harlow and Rawlings 2012, 32). From the 1960s and 1970s onwards, courts started to slowly reintegrate the fields of constitutional and administrative law (Hale 2019), while the marked executive centralisation of the following Thatcher years saw a further surge in the number of judicial review cases. On the political front, the relative weak standing of opposition parties during the nearly 20-years-long Conservative reign "created a sense that only the judges could act as a check on arbitrary actions by the executive" (Riddell 2007, 40). Stevens (2004, 359) notably claims that "the Labour Party's abdication [during the period] of the primary responsibility of an opposition—namely to oppose—left the judges in the firing line."

Overall, over the second half of the twentieth century, the increased centralisation of bureaucratic power in the hands of the executive and the hardening of party lines in Parliament effectively made the old political control mechanisms less effective and thus called for new safeguards. Echoing Lord Hailsham's concerns over what he termed the 'elective dictatorship' that British party government had become, the Lord Chief Justice of England in the 1980s, Lord Lane, stated in a parliamentary debate that "as Parliament [was] increasingly liable to do what the government of the day wish[ed] it to do […] it [was] [..] becoming more and more necessary to preserve intact the courts' power of judicial review" (quoted by Stevens 2004, 359). Lord Mustill later concurred in *Fire Brigades Union* ([1995] 2 AC 513, 27) that "the courts ha[d] no option but to occupy the dead ground [left by Parliament]" to guarantee the proper protection of citizens against potential executive abuse. It is therefore "perceived shortcomings in parliamentary modes of accountability" that justified a turn towards judicial accountability mechanisms and the growth of judicial review as a complementary check on the executive (Elliott and Thomas 2020, 496). With landmark cases like *Anisminic* ([1969] 2 AC 147)—by which judges refused to give full effect to ouster clauses—or the '*GCHQ* case' ([1984] UKHL 9)—in which they held that some powers exercised by ministers under the non-statutory royal prerogative could also be subject to judicial review—the judiciary expanded its jurisdiction and reaffirmed its position as a control actor in the policy process. The

executive acknowledged this fact with the publication in 1987 of a civil service handbook on judicial review, aptly titled *The Judge Over Your Shoulder (JOYS)*, which has been reedited several times since and is still in use to this day (Government Legal Department 2018). Applications for judicial review continued to grow in the 1990s to reach a peak in 2010-2013 (Norton 2020b, 95), before the transfer of immigration and asylum decision to the Upper Tribunal of the Immigration and Asylum Chamber (Haddon, Hogarth and Nice 2021). "It is the judiciary and not Parliament", writes Alison Young (2019a, 340), "who are beginning to take centre stage when it comes to the regulation of the executive."

The modalities and limits of judicial review

In the British legal system, the judiciary has therefore come to perform functions of legal review of executive action which are rather similar in form and scope to the administrative justice practices that can be found in other common law jurisdictions. On orthodox accounts, this competence is regarded as deriving mainly from the *ultra vires* doctrine, which consists in ensuring that public officials exercise their powers strictly within the statutory confines prescribed by the relevant Acts of Parliament (or the residual limits of the royal prerogative). A minister, a civil servant or a public body cannot use powers they do not by law possess. This is the first and overriding ground for judicial review, 'legality', by which the courts essentially ensure that the executive acts lawfully (Jowell 2019, 19-21). The second ground is 'procedural propriety', which is to verify that administrative decision-making has followed due process, was free of bias, and allowed affected parties to be heard before being denied a right or an interest (Jowell 2019, 19-21). The third and last ground for judicial review has been developed by the courts in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* ([1948] 1 KB 223) and is thus often called 'Wednesbury unreasonableness' or conversely 'rationality'. In the words of Lord Greene, who wrote the decision, the principle is that "discretion must be exercised reasonably. […] [I]f a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere" ([1948] 1 KB 223, 230). A court could therefore provide remedy against a decision

which would appear non-sensical, capricious, to have been made in bad faith or in blatant disregard of obvious factors. Such remedies include overturning an executive act found to be unlawful (a 'quashing order'); prohibiting an officeholder from undertaking a certain action that would be unlawful (a 'prohibiting order'); or directing the government to do something in order to comply with the law (a 'mandatory order') (Elliott and Thomas 2020, 591-595).

If the judiciary can review the lawfulness of executive actions, in theory that competence does not extend to reviewing the constitutionality of Acts of Parliament. That is because, according to an orthodox interpretation of the constitutional principle of parliamentary sovereignty—which constitutes the 'rule of recognition'[29] of the UK legal system—judge-made common law is inferior to and must give way to the statute law of Parliament whenever they conflict. Moreover, in the absence of an entrenched constitutional document circumscribing the powers of the legislature and thereby providing the criteria against which to review the constitutionality of Acts of Parliament, there is in that (limited) sense virtually no constitution for the courts to police. As we shall see, however, that orthodox view might be eroding.

3. Constitutional reforms and judicial power: towards a constitutional court?

New Labour, new grounds for constitutional litigation

From 1997, the Labour Government of Tony Blair successively implemented several constitutional reforms which, in many instances, extended the judiciary's jurisdiction in ways that led it to exercise new functions akin to those generally performed by constitutional courts in other countries. We have already explained, in the preceding chapter, how the legal regime introduced by the *Human Rights Act 1998* (HRA) conferred a new role on senior courts in assessing the compliance of governmental action and parliamentary legislation with rights protected under the

[29] See the definition in H.L.A. Hart's *The Concept of Law* (1961, Oxford University Press) or in chapter 2 at n.10.

European Convention on Human Rights. The HRA created new grounds for judicial review of ministerial decisions and enabled judges to issue 'declarations of incompatibility' calling on Parliament to amend provisions infringing on Convention rights. We have seen that Parliament (or in relevant instances the Government) has so far always complied with such declarations by removing incompatibilities identified by the courts (Ministry of Justice 2020). This indicates that, with regard to human rights, declarations of incompatibility ultimately have, in practice, the same effects as remedies provided by courts with the power to invalidate laws on grounds of unconstitutionality.

In the following years, devolution of legislative powers to national legislatures in Scotland and Wales, and the restoration of devolution in Northern Ireland, also introduced a new constitutional regime subject to the arbitration of the judiciary (Hale 2019). Indeed, federal models of constitutional division of powers typically require arbitration of jurisdictional disputes by a neutral party, which in most federal states is the apex court or a constitutional court (Ginsburg 2008). In the United Kingdom, jurisdiction over devolution issues was similarly vested first in the Judicial Committee of the Privy Council, and then (from its creation in 2009) in the Supreme Court (Department for Constitutional Affairs 2003). On McCorkindale, McHarg and Scott's count in 2018, there had been five cases where the Court had invalidated an Act of the Scottish Parliament and one instance where provisions of the Welsh Assembly were struck down. Examining Scotland's experience, the same authors remark that the Scottish Government's reactions to these judicial pronouncements against its legislation were quite restrained and find that there is evidence of acceptance of and "relative comfort with the judicial role in Scottish political discourse." They therefore conclude that "attitudes to constitutional review in the Scottish context do […] seem to be indicative of new constitutional thinking which is antithetical to the insulation of primary legislation from judicial control" (McCorkindale, McHarg and Scott 2018, 309-310). In sum, by reviewing the validity of acts of the devolved legislatures (including their compliance with the HRA) and by resolving disputes over competence with Westminster, the UK Supreme Court is turned into a quasi-federal court by the devolution settlements. That is significant, given that the US Supreme Court's position as federal mediator has been identified

as an early contributing factor to the rise of judicial supremacy in the United States (Friedman and Delaney 2011). "I think that the only conclusion I can draw is that devolution […] turns the United Kingdom Supreme Court into a genuinely constitutional court", concludes for us former Supreme Court President Lady Hale (2018, 18). Both the HRA and devolution have therefore considerably increased the judiciary's caseload in constitutional matters and correspondingly enhanced the Supreme Court's role as a constitutional arbiter. And they effectively bring the court's functions closer to constitutional review.

Separation of powers and the new Supreme Court

Among these constitutional reforms introduced by the Blair government, one specifically addressing and most patently embodying a passage to legal-constitutional standards has been the *Constitutional Reform Act 2005* (CRA). The initial proposals contained in the Act were presented to the public for the first time incidentally, in a simple press release about a Cabinet reshuffle in 2003 (Delaney 2014). Despite the constitutional importance of the changes it would implement, the Government had conceived the reform as a straightforward, uncontroversial modernization of British institutions: It was very much in line with the branding of New Labour's political agenda and "its continuing drive to modernise the constitution and public services" (Department for Constitutional Affairs 2003, 10), but also with global trends in liberal constitutionalism.

The purpose of the Act was expressly to put an end to the constitutional illusion of a fusion of legislative and judicial powers which stemmed from the dual position of the House of Lords as both the UK's parliamentary upper chamber *and* court of last resort. Of course, in practice, all of the House's judicial functions were carried out since 1876 by its Appellate Committee, composed exclusively of senior judges appointed to that effect and called the 'Lords of Appeal in Ordinary' (or 'Law Lords' for short) (*Appellate Jurisdiction Act 1876*). Yet the appearance of overlap between the country's apex court and legislature was perceived as a constitutional anomaly by contemporary democratic standards. These standards align with the model of legal constitutionalism, which places emphasis on a clear separation of

powers and demands that an independent judiciary serve as institutional arbiter between the other branches of the State (Ginsburg 2008). As with the *Human Rights Act,* part of the justification for the reform came from Strasburg:

> Recent case law from the European Court of Human Rights had raised questions about separation of powers within Britain, and the government sought to clarify institutional relationships to forestall any detrimental litigation. […] [Indeed], the position of the Appellate Committee in the House of Lords suggested that the tribunal might not be truly independent, as required by Article 6 of the European Convention on Human Rights [which had now, through the HRA, force of law in the UK]. (Delaney 2014, 570)

In addition to this legal requirement, the problem was also one of public perception. Ordinary citizens—most of whom were probably not familiar with the inner workings of the House of Lords—might have been misled into believing that the House's judicial decisions could be influenced, or outright made, by politicians (Woodhouse 2004; Department for Constitutional Affairs 2003). The continued rise in judicial review cases, in particular under the new regime set up by the HRA, rendered the situation all the more sensitive. Like Jeremy Bentham, Walter Bagehot or William Gladstone before them (Duffy-Meunier 2012), prominent figures including the Senior Law Lord, Lord Bingham, or the Chair of the Bar Council had thus called for the removal of the Law Lords from the legislature (Department for Constitutional Affairs 2003). The Prime Minister, whose government had already began working on the modernisation of the upper house, concurred.

The three-headed character of the office of Lord Chancellor was similarly regarded as constitutionally problematic. At once a minister of the Crown, the House of Lords' presiding officer and the head of the judiciary in England and Wales, the Lord Chancellor was an active member of the executive, legislative and judicial branches. The role thereby personified the fusion of powers that characterized the British system of government. By legal-constitutional standards—which put great emphasis on the separation of powers—these arrangements seemed like a grotesque aberration, unbefitting a modern democracy. "A modern democracy committed to the rule of law needs to demonstrate its commitment to separation of powers," so claimed Lord Neuberger (2009, 15).

The *Constitutional Reform Act 2005* remedied these two anomalies. First, it removed the Appellate Committee from the House of Lords and constituted it

(starting in 2009) into a new Supreme Court of the United Kingdom, with the then-serving Law Lords becoming the initial set of Supreme Court Justices. The House of Lords' jurisdiction was mostly transferred unaltered to the new Court, with the only addition of devolution matters[30]. The Supreme Court was housed in its own separate building across from the Palace of Westminster—Middlesex Guildhall—which "provided a visual and physical demonstration of a functional separation" between the legislative and judicial branches (Delaney 2014, 572).

The judicial and legislative functions of the Lord Chancellor were respectively transferred to the Lord Chief Justice of England and Wales[31] and a newly created position of Lord Speaker of the House of Lords. The Act legally reinforced the principle of judicial independence and curtailed politicians' influence in the appointment of judges by providing for the creation of an independent Judicial Appointments Commission to more transparently nominate candidates based on prescribed criteria. As a result, the office of Lord Chancellor was largely confined to that of Secretary of State for Justice (which became its other title from 2007), and only ceremonial functions remained otherwise attached to the role. A new Ministry of Justice was created to support it and has now become one of the largest departments of the UK Government (Leyland 2012, 192). The historical obligation for that minister to be a member of the (unelected) House of Lords having been removed, all subsequent Lord Chancellors were also, like most of their ministerial colleagues, elected Members of Parliament.

In sum, the provisions of the *Constitutional Reform Act 2005* effectively normalised the status of the UK's highest court and achieved the full separation of the judicial power from the other branches of the British state. It brought the British Constitution in line, in that regard, with the legal-constitutional injunction to have a separate, independent judiciary as the core component of a system of checks and balances. The CRA also refers specifically—for the first time in statutory form—to

[30] Jurisdiction over devolution matters had until then been given to the Judicial Committee of the Privy Council—a body which was used to arbitrate federal disputes in other Commonwealth realms—as it was regarded as improper to let a committee of the British Parliament settle disputes between that Parliament and devolved legislatures (Department for Constitutional Affairs 2003).

[31] Contrary to what his or her title implied, the Lord Chief Justice of England and Wales was previously the second-most senior judge in that jurisdiction after the Lord Chancellor and presided over the Court of Appeal and the Queen's Bench Division of the High Court. The *Constitutional Reform Act 2005* made him Head of the Judiciary and President of the Courts of England and Wales.

the "existing constitutional principle of the rule of law" (s.1) and, doing so, evokes expressly the constitutional paradigm shift towards legalism in which it is embedded (Duffy-Meunier 2012). Lord Bingham (2020, 7) however notes that, while the Act recognised the principle, it did not provide it with a legal definition:

> [O]ne might have expected the Constitutional Reform Act to contain a definition of so obviously important a concept as the rule of law. But there is none. […] [P]robably, I think, they recognized the extreme difficulty of devising a pithy definition suitable for inclusion in a statute. […] [T]hey might reasonably have thought, to omit a definition and leave it to the judges.

For Diana Woodhouse (2004, 134), the CRA thus amounts to "a recognition of the increasing constitutional importance of the judiciary and a manifestation of the ongoing shift in the balance of power, away from politicians towards the judges."

While the reform was essentially cosmetic in practical terms, the institutional and physical separateness of the new Supreme Court—as well as its new constitutional review jurisdiction over devolution disputes—now mirrors the position of apex courts in other countries (like the United States) where the judiciary has substantial legitimacy and powers as constitutional arbiter. Therefore, from an equally symbolic point of view, it lends to the new Court a similarly increased legitimacy as a judicial body, especially in its interactions with Parliament or the Government: "The Supreme Court is [perceived as] becoming more of a constitutional court, deciding more issues of constitutional importance than were decided by the House of Lords" (Young 2019a, 328). In time, the Court's enhanced status might encourage the Justices to take example on their counterparts in other democracies and take on a more front-stage role in public law matters. It might notably give more credence to its claims to the power to strike down Acts of Parliament which judges deem unconstitutional or incompatible with fundamental rights[32] (Woodhouse 2004; Duffy-Meunier 2012).

Finally, the Supreme Court's position as a more visible, standalone institution may also cause Justices to be perceived (and to perceive themselves) to a greater extent as political actors, to be subjected to increased media attention and to be

[32] As we will see further, in *R (Jackson) v Attorney General* ([2005] UKHL 56) some Law Lords (including future Supreme Court Justices) implied for the first time, *obiter dicta*, that the courts might refuse to give effect to an Act of Parliament infringing on fundamental constitutional principles or fundamental rights protected by the common law.

exposed to more overt criticism (Norton 2020b, 86-89; Woodhouse 2004). "The more we are the new institution, […] the more we're going to be under fire for the things that we do", foreseeingly declared Lady Hale[33] on this point (quoted by Delaney 2014, 572).

4. Changing judicial approaches to constitutional review

The renaissance of common law constitutionalism

In the early 17th century, Chief Justice of the King's Bench Sir Edward Coke famously sought to affirm the legal primacy of the (judge-made) common law in *Dr Bonham's Case* ([1610] 8 Co Rep 113b, para. 118a), suggesting that "in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void." Although Coke was subsequently removed by a displeased King James I, his view has had some resonance and continues to stir controversy among legal scholars (Zhou 2019). Han-Ru Zhou (209, 292) even argues that Coke's vision was a key influence in the rationale for the US Supreme Court's decision in *Marbury v Madison*, by which it arrogated the power of constitutional review: "Anyone reading *Marbury* […] cannot fail to note the presence of the same key terms once used by Coke, with only the *Constitution* substituted for the *common law*. To many constitutional scholars in the United States and elsewhere, the intellectual origins of *Marbury* can be traced back to *Bonham*."

The would-be constitutional doctrine sketched out in *Dr Bonham* nevertheless quickly died out in the troubles of the English Revolution, which instead saw the doctrine of parliamentary sovereignty triumph over both royal absolutism and these embryonic attempts to assert judicial supremacy in England. Thereafter, the authoritative accounts of Blackstone (1765) and Dicey (1885) would become prevalent, and parliamentary sovereignty—established by history as a 'political fact'

[33] Brenda Hale (Lady Hale) was Lady of Appeal in Ordinary and then one of the inaugural Justices of the Supreme Court from 2004 to 2020, serving as the second President of the Supreme Court from 2017 to 2020.

(Wade 1855; Jowell 2006; Goldsworthy 2010)—legally uncontested. In the 19th century, the gradual extension of the electoral franchise and the consequent enhancement of the House of Commons' democratic legitimacy ultimately consecrated the political superiority of the legislature: "It was only at that time that the courts first began to categorically reject the idea, explicit in the seventeenth century Coke's doctrine, that some type of higher, fundamental constitutional principles imposed legal restraints upon legislative freedom" (Wicks 2017, 235).

However, there is now evidence that the approach taken by Coke is undergoing a revival in Britain, notably in the form of 'common law constitutionalism'. The theory has been championed by judge Sir John Laws and further developed legal scholars such as Trevor Allan, Paul Craig, Dawn Oliver, Jeffrey Jowell and Mark Elliott. Its tenants see the common law developed in the judicial arena through real-life litigation as politically superior to parliamentary legislation resulting from the process of democratic deliberation, because it would be by nature more suited to resolving moral dilemmas—over the long term and in an incremental and reasoned fashion—and therefore to deriving from them more refined moral principles (Poole 2003). In consequence, common law constitutionalism turns on its head the normative hierarchy between the rule of law and parliamentary sovereignty—and, *ipso facto*, between common law and statute law—to place the common law court, as "primary guardian of a society's fundamental values and rights" (Poole 2003, 439), at the centre of the constitutional order. Under this view, the common law provides constitutional protection to such fundamental rights and values which could extend—as Coke proposed it—to serving as a control standard of the lawfulness of statutory legislation.

A resurgence of judicial support for the common law as a prevailing source of constitutional legality can be found in recent case law, with the senior judiciary notably asserting the primacy of common law constitutional rights over the concurrent statutory guarantees provided by the HRA (Elliott and Hughes 2020). In doctrinal terms, this regime of common law protection of fundamental rights and principles has in recent years been articulated by the judiciary as the 'principle of legality'. It is "a presumption of statutory interpretation [which has now become recognised as] a principle of the UK constitution" (Young 2020, 249). It entails two

elements. First, that "general words found in legislative provisions cannot remove or restrict, or empower the executive to remove or restrict" rights recognised by the common law (Young 2020, 223). That means that the courts will not interpret an Act of Parliament as implying a restriction of common law constitutional rights and will instead presume Parliament never intended—unless it stated so explicitly—to limit citizen's basic rights. Indeed, for Lord Steyn[34] in *Pierson* ([1998] AC 539, p. 575), "Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy based upon the traditions of the common law. […] Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the Rule of Law." The principle's rationale is further explained by Lord Hoffmann[35] in *Simms* ([2003] 2 AC 115, p. 131):

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. […] 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. […] The courts [will] presume that even the most general words were intended to be subject to the basic rights of the individual. **In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document**. [Emphasis added]

The second element of the principle of legality is summarised by Lord Reed[36] in *UNISON* ([2017] UKSC 51, para. 91), drawing on a doctrine previously established by Lord Bingham in *Daly*, and states that "the degree of intrusion [of legislation in citizen's rights] must not be greater than is justified by the objectives which the measure is intended to serve" or, in Alison Young's (2020, 227) terms, "that any restriction placed on a fundamental right must be reasonably necessary to achieve a legitimate purpose." Canadians will surely notice the resemblance this legal test bears with the 'Section 1 test' in Canadian constitutional law, derived from the Supreme Court of Canada's decision in *Oakes* ([1986] 1 S.C.R. 103) and which serves as the

[34] Johan Steyn (Lord Steyn) served as Lord of Appeal in Ordinary from 1995 to 2005, retiring before the creation of the Supreme Court.
[35] Lennie Hoffmann (Lord Hoffmann) served as Lord of Appeal in Ordinary from 1995 to 2009, retiring before the creation of the Supreme Court.
[36] Robert Reed (Lord Reed of Allermuir) has served as a Justice of the Supreme Court since 2012 and currently serves as President since 2020.

principal standard for the constitutional review of legislation alleged to violate the *Charter of Rights and Freedoms*[37].

The principle of legality—as Laws LJ's doctrine established in *Thoburn* ([2002] EWHC 195 (Admin)) does with 'constitutional statutes'— a priori only prevents statute law from *impliedly* curtailing fundamental rights: "It is still possible for Parliament, should it wish, to legislate contrary to fundamental constitutional rights protected by the common law, provided it makes its intention to do so clear, so that it can be held to account politically for its actions" (Young 2020, 229). Yet, along with these newly labelled 'constitutional statutes', the notion of common law constitutional rights and principles seems to constitute a framework against which conceptually subordinate 'ordinary' legislation must be interpreted, according to the hierarchy of norms designed by judicial doctrine. As such, it provides a '*bloc de constitutionnalité*'[38] which UK courts theoretically lack in order to be able to squarely review the constitutionality of Acts of Parliament. And it nevertheless allows for "an interpretive approach […] [equivalent to] a functional form of 'soft strike-down'" (Elliott 2017a, 277).

Lord Neuberger[39] (2009, 11-13) affirmed that "in the absence of a written, codified constitution limiting Parliament's competence [for the judiciary to police,] it is difficult to see how our Supreme Court could draw the *Marbury* inference" and claim such a competence. Yet, UK courts can already be called upon to review the conformity of the devolved legislatures' acts with the division of powers laid down in the devolution settlements. They give effect to statute law in a way that is consistent with both Convention rights guaranteed by the HRA and with basic rights they see as being recognised by the common law. They now also give interpretive

[37] Section 1 of the Canadian *Charter* states it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The test first developed in *Oakes* has two steps: first, the Government must demonstrate that the legislation has both 'pressing and substantial' objectives. Then, the Court proceeds to a proportionality analysis and ensures the provisions at issue are (i) rationally connected to the law's purpose, (ii) minimally impair the right(s) or freedom(s) in question, and (iii) that the provisions' benefits outweigh their detriments (Centre for Constitutional Studies 2019).

[38] Doctrinal expression used in French constitutional law to designate, in the legal hierarchy, the body of norms of constitutional value which form the basis for the constitutional review of legislation, and which likewise comprises various fundamental principles recognised by the *Conseil constitutionnel* alongside constitutional legislation (Rousseau, Gahdoun and Bonnet 2016, 231).

[39] David Neuberger (Lord Neuberger of Abbotsbury) served as Lord of Appeal in Ordinary from 2007 to 2009, Master of the Rolls from 2009 to 2012, and then as the second President of the Supreme Court from 2012 to 2017.

precedence to Acts of Parliament which they regard as having constitutional standing and to unwritten constitutional principles of their own device which they regard as fundamental. In reality, British senior courts *are* exercising some of the functions of a constitutional court and, doing so, are engaging in forms of constitutional control which appear to be only a step away from outright judicial review of legislation.

Parliamentary Sovereignty v Rule of Law: the Jackson *dicta*

Could the logic of common law constitutionalism, carried to its full extent, eventually enable the judiciary to strike down a particularly controversial Act of Parliament on grounds of unconstitutionality? There is evidence of explicit support for that understanding among the senior British judiciary, who—relying on the notion of the rule of law—cite constitutional rights and principles recognised by the common law as potential legal brakes on the legislative power of the parliamentary majority. Most prominently in *Jackson* ([2005] UKHL 56)—in which judges "engaged in exactly the kind of exercise that characterises [constitutional] review in countries with written constitutions", remarks Jowell (2006, 577)[40]—three Law Lords made *obiter* comments suggesting that the courts might refuse to give full legal effect to statutory provisions that would infringe on especially fundamental constitutional principles or rights. While the main question of law raised in the case was not concerned by those statements, they warned that graver circumstances could push the judiciary to cross the Rubicon of invalidating legislation. Lady Hale (para. 159) admitted for instance that "the courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny".

[40] In *Jackson v Attorney General* ([2005] UKHL 56) appellants challenged the validity of the *Hunting Act 2004* on the basis that it was enacted, without the consent of the House of Lords, following the procedure established by the *Parliament Acts 1911 and 1949*, which removed the Lords' power to veto legislation and allowed public bills to be enacted with the sole approval of the Commons after a delay of one year. The appellants argued that the *Parliament Act 1949* was itself invalid, because it was in turn enacted using the procedure established by the *Parliament Act 1911*, which they construed as having only delegated legislative powers to the Commons that, as such, did not extend to the power to amend the delegating statute ('*Delegata potestas non potest delegari*'). The Law Lords rejected that reasoning and found both Acts to be lawful but took the opportunity to discuss the eventuality that a court might have to declare a statute unlawful. The fact that the House of Lords accepted to consider the validity of Acts of Parliament in that case was itself unprecedented.

Lord Steyn was more unequivocal. He asserted that the enactment of the HRA had ushered in a new legal order in Britain and, as a consequence, that

> the classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. **It is a construct of the common law. The judges created this principle.** If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a **different hypothesis of constitutionalism**. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. [Emphasis added] ([2005] UKHL 56, para. 102)

Here, Lord Steyn explicitly alludes and adheres to a particular interpretation of the principle of parliamentary sovereignty derived from common law constitutionalism. That view, which we will discuss further, sees parliamentary sovereignty as a creation of the common law dependent on its recognition and definition by judges. As such, its legal meaning and scope would be open to judicial reinterpretation. Lord Hope[41] (para. 104) thus restates:

> "Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. […] It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified."

He then goes on to declare that, in his view, it is in fact "[t]he rule of law enforced by the courts [which] is the ultimate controlling factor on which our constitution is based. […] [It follows that] the courts have a part to play in defining the limits of Parliament's legislative sovereignty" ([2005] UKHL 56, para. 107). Lord Hope is effectively suggesting an ideational shift in the normative hierarchy between the two principles in favour of the rule of law, and through it a rebalancing of the constitutional allocation of powers between the judiciary and the legislature.

The circumstances the justices go on to mention as being grave enough to justify judicial resistance to parliamentary authority mostly relate to either (i)

[41] David Hope (Lord Hope of Craighead) was Lord of Appeal in Ordinary from 1996 to 2009, and then Deputy President of the Supreme Court from 2009 to 2013.

attempts to statutorily restrict access to the justice system and/or curtail the constitutional role of the courts in upholding the rule of law (Young 2020) or (ii) provisions that would curtail voting rights and thus undermine the democratic legitimacy of Parliament upon which its sovereignty normatively relies (Jowell 2006). That is, explains Lord Hope (in *Jackson* [2005] UKHL 56, para. 126), because the principle of parliamentary sovereignty is construed under and "built upon the assumption that Parliament represents the people whom it exists to serve". It is therefore the eventuality of a statute that would infringe or purport to diminish one of the two principles traditionally regarded as the keystones of the British constitution—namely the rule of law and parliamentary sovereignty—that would mark the boundary of the lawful exercise of Parliament's legislative power in the eyes of the judiciary:

> Dicta concerning the refusal to apply legislation is best understood as protecting foundational constitutional principles. In particular, it upholds the separation of powers, protecting the role of the court as a constitutional safeguard of individual rights […]. Moreover, it is a means by which courts can protect democracy in extreme circumstances. (Young 2020, 249)

These statements made in their judicial capacity by three justices of the UK's apex court broke with established (political-)constitutional doctrine (Wicks 2017; Mullen 2007), beginning with Dicey's classical assertion that the legally unconstrained "legislative supremacy of Parliament is the very keystone of the law of the [British] constitution" (Dicey 1915, 25). Doing so, they were also the first senior judges to offer from the bench their contemporary interpretation of the doctrine of parliamentary sovereignty since the 19th century (Wick 2017). The *dicta* were therefore all the more doctrinally ground-breaking: "As recently as the 1970s and perhaps even the 1980s, such comments would have been considered by virtually all judges as expressing constitutional heresy. By the 1990s what was once heretical could be said openly, even if extra-judicially, and it can now be, and has been, said judicially" (Mullen 2007, 15). It is particularly noteworthy to point out Lord Steyn's explicit mention of a "different hypothesis of constitutionalism" as the philosophical basis for this newly articulated doctrine. Tom Mullen (2007, 15) hence remarks that *Jackson* "may be seen as, if not a battle, at least an important skirmish, in the conflict between political and judicial constitutionalism."

Lord Hope later took the opportunity to reiterate his position in *Axa* ([2011] UKSC 46, para. 51), explaining that

> [i]t is not entirely unthinkable that a government [with a strong parliamentary majority] may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.

Here, Lord Hope articulates common concerns put forward by legal constitutionalists, who see legal restraints enforced by the courts as the only reliable safeguards against an eventual abuse of institutional power or tyranny of the majority. Political scientist and Conservative peer Philip Norton[42] (2020, 28) retorts that the assumption "[t]hat a government would not use such a power is, in Diceyan terms, not beside the point—quite the reverse—and it is not a case of judges retaining a power, since they did not have it in the first place." The argument being, for political constitutionalists, that *political* constraints on the exercise of institutional power exist and should not be dismissed as less effective. The normative debate between political and legal constitutionalism is in evidence here, but a judicial consensus tends to be forming behind the latter. For instance, the view is also echoed by Lord Hodge[43] in *Moohan,* a case dealing with the limitation of prisoners' voting rights. He upheld that "in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a [significant] curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful" ([2014] UKSC 67, para. 35). And Lord Neuberger noted extrajudicially that

> section 40(5) of the *Constitutional Reform Act 2005*[44] could imply a power to review the constitutionality of statutes […] if the question [of] whether an Act of Parliament is contrary to […] a constitutional right [should be brought before the Court]. […] [I]t provides more than the US Constitution does as a

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42 Also known as Lord Norton of Lough, although we have preferred to cite ennobled scholars using their birth names and not their peerages.

43 Patrick Hodge (Lord Hodge) has served as Justice of the Supreme Court since 2013, and as its Deputy President since 2020.

44 Section 40 of the CRA establishes the Supreme Court's jurisdiction, with subsection (5) stating rather broadly: "The Court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment."

> guide as to whether constitutional judicial review lies within the ambit of the Supreme Court. (Neuberger 2009)

The debate taking shape here brings in two competing interpretations of parliamentary sovereignty, each relying on a different understanding of British constitutionalism. The first interpretation aligns with legal positivism and follows from Wade's (1955) definition of parliamentary sovereignty as a socially accepted "political fact" and product of British political history. Simply put, "Parliament progressively acquired its authority by accumulating legitimacy over the years" as the sole democratic representative of the people's will (Jowell 2006, 565). Under that view, per Dicey (1915), the rule of law is only a corollary principle to that of parliamentary sovereignty: the courts merely enforce Parliament's will as expressed through legislation, including—following the *ultra vires* doctrine—upon the executive by means of judicial review. That conception of parliamentary sovereignty and the rule of law has arguably come to be understood as the 'rule of recognition' (Hart 1961) of the United Kingdom's legal system: "This foundational rule is manifest in the beliefs and practices of the senior officials in the UK legal systems, and has been so for a long time. The evidence for this view is to be found in a variety of sources, including reported cases, legal and political writings, and historical events" (Mullen 2007, 17). It is correspondingly—according to Norton (2020, 25) relying on Lord Bingham's *The Rule of Law*—an understanding which is "immanent in the United Kingdom's constitution and could only be altered [in the same way it was created:] by a whole new constitutional settlement."

The second interpretation—which is the one relied upon by the justices cited above—rather sees the doctrine of parliamentary sovereignty as a judge-made "construct of the common law". From that perspective, which tends to align with the theory of natural justice, it is rather the rule of law that precedes parliamentary sovereignty. The latter principle instead "lies in the keeping of the courts […] [since] it is always for the courts, in the last resort, to say what is a valid Act of Parliament" (Wade 1955, 189). The principle of parliamentary sovereignty would thus be, under that view, dependent on judicial recognition and doctrinal definition. It follows that it would be open to reinterpretation by the judges, which in turn would mean that the rule of recognition of the UK legal system could be changed by the courts. We

might therefore be witnessing an "evolution of the rule of recognition to prioritise the rule of law" over parliamentary sovereignty (Wicks 2017, 231).

It is true that Hart's theory admits that the rule of recognition can change and is ultimately contingent on its acceptance by the "senior legal officials" in a polity (Hart 1961). These statements by several senior British judges could thus be evidence of such an evolution (Jowell 2006). Yet political constitutionalist Jeffrey Goldsworthy (2010) argues that this group should not be understood as being limited to the senior judiciary and should instead comprise actors in all three branches of the state. That is because "the reason that we are able to accept that sovereignty is the fundamental rule of the system is that there is a consensus to that effect amongst the courts, parliamentarians and government ministers, and it is the historical actions of all three that have created the current position", explains Mullen (2007, 17), adding that some also now consider popular acceptance to be necessary.

In the context of a "judge-made constitution" (Dicey 1915) in a common law system, whether a judicial redefinition of the doctrine of parliamentary sovereignty—on the basis of the new constitutional theory initiated in *Jackson*—can successfully alter the 'rule of recognition' in the United Kingdom to create a new regime of constitutional review (Duffy-Meunier 2012) remains up for jurisprudential debate. But from a political scientist's standpoint, there is compelling evidence here of an ideational power struggle in which the judiciary is developing a jurisprudential narrative that would legitimise a version of constitutionalism strengthening its own position in the constitutional order. These *dicta* might as such be a way for the judiciary to prepare the ground for the eventuality where extreme political circumstances would arise and prompt it to claim the power of disapplying legislation, with a doctrine slowly developed over time serving as credible justification and consistent precedent for a British-style *Marbury v Madison*—the ultimate success of such a power grab being contingent on its consensual acceptance by all stakeholders in the UK's political-legal system.

The UK Supreme Court recently took a significant further step towards constitutional review in *Miller II/Cherry* ([2019] UKSC 41), which stands as one of the most consequential constitutional cases so far decided by the Court. The decision arguably broke with established doctrine and precedent with regard to the justiciability of political conventions and to the limits of judicial intervention in the operation of the political system in general, and Parliament in particular.

The case's backdrop is the process of Brexit. On 29 March 2017—implementing the result of the 2016 Brexit referendum and duly authorised by the *European Union (Notification of Withdrawal) Act 2017* as the Supreme Court required in *Miller I*—Prime Minister Theresa May formally gave notice under article 50 of the *Treaty on the European Union* of the United Kingdom's intention to withdraw from the European Union, leaving two years to both parties to negotiate arrangements for the withdrawal before it became effective[45]. That process, however, proved difficult for the British Government, as it failed—by three times and despite several extensions to the original deadline—to get the House of Commons to approve a withdrawal agreement. These difficulties prompted Ms. May to resign as Prime Minister in the summer of 2019. Her successor as head of the government and Conservative leader, Boris Johnson, decided to explicitly use the prospect of a Brexit *without* a transition agreement as a new negotiating strategy with Brussels and openly took steps to prepare his government to the possibility. After facing the same opposition in Parliament to both his government's new Brexit deal and to a 'no-deal' option, the Government—then lacking an overall majority in the Commons—eventually lost control of the parliamentary agenda to the hands of members of the Opposition, who managed to successfully pass a bill forcing the Prime Minister to request a new extension to the deadline for the UK's withdrawal if Parliament did not approve either a withdrawal agreement, or a withdrawal without one, before 19 October 2019—the deadline for Brexit being scheduled at that time for the 31 October. As a majority of MPs were keen to prevent a 'no-deal' Brexit, the Prime

[45] Unless otherwise mentioned, the source for the facts included in this summary of the case is the decision itself.

Minister was unable to pass a motion for an early dissolution of Parliament under the *Fixed-term Parliaments Act 2011*. Hence, some on the government benches started talking of using prerogative powers in constitutionally unprecedented ways (such as proroguing Parliament or withholding Royal Assent) to thwart MPs efforts to delay Brexit (McHarg 2020).

On 10 September 2019, Parliament was therefore prorogued[46] until 14 October 2019 by commission of Her Majesty the Queen, ending after 341 days the longest parliamentary session ever recorded in England (Nikki da Costa in [2019] UKSC 41, para. 17). With the UK's withdrawal from the EU scheduled eight weeks later, this unusual five-week long prorogation left little time for parliamentary scrutiny of the Government's Brexit negotiations. The usual lengths of modern-times prorogations had indeed been around a week (Nikki da Costa in [2019] UKSC 41, para. 17), with four to six days being typically needed to prepare the Queen's Speech opening the new session (Sir John Major in [2019] UKSC 41, para. 59). As a reserve power exercised under the royal prerogative, prorogation of Parliament is formally decreed by the Queen-in-Council acting exclusively on the advice of the Prime Minister. Many, including Commons Speaker John Bercow, thus alleged that the procedure was being improperly used by Mr. Johnson to avoid parliamentary scrutiny and coerce MPs into passing his Brexit agreement to avoid seeing the UK leave the EU on 31 October without one (Proctor 2019; Elgot 2019). The Leader of the Opposition even unsuccessfully attempted to convince the Sovereign to reject the Prime Minister's advice, arguing "that the royal prerogative [was] being set directly against the wishes of a majority of the House of Commons" (cited by Elgot 2019). Proceedings were initiated in both the Court of Session in Scotland (*Cherry v Advocate General for Scotland* [2019] CSIH 49), and the High Court in England and Wales (*Miller v The Prime Minister* [2019] EWHC 2381 (QB)), to challenge the constitutionality of the prorogation. The *political* arena—at least in its primary

[46] The prorogation of Parliament is a prerogative of the Crown exercised by the Sovereign on the advice of the Prime Minister, and has the effect of ending the legislative session, thereby suspending all parliamentary activity—including committee meetings, questions by MPs to Ministers and other parliamentary accountability mechanisms—until Parliament is reopened with a Queen's Speech setting out the priorities of the Government for the new session. It is different from adjournment or recess, which is decided by each House for itself using a motion to that effect. In modern times, Parliament is prorogued under a Royal Proclamation by an announcement made to both Houses in the House of Lords by Royal Commissioners appointed by the Queen. (Erskine May 2019, para. 8.5-8.8)

institutional form—having been rendered inaccessible by the suspension of parliamentary activity, stakeholders (including private citizens) thus resorted to the *judicial* arena for the arbitration of this constitutional dispute.

In England, the High Court dismissed the claim, deeming that the matter being properly and entirely political was not justiciable. Relying heavily on previous caselaw and "unbroken precedent" (Finnis 2019, 12), judges found that the advice and the decision to prorogue relied on political convention, "were inherently political in nature and [that] there [were] no legal standards against which to judge their legitimacy" ([2019] EWHC 2381 (QB), para. 51). Summing up its approach, the High Court cited (para. 43) Lord Bingham in *A v Secretary of State for the Home Department*:

> The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. ([2004] UKHL 56, para. 29)

That statement reflects the orthodox constitutional position and the traditional deference of the judiciary for the political branches of the state regarding the exercise of a certain category of powers (such as the power to dissolve Parliament) seen as belonging to the political realm, a boundary most notably established in the *GCHQ* case ([1984] UKHL 9).

In Scotland, however, the Court of Session took a different view. It allowed the appeal, holding that the Prime Minister's advice to the Queen was justiciable and that, being "motivated by the improper purpose of stymying Parliamentary scrutiny of the executive" ([2019] UKSC 41, para. 24), was unlawful and should be regarded as void. The disaccord was therefore to be resolved by the UK's apex court which, given "the grave constitutional importance of the matter, and the disagreement between the courts in England and Wales and Scotland," exceptionally sat as a full[47] panel of eleven Justices for only the second time since its creation ([2019] UKSC 41, para. 26).

[47] The UK Supreme Court does not sit *en banc*: the President assigns a varying number of Justices to panels for each case. There are normally twelve serving Supreme Court Justices, but they might only sit in panels of odd numbers to avoid ties. The largest possible panel is therefore 11 Justices, which has so far only been assembled on two occasions—the other being the first *Miller* case in 2017.

The Supreme Court's decision in the *Miller II/Cherry* case is especially significant for our purposes. It "constituted arguably its most important judgement since it came into being" (Norton 2020b, 85) and has been widely viewed by constitutionalists and commenters as having unprecedentedly challenged the balance of powers between the political and judicial branches of the British state (e.g. Finnis 2019; Loughlin 2019; McHarg 2020). It could therefore be seen as a tipping point in the dialectic between political and legal constitutionalism in the UK.

The judgement has already been the subject of wide academic debate, notably in commentary published via Policy Exchange's *Judicial Power Project*[48] (*inter alia* Finnis 2019; Loughlin 2019; Young 2019b), but also in legal scholarship (e.g. Elliott 2020; McHarg 2020). If leading constitutionalists are divided on the judgement's merits (mainly along the lines of whether they adhere to political or legal constitutionalism), most concur on its "historic" (Finnis 2019, 6), "innovative" (Loughlin 2019, 5), "incendiary" and "constitutionally explosive" (Elliott 2020, 626) character, confirming that it "undoubtedly represents an important milestone in the narrative arc of modern public law in the UK" (Elliott 2020, 642).

The question before the Supreme Court was to determine whether or not the advice given by the Prime Minister to Her Majesty the Queen that Parliament should be prorogued from 10 September to 14 October 2019 was lawful—but to do so, it first needed to consider if the question was justiciable at all. Unconstrained, as court of last resort, by previous judicial decisions, the Supreme Court was able to offer a larger interpretation of the constitutional principles lying at the core of the issue and, if necessary, to break with precedent. The young court was compelled to re-evaluate its own position in the political system and to further delimit the boundaries of its judicial review jurisdiction with regards to political-constitutional matters. The case, in sum, involved no less than deciding whether the political constitution of the UK could be enforced in a court of law.

[48] The *Judicial Power Project*, led by Professor Richard Ekins (University of Oxford), opposes what it regards as "judicial overreach" or judicial activism and "aims to address th[e] problem [of] restoring balance to the Westminster constitution". As such, it could be described as supporting the 'political' version of British constitutionalism. It is affiliated to Policy Exchange, an influential right-wing think tank based in London. (Judicial Power Project. (n.d.). "About the Project." *Policy Exchange*. Online: judicialpowerproject.org.uk/about)

On the question of justiciability, the Prime Minister's Counsel and the Advocate General for Scotland—representing the Government—argued that "courts should not enter the political arena but should respect the separation of powers" ([2019] UKSC 41, para. 28) by allowing the Crown to exercise its prerogative powers in relation to Parliament free from judicial interference. The Court retorted that "although the courts cannot decide political questions", it can decide questions of law and "the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been a sufficient reason for the courts to refuse to consider it" ([2019] UKSC 41, para. 31). And while prorogation could have been construed (e.g. Finnis 2019) as a "proceeding in Parliament" excluded by parliamentary privilege from interference from any court of law (*Bill of Rights 1689*, art. 9), the Court rejected this interpretation. It further noted that the power to prorogue Parliament, as a prerogative power, was by definition recognised exclusively by the common law (Elliott 2020, 627), which meant that the courts could determine "whether [such] a prerogative power exists, and if it does exist, its extent" ([2019] UKSC 41, para. 35). By framing the question as one regarding the *scope* of the power rather than the way in which it was wielded, the Court was therefore able to circumvent the "deferential approach to review that is normally applicable when questions about the reasonableness of a[n] [executive] decision arise" (Elliott 2020, 638) and to eschew long-standing limitations on the justiciability of the exercise of 'political' prerogative powers.

That first element of the decision is already constitutionally ground-breaking: the personal exercise by the Prime Minister (through the Sovereign) of a prerogative power of the Crown pertaining directly to the operation of the Parliament, which precedent had clearly categorised as being unsuited to judicial review ('*GCHQ*' [1984] UKHL 9; Oliver 1989) and a "no-go [area] for the courts" (Elliott 2020, 642), was unexpectedly deemed justiciable. The judiciary asserted that it was ready to enter political terrain to take on the role of constitutional guardian which legal constitutionalism would ascribe to it (McHarg 2020, Loughlin 2019, Elliott 2020). Indeed, Justices clearly affirmed their belief that

> the courts have the responsibility of upholding the values and principles of [the] constitution and making them effective[,] […] to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. ([2019] UKSC 41, para. 39)

The question being received for judicial review, the Court then had to determine the legal standard by which the lawfulness of the exercise of the prorogation power was to be judged. Given the absence of written legal rules on the matter, the Court relied on its interpretation of (unwritten) constitutional principles to establish a new common law standard. Justices remarked that "[one] effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued" ([2019] UKSC 41, para. 33), which means that *political* mechanisms of accountability and constitutional control cannot properly operate, hence calling for *legal* controls. "The longer Parliament stands prorogued," they contended, "the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model" ([2019] UKSC 41, para. 48) the UK constitution is supposed to uphold. That is one of the two constitutional principles—which the Court calls 'Parliamentary accountability' and which we equate to the notion of responsible government—evoked in the judgement.

The other is the principle of parliamentary sovereignty, the meaning of which the Court construed beyond the sole legislative supremacy of Acts of Parliament:

> The sovereignty of Parliament would […] be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased. […] An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty. […] It must therefore follow, as a concomitant of Parliamentary sovereignty, that the power to prorogue cannot be unlimited. ([2019] UKSC 41, para. 42-44)

That new interpretation provided the basis for a limitation of the prorogation prerogative: for the Court, Parliament cannot be 'sovereign' if it can be suspended by the Crown for an unlimited period of time. Similarly, Britain could not be considered a functioning constitutional democracy if the executive could escape parliamentary accountability by proroguing the legislature at will. Therefore, the prorogation power could not be unlimited.

The judgement quickly rejected as "scant reassurance" ([2019] UKSC 41, para. 43) arguments from government counsels that practical-political constraints on the exercise of the prorogation power existed: for example, as Dicey (1915, 296-299) argued, because the Government would need parliamentary authorisation to legally be able to levy taxes, to fund public services or to maintain armed forces. It dismissed *ipso facto* the tenets of political constitutionalism: "Establishing itself as the [only] forum of constitutional principle," writes Martin Loughlin (2019, 20), "the Supreme Court determined that the principle of parliamentary accountability it assert[ed] in this case trump[ed] all pragmatic, practical, policy and political considerations."

Consequently, the Supreme Court stated the new rule constraining the exercise of the prorogation prerogative as follows:

> A decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will 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. ([2019] UKSC 41, para. 50)

Here, constitutionalist Aileen McHarg (2020, 5) comments:

> The use of parliamentary sovereignty to argue that the government had a duty not to frustrate, not merely the expressed will of Parliament, but also Parliament's ability to express that will, was entirely unprecedented. […] [T]he court turned previous authority […] on its head to convert the government's conventional duty to account to Parliament into a legally-enforceable obligation.

In pursuing its reasoning, the Court then had to assess whether or not Boris Johnson's decision to advise the Queen to prorogue Parliament in the instance was lawful by such standard. Justices found quite forthrightly that "it [was] impossible for [them] to conclude, based on the evidence [presented by the government], that there was any reason—let alone a good reason—to advise Her Majesty to prorogue Parliament for five weeks" ([2019] UKSC 41, para. 61). Admitting that the prorogation had the effect of "stymying Parliamentary scrutiny of the executive", it followed that the Prime Minister's advice to the Queen was deemed unlawful, and with it the ensuing Order in Council proroguing Parliament was itself "unlawful, null and of no [legal] effect and should be quashed" ([2019] UKSC 41, para. 69). The Court made clear that, accordingly, the effect of its ruling was "as if the [Royal] Commissioners had walked into Parliament with a blank piece of paper" when they

announced its prorogation by the Queen, meaning quite simply that "Parliament [had] not been prorogued" ([2019] UKSC 41, para. 69-70). The judiciary had thereby—arguably for the first time so unreservedly—legally enforced (and *ipso facto* legalised) purely political elements of the constitution of the United Kingdom.

The decision was unprecedented and stirred controversy among constitutional observers (Elliott 2020, 628): "For some, it amounted to a welcome and wholly appropriate reassertion of fundamental constitutional principle. For others, it represented an egregious example of judicial overreach." For instance, legal scholar Sionaidh Douglas-Scott (2019) contends that

> the judgment upholds parliamentary sovereignty against an overbearing executive, by the Court's strict and careful application of legal principles. For this reason, despite alarm from some quarters, the judgment cannot be said to represent a deviation from the central tenets of the constitution. To the contrary, it upholds them.

Like other critics of the judgement, Australian legal philosopher John Finnis (2019) holds opposite views. He considers that the Supreme Court unduly encroached into political terrain in a way that would have been inconceivable before, breaking with a centuries-old constitutional distinction between justiciable rules of law and non-justiciable political conventions—a delimitation he sees as the bedrock of British constitutionalism. For Finnis and other tenants of political constitutionalism, the decision represents an error of law and even a "usurpation" by the judiciary of constitutional authority "that the law and the constitution ha[d] assigned to others" (Finnis 2019, 15). In his view, the judgement marks a paradigm shift in British constitutionalism, arbitrarily "transforming a [political] convention into justiciable law" and, doing so, "replacing some main elements of a constitutional settlement embodying, for hundreds of years, certain tried and tested political assessments and judgments" (Finnis 2019, 13-14). Constitutional scholar Martin Loughlin (2019, 15) concurs that the judgement "sets aside clear precedents concerning justiciability, adopts creative reasoning […] and asserts the authority of certain newly-minted 'constitutional principles'" which the courts alone can recognise. He contends that, with *Miller II*/*Cherry*, "the [Supreme] Court has made a paradigmatic shift" (Loughlin 2019, 6) and positioned itself as the "primary guardian of the British constitution" (Loughlin 2019, 15). Laws LJ wrote in *Roth* ([2002] EWCA Civ 158, para. 71) that "in

its […] state of evolution [at the time], the British system [could] be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy". For Loughlin (2019, 21), the Supreme Court finally "[took] the next step" in *Miller II/Cherry*, the result being "a major […] extension of the court's jurisdiction with respect to constitutional matters" and thus a leap towards legal constitutionalism.

It could however be argued that this judicial intervention was made necessary by the fact that political actors sought to stretch the boundaries of constitutional propriety (Douglas-Scott 2019) and to play "constitutional hardball" (Tushnet 2004) in a time of crisis and "in circumstances which ha[d] never arisen before and are unlikely ever to arise again" ([2019] UKSC 41, para. 1). Political mechanisms of constitutional control having been short-circuited, the judiciary was dragged into the political arena and forced to intervene to enforce conventions and principles of the political constitution in place of political actors. "The decision may be unprecedented. But so was this prorogation," maintains Alison Young (2019). This case is thus also a prominent contemporary example of the evolutionary nature of the British constitutional settlement, which is characteristic of a common law constitution. The question of the legal limits of the prorogation prerogative had never before arisen in British political history because its use had arguably never been a matter of controversy. As the behaviour and actions of constitutional actors test the confines of the constitutional framework, new questions arise, and new rules are set in response.

What is also striking about the decision is the fact that it was rendered unanimously by the full Supreme Court. Dissenting opinions are usual in common law jurisdictions—and might even be expected from a large panel of eleven Justices—yet in *Miller II/Cherry* the Court presents a united front. It is especially astonishing considering that several Supreme Court justices who signed on the decision broke, so doing, with their own previous approaches to the justiciability of 'high-political' prerogative powers (Loughlin 2019, 14). Lord Reed notably stated no earlier than in his dissenting opinion in *Miller I* ([2017] UKSC 5, para. 240) that "for a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is

[…] an assumption which is foreign to [Britain's] constitutional traditions"—yet it is very precisely the Court's justification for its decision in *Miller II/Cherry* two years later. The majority in that other landmark case stressed for its part:

> It is well established that the courts of law cannot enforce a political convention. […] Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention […] but they cannot give legal rulings on its operation or scope. ([2017] UKSC 5, para. 141 and 146)

While it is impossible to know what discussions were held behind the closed doors of Middlesex Guildhall, one possible explanation for this questionable unanimity is that Justices were particularly conscious of the politically sensitive nature of the judgement they were about to make. Following the High Court's equally politicised decision in *Miller I*, the *Daily Mail* had published an infamous cover featuring pictures of the judges who gave the ruling with the inflammatory headline: "ENEMIES OF THE PEOPLE: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis" (Slack 2016). The publication, which contained malicious and homophobic attacks on individual judges, was widely regarded as an assault by the press on the British *état de droit* (BBC 2017). Yet it prompted only a belated and timid defence from the Government (The Guardian 2016), who was also the losing party in the case. The article's author, James Slack, even went on a few months later to work as spokesperson for 10 Downing Street (HM Government 2017). There were therefore well-founded concerns among the judges that their decision could be subject to attacks by the press or the government itself, and that in such context any dissenting opinion could have been weaponised to discredit the majority and/or individual Justices. There was even a perceived risk that the government might not comply with the ruling (McHarg 2020). As Loughlin (2019, 7) romantically put it: "For such a transgression, as with the senatorial assassination of Caesar on the Ides of March, all [had to] be implicated."

The highly political and legally innovative nature of the judgement justifies in itself that the British Supreme Court—only a 10-years-old institution—could have felt the need to weigh in with all eleven Justices in this constitutional tussle with the Crown. For Aileen McHarg (2020, 4):

> The Supreme Court's judgement was carefully crafted, on the one hand, to send a strong message to a minority government with a tenuous hold on the confidence of the House of Commons which was exploiting its prerogative powers in—at best—a constitutionally dubious manner, while, on the other hand, seeking to protect itself against accusations of political decision-making.

It certainly shows that—contrary to their contention—Justices were well-aware that their ruling was, in essence, a political act. Loughlin (2019, 6) claims indeed that "constitutional review [is] intrinsically political." And while the Court is careful to frame its decision as a strict question of law and refuses to consider what the Prime Minister's motives were, or whether they were reasonable, it nevertheless engages explicitly in an analysis of the underlying political conjuncture. To defend the judiciary's intervention, it first recalls that Brexit makes the situation politically and constitutionally critical:

> Such an interruption [i.e. the prorogation] in the process of responsible government might not matter in some circumstances. But the circumstances here were […] quite exceptional. A fundamental change was due to take place in the Constitution of the United Kingdom on 31st October 2019 ([2019] UKSC 41, para. 57)

And it takes into consideration the latest developments in Parliament to justify its decision:

> The House of Commons has already demonstrated by its motions against leaving without an agreement and by the European Union (Withdrawal) (No 2) Act 2019, that it does not support the Prime Minister on the critical issue for his Government at this time and that it is especially important that he be ready to face the House of Commons ([2019] UKSC 41, para. 57)

Doing so, the Court effectively acknowledges that its intervention is political, yet still chooses to cross the previously established boundary into political-constitutional territory. The result, in this instance, is the judicialisation of elements of the political constitution in an unprecedented deployment of legal-constitutional controls, and a consolidation of the central position the Supreme Court appears to be taking on as the main arbiter of the constitutional system.

5. Conclusion

The judiciary's place in the UK's constitutional architecture is changing. As a result of the growth of administrative justice, the courts have become key players in the

policy process. As illustrated in *Miller II*/Cherry, the judiciary's gradual extension of its judicial review competence means that it now "extends not only to questions about the existence but also the lawfulness of the exercise of [governmental] powers […]. At the same time, the courts have to some extent shrugged off the constraints imposed by the concept of justiciability, moving away from the categorical approach of *GCHQ*" (Elliott 2017a, 277).

From 1997, the further expansion of the judiciary's constitutional province by the statutory regimes of the *Human Rights Act 1998* and devolution has conferred on British judges—and on the Supreme Court in particular—new powers that closely mirror some of the functions of a constitutional court. That position has been symbolically strengthened by the physical and institutional separateness of the new Supreme Court created by the *Constitutional Reform Act 2005*, a reform showing adherence to the precept of separation of powers. This first form of quasi-constitutional review arising from legislation is supplemented by curial enthusiasm for new doctrinal trends in common law constitutionalism. The interpretive primacy they ascribe to judicially-defined common law fundamental principles and rights enforced through the 'principle of legality', and to 'constitutional statutes' identified by the *Thoburn* decision seem to be forming a legally preponderant *bloc de constitutionnalité* in the British hierarchy of norms, and which could ultimately serve as a basis for a full shift to judicial review of the constitutionality of legislation. New jurisprudential narratives arising from recent case law appear to be moving in the direction of such a legal-constitutional approach and propose as rationale a reassessment of the relative weight of the constitutional principles of parliamentary sovereignty and the rule of law. The result is that the "key principles that form the normative heart of the UK's unwritten constitution are increasingly [being] considered in co-equal terms" (Elliott 2017a, 280).

Ordinary citizens, like Gina Miller, are turning to the judicial arena as a forum for the resolution of constitutional disputes—an indication of growing public acceptance of the judiciary's role as constitutional arbiter. Legal mechanisms of constitutional control can thus compensate when political mechanisms are lacking, as in the case of the 2019 prorogation. A perceived failure of the political controls that traditionally characterised the UK constitution, in a context of high partisanship

and administrative centralisation, could indeed offer one explanation for this resort to the protections of legal constitutionalism (Young 2019a). In turn, judges are becoming more assertive when it comes to constitutional adjudication and no longer hesitate to encroach on political terrain—armed with jurisprudential justifications and doctrinal innovations—to ensure the enforcement of the 'judge-made' British constitution. The *Miller II*/*Cherry* decision, delivered by a Supreme Court perhaps keen to defend its new status, appears to enshrine this position of the judiciary as guardian of the constitution. In that regard, it may signify a paradigm shift in the dialectic between legal and political constitutionalism in the United Kingdom.

The definitive answer to the question of whether the rule of law will trump parliamentary sovereignty—hence marking the triumph of legal over political constitutionalism—might perhaps only be provided by a genuine constitutional crisis, resulting from one's attempt to test the boundaries of constitutional propriety (Elliott 2019). The UK constitution is, after all, largely a product of the outcomes of political conflicts (Griffith 1985). Nevertheless, "[g]iven these developments, it is hard to conclude anything other than that the courts have become more important, with a perceived shift in the constitutional balance of power away from Parliament and towards the courts" (Young 2019a, 335).

Chapter IV

Conclusion

The last two decades have witnessed a period of constitutional change without precedent in the United Kingdom's contemporary history, and the implications of these transformations are still to be fully assessed. We have nonetheless preliminary evidence of at least a partial legalisation of the British constitutional framework in the last twenty years.

There has been greater reliance on legislation to effect constitutional change than before. The battery of reforms implemented by New Labour at the turn of the century provides plenty of examples, and so does the *Fixed-term Parliament Act*'s attempt to replace prerogative powers and political conventions by legal provisions. The political constitution has itself been entirely codified into a *Cabinet Manual*. If theoretically non-binding, the document is nevertheless intended to serve as reference for both practitioners and the public, and therefore bound to condition—and to at least some extent fix—conventional understandings of the constitution.

There has also been more frequent resort to judicial controls to prevent or provide remedy to alleged unconstitutional behaviour—including on the part of ordinary citizens like the now famous Gina Miller. Applications for judicial review are not declining, and the courts' jurisdiction in this regard has only seemed to expand. In that respect, the most significant development has been the enactment of the *Human Rights Act 1998,* which introduced a regime of rights protection giving interpretive primacy to Convention rights and allowing for the 'soft strike down' of statutory provisions through declarations of incompatibility seldom, if ever, ignored by Parliament. Coupled with the new class of legally preeminent 'constitutional statutes' identified in *Thoburn* and the notion of common law constitutional rights and principles given preponderant effect by the courts via the principle of legality, a quasi-entrenched '*bloc de constitutionnalité*' appears to have formed in British public law. It could provide the framework for the constitutional review of legislation in the United Kingdom.

Indeed, British courts are increasingly performing the functions of constitutional courts. They test the compatibility of statutes with Convention rights, common law rights and fundamental principles, or interpret them in such a way as to make them compatible. They determine what counts as a 'constitutional statute' and ensure that their provisions prevail over later law unless Parliament explicitly specified otherwise. They also arbitrate devolution disputes between Westminster and devolved governments. Concurrently, the judiciary appears to have become more assertive when it comes to constitutional adjudication and to be progressively abandoning its traditional deference to the elected branches of the state in politically sensitive matters. The Supreme Court's historic decision in *Miller II/Cherry* stands out as one of the most prominent expressions of this changing approach.

Some of these changes are explicitly underpinned by the increasingly influential theory of common law constitutionalism, which appears to command considerable sympathy in the senior judiciary. Through it, the common law is providing judges with the legal and jurisprudential means they need to take on the role of guardians of the constitution. The recourse to legal controls has further been justified as a response to the shortcomings of the democratic system in the age of executive centralisation at the expense of the legislature, in part the result of hardening party lines and of the expansion of the administrative state. It is indeed this weakening of the political controls of the traditional constitution that Lord Hailsham and Laws LJ cited as the main motive for a turn to legal constitutionalism.

The literature offers other possible explanations for the trend. It points, for instance, to a rupture in the normative consensus of the previously homogenous political class as an important factor explaining this breakdown of the political constitution. Indeed, Feldman (2013, 104-105) writes that a tacit constitutional arrangement has worked historically as it reflected "common standards among parliamentarians as to what measures should simply not be taken because they would be unacceptable in civilised society". Today, however, "disagreement is yet more likely, as […] people have been entering Parliament (in both Houses) from a wider range of social, economic and educational backgrounds than previously" (Feldman 2013, 104). Others (e.g. Goldsworthy 2007; Ginsburg 2008; Tomkins 2009) highlight for their part the influence of the phenomenon of constitutional

globalisation, especially in terms of human rights protection, as another key element explaining legal constitutionalism's ascendancy. Jeffrey Goldsworthy (2007, 115) writes that "the migration of constitutional ideas through judicial borrowings has facilitated the emergence, in a variety of jurisdictions, of a common liberal democratic model of constitutionalism". For Tomkins (2009), Britain is merely catching-up on a phenomenon that has largely already occurred, or is ongoing, in many other jurisdictions.

In the end, is it possible, therefore, to conclude to the demise of the political constitution and to declare the final victory of legal constitutionalism in Britain? Not so unequivocally. The UK constitution can no longer be described as exclusively 'political', but it is still in large parts composed of political elements and its future remains contingent on political will. Indeed, while they have been codified in executive guidelines, the constitution still relies overwhelmingly on conventional rules for its most important democratic features. And while it has been unprecedentedly challenged in *obiter* comments and jurisprudential discussions, and partly requalified by doctrinal innovations and the regime of the HRA, the sovereignty of the British Parliament largely endures. It is still "the general principle of [the] constitution" ([2005] UKHL 56, para. 102).

The move towards legal constitutionalism is not uncontested and the developments we have discussed are still unfolding. The government of Boris Johnson appears committed to resist the trend and to reverse the effects of some of these changes, in an explicit defence of the tenets of political constitutionalism (e.g. Buckland 2020a, 2020b, 2020c). After suffering a personal setback before the Supreme Court in the *Miller II/Cherry* case, Prime Minister Boris Johnson has indeed shown willingness to curb the powers of the judiciary, with aides declaring that judges had made "a serious mistake in extending its reach into these political matters" (*Economist* 2020a) and Leader of the House of Commons Jacob Rees-Mogg accusing Justices of staging a "constitutional coup" in "the most extraordinary overthrowing of the constitution" (Doyle, Martin and Doughty 2019). Attorney General Suella Braverman similarly condemned the judiciary for unduly "trespass[ing] into inherently political terrain" (*Economist* 2020a) and urged Parliament to "take back control" (*Economist* 2020b)—a nod to Brexiteers' slogan.

As a result, the Conservative Party's manifesto for the 2019 general election included commitments to "get rid of the Fixed-term Parliament Act", to "update the Human Rights Act and administrative law" to "ensur[e] that [judicial review] is not abused to conduct politics by another means", to review more broadly "the relationship between the Government, Parliament and the courts" and to "set up a Constitution, Democracy & Rights Commission" to do so (Conservative Party 2019, 48). There has also been talks among government ministers of reconsidering the changes brought by the *Constitutional Reform Act 2005* (Buckland 2021a; Buckland 2021b), for instance by abolishing the Supreme Court to put Justices back in the House of Lords (Economist 2020a) or by changing the Court's name to diminish its status (Economist 2020c), and by considering ways of restoring some degree of ministerial control over judicial appointments (Economist 2020a). Former Lord Chancellor Robert Buckland (2021c) also discussed in an event hosted by Policy Exchange's firmly political-constitutional 'Judicial Power Project' his intent to tackle judicial reluctance at giving effect to ouster clauses.

It remains to be seen whether the government will follow through on all of these proposals, but it has already started to act on some of them. A bill to repeal the *Fixed-term Parliaments Act 2011* and revive the dissolution prerogative[49]—thereby reverting to the *status quo ante* under the political constitution—seems on track to be passed in the House of Lords after its adoption in the Commons (House of Commons 2021a). It includes an ouster clause attempting to shield the exercise of the dissolution power from any kind of judicial scrutiny—which would seem to be a clear response to the Supreme Court's decision against the Prime Minister in *Miller II/Cherry*. The Government also commissioned an 'Independent Review of Administrative Law' (HM Government 2021) and held further consultations on judicial review (Ministry of Justice 2021b) to consider the possibility of curtailing the courts' powers to review administrative decisions. As of now, the *Judicial Review and Courts Bill* (House of Commons 2021b) introduced in the House of Commons does not go very far down this road. Another independent review of the Human

[49] The proposed Dissolution and Calling of Parliament Bill is the first in British legal history to attempt to revive a prerogative power previously abolished by statute. As such, it is debated whether Parliament can legally reinstate the prerogative, or if it is instead necessarily creating a new statutory power exercisable by the Crown (see Parliament 2021, 30-34).

Rights Act (Ministry of Justice 2021a), however, has yet to hand over its recommendations. That agenda has lately been assigned to the new Lord Chancellor and Deputy Prime Minister, Dominic Raab, who has in the past been a staunch critic of the HRA, and of judicial review in general (Syal and Siddique 2021). "We are attempting to return to the political constitution model that was the orthodoxy for much of the 20th century" (Buckland 2021b), his predecessor plainly declared to summarise the Johnson government's approach.

It certainly appears that constitutional change in the United Kingdom is neither unidirectional, nor concluded. The debate is ongoing, and the dynamics we have surveyed are still evolving. The current government's agenda may herald a revival of political constitutionalism or foreshadow frictions providing new opportunities to test the balance of power between the political and the judicial branches of the British state. It will therefore be important to continue to monitor these constitutional developments. The UK constitution would indeed appear to be in an effervescent state of flux, which should not be so surprising in the case of an unwritten constitutional settlement. As Mark Elliott (2017, 282) explains:

> [T]he UK [political] system, lacking allocations of institutional power that are authoritatively fixed in place by a constitutional text, depends upon institutions interacting in a way that facilitates the emergence (and sometimes the evolution) of a form of constitutional equilibrium: that is, a tacit understanding about how such institutions are to relate to one another, about where the boundaries upon their respective roles and powers are to be found, and about the underlying values and principles by reference to which such issues fall to be negotiated. In such circumstances, we should not be surprised if, over time, ideas evolve about what a proper constitutional balance looks like.

Given the rapid pace of the constitutional changes this thesis discusses, its conclusions might already be out-of-date the very day after its submission. It nevertheless underscores the relevance and timeliness of our research, which is embedded in shifting dynamics and an ongoing academic conversation. As one well-respected expert put it more simply, "the British Constitution has always been puzzling and always will be."[50] It will surely continue to be a fascinating object of study for both constitutionalists and political scientists in the years to come.

[50] HM Queen Elizabeth II, after attending part of a constitutional law lecture by Professor Peter Hennessy at Queen Mary University of London (cited in Peter Hennessy. 1995. *The Hidden Wiring*. London: Gollancz, p. 33).

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