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CONSTITUTIONALISM AT COMMON LAW: THE RULE OF LAW AND JUDICIAL REVIEW

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ABSTRACT. *UK public law is often viewed as a sophisticated power struggle between rival institutions, an approach encouraged by the assumption that the law is ultimately dependent on such contingencies as the existence of an official consensus about its sources. From that perspective, legal judgments should be read as strategic moves within the political power-game. We can make better sense of public law if, instead, we interpret it as the articulation and enforcement of standards of legitimate governance, inspired by universal ideals of individual freedom and human dignity. The rule of Law denies the legal validity of arbitrary, unjustified assertions of power inimical to those ideals. Positive law is, at root, an instantiation of natural law, as the interplay of legal rule and underlying principle, characteristic of common law reasoning, confirms. There are important implications for our understanding of the constitutional foundations of judicial review, the limits of parliamentary sovereignty, the nature of the principle of legality, and the scope and content of fundamental rights.*

KEYWORDS: *judicial review, constitutional rights, principle of legality, parliamentary sovereignty, constitutional conventions, rule of law.*

I. INTRODUCTION

Public law in the UK is arguably afflicted by a deep confusion about its foundations and, hence, its nature and scope. Critical discourse often supposes that the main issue concerns the source of ultimate power – who, in the familiar phrase, enjoys the "last word". If, as a matter of social fact or political history, Parliament is truly "sovereign", the standards of constitutional propriety or legality represented by the rule of Law must have a subservient status.[1] In a struggle for power, moreover, elected officials ought to prevail over an unelected judicial élite, a consideration that strengthens the case for acknowledging what is

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[1] "Law" is capitalised to signify the status of the rule of Law as a basic precept of legitimate governance.

supposedly an ineluctable state of affairs. In the absence of a formally enacted constitution, there is an unfettered Austinian lawmaker bound only by moral rather than legal limits, or so it is widely assumed.[2] An "unwritten" constitution, a mere relic of historical fact, lacks the moral resources to secure such legal limits.

Although the Austinian sovereign has been displaced, in some accounts of British constitutionalism, by a Hartian "rule of recognition", a similar severance of positive law from the moral ideal of legality remains.[3] Here the source of parliamentary sovereignty is merely a consensus among senior officials, detached from any considerations of legitimacy that might be thought to justify it. Normative questions about the nature and scope of "sovereignty" can scarcely be addressed in court without provoking fears of judicial "overreach". It must appear that judges are imposing their own preferences or prejudices in a matter that, in the absence of consensus, lacks an objective legal answer.[4] Without a moral foundation in an appropriate conception of democracy, parliamentary sovereignty cannot be reconciled with other legal principles, which limit what can count as valid law in a legitimate regime. Law has surrendered to the struggle for power: it has evidently petered out into a constitutional void.[5] Even if an official consensus could be ascertained, on the matter in issue, it would be merely an assertion of will. It would not rest on reasons pertaining to constitutional legitimacy, which is a question of moral and political judgment.[6]

In *Privacy International*, Lord Sumption confronts us with a stark choice between parliamentary absolutism, on the one hand, and judicial supremacy, on the other:

> In the absence of a written constitution capable of serving as a higher source of law, the status of Parliamentary legislation as the ultimate source of law is the

[2] Austin thought that a "sovereign" lawmaker ruled by commands addressed to legal subjects: J. Austin, *The Province of Jurisprudence Determined*, W.E. Rumble (ed.) (Cambridge 1995), Lecture 1.

[3] See H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford 1994), chs. 6, 7.

[4] Hart suggests that "when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given". On this view, "all that succeeds is success": ibid., 153 (Hart's emphasis).

[5] Cf. J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge 2010), 48: "There cannot be an infinite regress of legal institutions or norms, each owing its authority to the next in line." For the linear conception of authority, Walters substitutes a circular one: legal authority is conceived as moral authority, reflecting an interlocking and interdependent array of constitutional standards, bringing history and morality into continuing dialogue. A non-linear account of authority rests, in turn, on a non-linear view of normative truth, emerging "through the *circular* discourse about concrete and abstract dimensions of value with a view to coherence": M.D. Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge 2020), 367 (emphasis in original).

[6] That severance of law from reason appears to lie at the root of much of the contemporary critique, in which complaints of judicial "overreach" are rarely supported by detailed analysis focused on the specific issues arising, viewed in their broader context. For an apt appraisal of Policy Exchange's "Judicial Power Project", see P. Craig, "Judicial Power, the Judicial Power Project and the UK" (2017) University of Queensland Law Journal 355. See also P. Craig, "Judicial Review, Methodology and Reform" [2022] P.L. 19.

> foundation of democracy in the United Kingdom. The alternative would be to treat the courts as being entitled on their own initiative to create a higher source of law than statute, namely their own decisions.[7]

If we deny that statute is the "ultimate source of law", we must accept that the courts are empowered, in effect, to legislate a higher source of law.

Here is a false antithesis, which ought not to go unchallenged. The unwritten constitution of the UK is arguably rooted, not in any source of prior lawmaking, but directly in the rule of Law itself – in Law, conceived as the set of conditions under which the exercise of power by any state official or institution is rendered legitimate. Although public law is grounded in statute and precedent, which determine its concrete content, there is an important sense in which it reaches beyond its present shape to a more abstract ideal of Law or legality. Legal obligations are truly binding, as genuine moral obligations, only when they are grounded in a legitimate legal order, which honours the equal freedom and dignity of all those subject to the state's dominion. When the rule of Law obtains, enforcing appropriate standards of decision-making propriety, there is an unbroken continuity between universally valid precepts of just governance, affirming fundamental rights, and basic constitutional principles, binding on all state actors and institutions.[8]

The rule of Law and democracy are united, on this view, as integral features of an unwritten constitution that mediates between the exercise of governmental power and individual autonomy, seeking to reconcile public and private interests in a manner that elicits general assent. The ultimate appeal is neither to legislative will nor to judicial fiat but instead to reason – finally the reason and judgment of the law's subjects, each of whom bears a responsibility for her continuing allegiance to what she considers to be a legitimate constitution. It is part of that responsibility to interpret legal rules and requirements consistently with the conditions of legitimate authority, as she understands them. If the law is internally related to the ideal of just governance, striving to match the requirements of the rule of Law, its demands in any specific instance must be a matter of nuanced interpretation, sensitive to the relevant political values. It should not be conflated with anyone's opinion about the law, even if it is the considered view of a senior judge or official. While for practical purposes we must accept the judgment of the Supreme Court as settling a legal issue as it arises within a specific dispute, we are fully at liberty to criticise the court's reasoning and to question its decision. Presented as the dictate of reason, consistent with general principles widely

[7] *R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] A.C. 491, at [209].
[8] See T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford 2013). See also T.R.S. Allan, "The Moral Unity of Public Law" (2017) 67 U.T.L.J. 1.

acknowledged, a legal judgment must stand the test of public and professional scrutiny. Its correctness, as an interpretation of the applicable law, must be as fully open to public debate as any proposal for fresh legislation. Legality and democracy are united in that way: each ideal demands the citizen's independent moral judgment, accepting the exercise of political authority within its proper limits.[9] Law can be conceived as a discourse of reason, connecting civil and political customs and traditions with the ideas and ideals that nurture and inspire them.[10]

Legislative supremacy can be understood as the natural implication of democratic governance, operating within broad constraints of respect for basic rights and binding on all as a matter of fundamental equality. In defining its boundaries, when necessary, the courts are exploring the inherent demands of a liberal-democratic constitution in its distinctively British guise.[11] It follows, however, that resistance to ouster clauses, or to similar interference with the judicial function, entails no breach between "strict legality", on the one hand, and constitutional principle, on the other. Nor may judges unilaterally amend the constitution in the face of an "exorbitant assertion of government power" that Parliament has failed to suppress.[12] The assertion that the judges "created" the principle of parliamentary sovereignty, which in certain circumstances they might choose to modify, echoes the familiar view of the constitution as a struggle for institutional power. In such a game of brinkmanship the constitution would, it seems, be plasticine in the hands of competing factions.[13]

When we recognise the dependence of positive law, correctly interpreted, on the rule of Law, "strict legality" is conjoined with constitutional principle; and there is neither need nor justification, accordingly, for

[9] Cf. R. Dworkin, *Law's Empire* (London 1986), 190, defending a "protestant" account of political obligation, requiring "fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme". See also T.R.S. Allan, "Political Obligation and Public Law" in L. Burton Crawford, P. Emerton and D. Smith (eds.), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Oxford 2019), ch. 12.

[10] Cf. M.D. Walters, "The Unwritten Constitution as a Legal Concept" in D. Dyzenhaus and M. Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford 2016), ch. 2.

[11] Cf. *R. v Secretary of State for the Home Department, ex parte Pierson* [1998] A.C. 539, 587, where Lord Steyn observes that Parliament "legislates for a European liberal democracy founded on the principles and traditions of the common law". See also *AXA General Insurance Ltd. v Lord Advocate* [2011] UKSC 46, [2012] 1 A.C. 868, at [153] (Lord Reed).

[12] *R. (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 A.C. 262, at [101]–[102] (Lord Steyn). Sales draws a similarly questionable distinction between strict "legalism", as he terms it, and broader moral reasoning, sensitive to constitutional principle: P. Sales, "Legalism in Constitutional Law: Judging in a Democracy" [2018] P.L. 687.

[13] Elliott identifies an interpretative "activism" in judicial attitudes to legislation that threatens the rule of Law. See M. Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 C.L.P. 85, 113–14, citing Lord Phillips's evidence to the House of Commons Political and Constitutional Reform Committee: Political and Constitutional Reform Committee, *Constitutional Role of the Judiciary if There Were a Codified Constitution: Fourteenth Report of Session 2013–14* (London 2014), 16–17.

judges to repudiate the constitution that they were appointed to uphold. Nor is parliamentary sovereignty abruptly displaced by judicial supremacy at some uncertain and arbitrary border. Every statute must be interpreted with respect for its purpose, as revealed by its language, but consistently with the basic rights of persons – just as the requirements of natural justice are adapted to the administrative context while preserving the principal elements of fair procedure.[14] It does not matter whether we say that Parliament is presumed to require respect for procedural fairness or aver, instead, that "the justice of the common law will supply the omission of the legislature".[15] It is a semantic rather than substantive difference. Debate over the true foundations of judicial review has largely ignored this basic doctrinal unity, forcing us to choose between competing supremacies or rival sources of law.[16]

When we accept that the law is always, in part, a reflection of Law, or legality, we can make more sense of the idea of fundamental rights. These basic rights, now more clearly recognised at common law, quite independently of the Human Rights Act 1998, underpin and affirm the legitimacy of the legal order by conferring immunity from the more egregious abuses of power, disrespectful of persons. There is a close association with the human rights acknowledged in international rights charters, such as the Universal Declaration of Human Rights and the European Convention on Human Rights. An insistence on finding the legal foundation of rights in parliamentary assent – or inferred indifference – reduces them, in effect, to the status of gracious concession. Their central place within an adequate conception of the rule of Law is obscured.[17]

While fostering open debate over the nature and scope of basic rights, the common law constitution resists the substitution of naked will or preference for reasoned argument even in the face of disagreement. In the traditional understanding, the common law is not made or "created" in the exercise of authority but ascertained or discovered through reflective deliberation. A judicial decision obtains its authority as a precedent from the strength of the reasons on which it depends; a poorly reasoned decision is unlikely to survive critical scrutiny. A court finds the law rather than imposing it in the sense that it is bound by rigorous requirements of

[14] *Lloyd v McMahon* [1987] 1 A.C. 625, 702–703 (Lord Bridge). A statute is interpreted accordingly, the courts not only requiring any specified procedure to be duly followed but, further, implying or importing such "additional procedural safeguards as will ensure the attainment of fairness" (ibid.).

[15] *Cooper v Wandsworth Board of Works* (1863) 143 E.R. 414, 14 C.B.N.S. 180, 194 (Byles J.).

[16] Adams rejects the standard choice but nonetheless distinguishes, implausibly, between distinct aspects of judicial review according to their sources in positive law: T. Adams, "Ultra Vires Revisited" [2018] P.L. 31, considered below.

[17] Cf. J. Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge 2016), 60: "The ideal of public law is a democratic legal order in which each person contributes to and, in turn, is bound by lawgiving that leaves the independence of each person bound by it undiminished."

moral and intellectual coherence. It must give reasons for decision that exhibit its consistency with the legal standards affirmed by acknowledged rules and familiar principles. While disagreement may, of course, persist, there is no pretence that the law is sealed off from moral debate about the requirements of human freedom and dignity.[18]

For all the scorn poured on the declaratory theory of the common law by its nineteenth and twentieth century critics, it accurately reflects the interdependence of legal rule and underlying principle.[19] While the judiciary may alter the rules, advancing incremental reform, change must be informed and guided by legal principle, expressing the requirements of justice. The positive law may change but only the better to conform to the natural law, which is always the relevant source of inspiration and critique.[20] If, then, public law is "artificial reason", in the sense invoked by Coke in resisting James I's attempts to subvert judicial independence, it is nevertheless informed by natural reason, which expresses the demands of political morality.[21] What we might today describe as a form of "reflective equilibrium" between general principle and more concrete, defeasible rules or precedents – each informing and supporting the other – was anticipated by the discursive approach of the early modern common law theorists, who emphasised the value of holistic coherence. A systematic elaboration of legal doctrine, erected on sound moral foundations, would provide a solution to every question whenever it arose for determination.[22]

The prerogative power to prorogue (or advise the monarch to prorogue) Parliament is normally exempt from judicial review, in keeping with legal tradition. If the law is ultimately a reflection of the rule of Law, however, the power must have limits that can be enforced judicially in exceptional cases. A wholly unfettered executive power to frustrate the ordinary functions of Parliament would be fundamentally injurious to democracy, threatening the legitimacy of British governance.[23] As a reflection of its commitment to the citizen's dignity as an equal member of the political

[18] For further argument see T.R.S. Allan, "Principle, Practice, and Precedent: Vindicating Justice, According to Law" [2018] C.L.J. 269. Cf. Dworkin, *Law's Empire*, chs. 6, 7.

[19] While Austin famously called the theory a "childish fiction", Lord Reid considered it a "fairy tale": see Reid, "The Judge as Lawmaker" (1972) 12 Journal of the Society of Public Teachers of Law 22, 22.

[20] Cf. A. Beever, "The Declaratory Theory of Law" (2013) 33 O.J.L.S. 421. For Beever, the declaratory theory is the law's conscience: "if the law cannot be true to the theory then it cannot be true to itself": ibid., 443. Cf. B. Zamulinski, "Rehabilitating the Declaratory Theory of the Common Law" (2014) 2 Journal of Law and Courts 171.

[21] *Prohibitions del Roy* (1608) 12 Co. Rep. 63. See also Sir Edward Coke, I *Institutes*, especially sections 21, 138.

[22] M.D. Walters, "Legal Humanism and Law-as-Integrity" [2008] C.L.J. 352. Cf. J. Rawls, "Outline of a Decision Procedure for Ethics" (1951) 60 Phil. Rev. 177. See also Allan, "Moral Unity".

[23] In *R. (Miller) v Prime Minister*; *Cherry v Advocate General for Scotland* [2019] UKSC 41, [2020] A.C. 373, at [57]–[58], it was held that because prorogation would have denied the House of Commons a voice on the manner of the UK's departure from the EU, it would have had "an extreme effect upon the fundamentals of our democracy".

community, the rule of Law embraces the value of democracy. It may, of course, be controversial whether an exceptional power of judicial review is rightly invoked in any specific instance. But the matter cannot be resolved simply by appeal to historical precedent or to expectations or assumptions widely entertained in 1689.[24] We must strive to interpret the law as an integrated *corpus iuris*, evolving in response to the challenge of adapting our principles to current conditions.[25]

When we interpret the law in that way, preserving the continuity between artificial and natural reason, we can more readily appreciate the interdependence of the legal and political constitutions. Common law thought, correctly understood, embraces all morally pertinent reasons: it seeks to place each issue within its wider context, as simultaneously a matter of focused doctrinal analysis and broader constitutional principle.[26] The familiar distinction between law and convention, for example, can generate confusion when invoked, in adjudication, without sensitivity to context. If convention must be treated, for legal purposes, as merely part of the factual background, lacking any inherent connection to the ideal of legality, there can be no fruitful interaction between legal and political principle. Judicial appeals to the value of democratic accountability must appear largely pragmatic, even partisan, as if judges must reach beyond the law to ideals that play no intrinsic role in legal reasoning.

When our constitutional theory is refracted through the distorting lens of power politics, as if it were only the product of rival claims to supremacy, we can make no sense of our dual commitment to democratic governance and respect for basic rights. If, for example, the "principle of legality" is understood merely as a means of tempering the legislative will, lacking the force of Law or legality itself, the whole edifice of the judicial protection of rights may become unstable.[27] The notion that parliamentary sovereignty trumps all the constraints of legality – at least if asserted with sufficient stridency – is only a reflection of the vision of

[24] According to Finnis, the Supreme Court imposed "a new, indeed revolutionary, layer of judicial scrutiny that would unhesitatingly have been rejected by all previous generations of judges back to the Bill of Rights as a violation of the constitutional settlement of 1689": J. Finnis, "The Unconstitutionality of the Supreme Court's Prorogation Judgment", available at https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf, at [10] (last accessed 16 February 2023).

[25] Finnis contends that any appeal to the rule of Law, in this context, involves setting the rule of Law aside: J. Finnis, "Judicial Power: Past, Present and Future" in R. Ekins (ed.), *Judicial Power and the Balance of Our Constitution: Two Lectures by John Finnis* (London 2018), ch. 1, 39–40. But it is hard to reconcile this view with his apparent recognition that judges are entitled to develop the common law to promote consistency of principle, at least within the constraints of the declaratory theory of judicial decision.

[26] See also T.R.S. Allan, "Why the Law Is What It Ought to Be" (2020) 11 Jurisprudence 574, defending a moral conception of law against the standard positivist model.

[27] See J.N.E. Varuhas, "The Principle of Legality" [2020] C.L.J. 578, considered below.

law as a struggle for power.[28] It is inimical to the faith in reason at the heart of common law thought, in which legislative supremacy is only one aspect of a larger, more complex whole. In upholding fundamental rights, the courts do not – or should not – impose their will on others or assert a power to determine the public interest. They enforce the demands of due process, which encompass not only natural justice or procedural fairness but the underlying conditions that preserve its integrity, linking procedure and substance. Judicial review is a defence against morally indefensible decision-making criteria, inconsistent with respect for the equal dignity of persons.[29]

II. The Constitutional Foundations of Judicial Review

The continuing debate about the constitutional foundations of judicial review has arguably suffered from a failure to recognise the flexibility of legal doctrine – its proper sensitivity to context and circumstance. And that failure, in turn, reflects an underlying preoccupation with lines of institutional power, as if judicial review were a battle of the sources – legislative or executive will, on one side, judicial fiat, on the other. The problem is evident in claims made, on behalf of the "common law theory", that the grounds of judicial review are "judicial creations", as if invented by judges out of new cloth.[30] Judicial creations owe nothing to the legislative will and cannot therefore be conceived as implicit constraints of the sort that responsible legislators may be supposed to take for granted. But the ultra vires doctrine, fairly interpreted, makes exactly that reasonable assumption. It encapsulates the idea that Parliament does not confer powers that may be wielded unfairly or in violation of the ordinary requirements of legality. No responsible legislature, acting legitimately, would attempt do so. It would not – could not – do so because the precepts of legality, as expressed in the various grounds of review, are ultimately implicit in the idea of governance through law. The "fig-leaf" of legislative intention is strictly unnecessary, as the critics of ultra vires maintain.[31] But it serves not to disguise a suspect judicial creativity – as if legal doctrine were merely an

[28] A familiar example is Lord Hoffmann's view, in *R. v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115, 131, that the "basic rights of the individual" are protected only in the absence of "express language or necessary implication" to the contrary. The principle of legality "means that Parliament must squarely confront what it is doing and accept the political cost".

[29] See also Allan, *Sovereignty of Law*, chs. 3, 7.

[30] J. Laws, "Law and Democracy" [1995] P.L. 72, 79: "They are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins. We do not need the fig-leaf any more."

[31] For the fig-leaf's defence, see C. Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" [1996] C.L.J. 122.

expression of judicial will or preference – but to mark the nature of judicial construction, which aims to give as full an effect to statutory purpose and context as the constraints of the rule of Law allow.[32]

Delineating the boundary between the rule of Law and arbitrariness, these precepts of legality (or grounds of review) cannot be overridden or displaced by any supposed legislative "intent". Legislative intention is only an inference drawn from language and context: it is an interpretative judgment, duly sensitive to the larger constitutional background.[33] The principles or presumptions captured by the ultra vires doctrine are too deeply rooted to be overthrown by literal or acontextual modes of construction. They operate to preserve the foundations of the legal order. A debate over ultra vires premised on a clash of conflicting sources of power can be defused by closer attention to the nature of law – to the enduring and crucial connection between artificial and natural reason.

Thomas Adams rightly repudiates the standard dichotomy, which holds that "either judicial review falls to be justified by the intention of the legislature or else it is justified on the basis of the autonomous law-making power of the judiciary".[34] But the focus on "law-making power" nevertheless threatens to derail us. Adams wants to divide the various grounds of review into two distinct branches, one dependent on legislative intention, the other on judicial authority.[35] It is, however, quite implausible to suppose that questions of jurisdictional error or reasonableness or procedural fairness could be segregated in that way. In each case, judicial doctrine is heavily dependent on the statutory context – the implicit legislative purpose or "intention" – for its proper application. How far could a challenge of unreasonableness, at common law, be coherently separated from a question about relevant and irrelevant grounds, which must be at least partly determined, in a statutory context, on the statutory language and purpose? When artificial reason moves too far from natural reason – or interpretative sensitivity to context and circumstance – it loses its bearings, causing confusion. It is, then, mistaken to contend that only after determining the "structure" of judicial review can we consider its justification.[36] These matters are far too closely interdependent to permit the severance of descriptive analysis from normative inquiry.

[32] For further argument see T.R.S. Allan, "Constitutional Dialogue and the Justification of Judicial Review" (2003) 23 O.J.L.S. 563. See also Allan, *Sovereignty of Law*, ch. 6.

[33] Invocations of "legislative intention" should be understood as references to the "intention of the statute", attributed to the enactment as an intelligible contribution to justice and the public good. Cf. L.L. Fuller, *The Morality of Law*, revised ed. (New Haven 1969), 85–87.

[34] Adams, "Ultra Vires Revisited", 32.

[35] "Just as the ultra vires theorist cannot lay claim to those aspects of judicial review that do not depend upon the language of the statute, so the common law theorist cannot lay claim to those that do" (ibid., 41).

[36] Ibid., 43.

It is his view of public law as a conflict between legislative and judicial power that leads Adams to deny that the "principle of legality" is a standard of interpretation. It is instead, he argues, a rule that gives Parliament "the final say" over whether the power to abrogate common law constitutional rights should be conferred on a public agency. It is a limited fetter on Parliament's authority rather than a means of discerning its "true intention".[37] But this is not persuasive. Parliament cannot have the final say because only the court can decide what implications, if any, a statute has for the correct resolution of any specific dispute: that is precisely the judicial function. There is no threat here to legislative supremacy because, whatever members of Parliament may have envisaged as regards the general point or effect of a statute, they had no intention – or at least no legitimate intention – in respect of any single case. The litigants in particular cases stand before the law viewed as a whole, in all its rich complexity; a statute's bearing on a specific dispute, in all the relevant circumstances, cannot therefore be fairly determined in advance of those circumstances arising. We should not confuse the court's responsibility to honour the statutory purposes or policy with an obligation to follow anyone's expectations or instructions about the law applicable to the facts in view.

If the implications of statute in specific cases depend so greatly on context and circumstance, there is no escape from interpretative nuance, reflecting the intricate integration of policy and principle. In his efforts to distinguish different variants of the principle of legality, Jason Varuhas arguably gives insufficient weight to such interpretative complexity.[38] He too readily embraces Lord Hoffmann's proffered rationale, that Parliament should be forced to incur a "political cost" for its violations of rights – thereby embracing the view of public law as strategic manoeuvring between competing authorities.[39] He makes the legal constitution too subservient to its political counterpart, threatening the secure foundations of basic rights.

In such cases as *Leech*,[40] *Simms*, *Daly*[41] and *Unison*,[42] the courts have not only denied that a power conferred by Parliament in merely general terms can authorise the infringement of basic rights – what Varuhas calls the "classic" principle – but have further denied that such a power permits a *disproportionate* interference – the "augmented" principle.[43] It was held, in *Daly*, that while there may have been good reasons for a

[37] Ibid.
[38] Varuhas, "Principle of Legality".
[39] *R. v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115, 131.
[40] *R. v Secretary of State for the Home Department, ex parte Leech* [1994] Q.B. 198.
[41] *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 A.C. 532.
[42] *R. (Unison) v Lord Chancellor* [2017] UKSC 51, [2020] A.C. 869.
[43] Varuhas, "Principle of Legality", 590–600.

limited inspection of a prisoner's privileged legal correspondence, there was no justification for interpreting the Prison Act 1952 as allowing the creation of unnecessary risk of breaches of confidentiality. The indiscriminate exclusion of prisoners from their cells during searches for prohibited materials would, in practice, accentuate that risk. If such interference were strictly unnecessary, it must be deemed unauthorised. Varuhas objects, however, that Hoffmann's familiar rationale is not applicable. If legality depends on an appraisal of the relevant circumstances, it is neither realistic nor reasonable to expect the statute to provide explicit authorisation.[44]

In response, however, we should reject the standard rationale and acknowledge the principle of legality as an expression of the rule of Law. The court's role is not to frustrate statutory schemes or purposes or cause embarrassment by apportioning blame for the violation of basic rights. It is instead to give effect to the relevant schemes or purposes, in good faith, to the full extent compatible with respect for constitutional rights. Parliament may choose how best to further the public interest, in all its various dimensions, but it must do so through Law – through the enactment of rules that comply, in all respects, with the inherent demands of legality. The "augmented" principle of legality strives to fulfil the purpose of its "classic" counterpart. No curtailment of basic rights is warranted unless the restrictions on liberty are truly necessary to satisfy an important dimension of the public good – a good in which those who suffer the restrictions have themselves a genuine interest. If a statute cannot anticipate and endorse such a judgment in advance, it does not signal any threat to constitutional propriety. Statutory meaning and effect are matters of judgment and degree, responsive to considerations of constitutional principle as it applies in all the circumstances.[45]

The common law is as much a deliberative process as a set of standards. Every legal rule or doctrine is inherently defeasible, representing only a temporary and tentative approximation to the underlying principles of justice. A rule can be reconsidered and revised, as necessary, even at the very point of application. The correct judicial decision is always an application of legal principle to the circumstances arising, even if for reasons of certainty and efficiency we are heavily dependent on doctrine to marshal the relevant principles applicable to specific categories of case. Statutes are absorbed into the *corpus iuris* by interpretation: they are

[44] "In such circumstances is it not disingenuous for a court to hold that an interference of a given extent is not authorised because an interference of that extent has not been explicitly provided for? : ibid., 605–606.

[45] A similar response may be made to Varuhas's critique of the so-called "proactive" principle of legality, requiring legislation to be construed consistently with basic rights. In limiting the effect of ouster clauses, the courts interpret them in the context of the statute viewed as a whole. In that sense, contrary to Varuhas's claim, the courts are, in effect, "seeking to identify and give effect to Parliament's intent" (ibid., 602).

construed in the manner that best represents an effective response to the defects and deficiencies of the law they were enacted to remedy, subject always to the requirements of the law's overall integrity as a unified set of standards.[46] Artificial reason fades by degrees into natural reason, the law being firmly grounded in the principles of political morality that provide the basis of legitimacy. In that sense the law must conform to the ideal of the rule of Law, which repels all forms of coercion that violate human dignity as inherently unlawful and unauthorised.

III. Legislative Supremacy and Judicial Review

While in one sense the enforcement of constitutional rights places limits on the scope of legislative supremacy, in another sense it secures such supremacy by preserving its legitimacy. If law is a discourse of reason rather than the product of a struggle for power, judicial obedience to statute should track the moral grounds for such deference. The construction of a statutory rule should express an understanding of its contribution to justice and the public good, reflecting the pertinent parliamentary responsibilities. The legislative will cannot operate as a substitute for judicial deliberation, as if courts should suspend their ordinary duties of reflection and judgment. When law is properly adapted to the ideal of the rule of Law, the court's role is to promote the relevant statutory purposes, in the manner prescribed, consistently with the fundamental values of equal freedom and respect for persons.[47]

A rule that curtails the scope of judicial review is finally a judicial construction, responsive to both the terms of any statutory ouster clause and the general requirements of legality. While the rule may apply within a limited sphere of administrative policy choice or expertise, its boundaries will reflect countervailing considerations of procedural or substantive fairness. As in the case of natural justice, so much depends on the specific context. The scope of judicial review will be a matter of judgment dependent on all the circumstances, including matters of official expertise and public function as well as the rights and reasonable expectations of the citizen. It is only in the context of the specific instance (or limited category of instances) that the implications of the ouster clause can be fully determined. A presumption in favour of non-justiciability, based on the words of the ouster clause alone, is wholly misguided, stripping the words from the wider context in which they obtain their proper meaning.

[46] Cf. *Heydon's Case* (1584) 76 E.R. 637, 3 Co. Rep. 7a, 7b. Once the "mischief and defect" has been understood, it can be discerned "what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth" and "the true reason of the remedy", allowing the statute to be construed in the manner appropriate to "suppress the mischief, and advance the remedy".

[47] See Allan, *Sovereignty of Law*, especially chs. 5, 8.

In *Privacy International*, Lord Sumption rightly affirms that judicial review would be available if the Investigatory Powers Tribunal exceeded its "subject matter competence" or contravened either specified procedural requirements or the principles of natural justice.[48] He does not consider that he is redrafting or contradicting the Regulation of Investigatory Powers Act 2000 by finding that, on correct interpretation, it excluded only "merits review". In providing that "determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court", section 67(8) plainly did not bar judicial review in all circumstances. The infelicitous reference to decisions about jurisdiction could scarcely justify treating the Tribunal as operating wholly outside the legal order – free to act in ways that would otherwise be judged unfair, unreasonable, or unlawful. Lord Sumption draws the reasonable conclusion that the Act envisaged a distinction between errors made within the Tribunal's permitted field and those falling outside it. It follows that the court's responsibility to distinguish between these sorts of "error" – in effect, granting the power to decide certain limited questions of law to the Tribunal – is inescapable.

There is nonetheless force in the view, favoured by the majority, that the Tribunal should not be free to develop its own "local" law on issues that might also arise in the ordinary courts in other cases. The law should speak consistently, whatever the court or tribunal involved.[49] But little is added by the routine insistence that judicial review can only be excluded by clear and explicit words, which is a standard that in practice demands judgments of interpretation and degree. Whether "Parliament has failed to make its intention sufficiently clear" depends on the context as much as the language; there is, then, no genuine issue of "stretching" words "beyond their natural meaning".[50] Interpretation cannot be equated with following explicit instructions. The law is ascertained by reference to both statute and common law, coherently combined in a manner that honours the fundamental demands of legality.

That conclusion is implicit in Lord Carnwath's recognition that the form and scope of judicial review must always be adapted to the statutory context and the requirements of the rule of Law.[51] If, as he says, it is "ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude judicial review", it is because the law on any matter cannot be detached from the ideal of legality.[52] Artificial legal reason is always, in part, dependent on natural reason: law is in that way

[48] *R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, at [205]–[206].
[49] Ibid., at [112], [139] (Lord Carnwath).
[50] Ibid., at [111].
[51] Ibid., at [130].
[52] Ibid., at [131].

inherently linked to justice. We should acknowledge the general principle that "binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law".[53] But we should add that such a clause is really a provision that has been misread, torn from its textual and contextual surroundings. On its true construction, sensitive to legal principle and specific administrative setting, it will have precisely the effect that political morality can justify in all the circumstances.

The general right of access to justice, including the right to a fair trial, consistent with the requirements of natural justice, is a cardinal feature of the common law constitution because the rule of Law depends on its protection. When an ouster clause is allowed to circumscribe judicial review of an administrative decision there is plainly a risk that serious injustice is left without remedy. A strong interpretative presumption against ouster, confining it to circumstances in which alternative legal remedies exist, is a legitimate means of reconciling legislative supremacy with the rule of Law. The familiar depiction of such reconciliation as a struggle for institutional dominance is very wide of the mark. In preserving their jurisdiction to review the legality of an administrative decision, the courts ensure not only that the persons affected are fairly treated but also that the public authority is confined to the task assigned to it on the most plausible view of the statutory delegation of power.

The conceptual limits on parliamentary sovereignty, intrinsic to democratic constitutionalism, were identified by Sir John Laws in his judgment in *Cart*.[54] Parliament cannot dispense with the requirement of an authoritative judicial source of interpretation of laws. There must always be a means of clarifying the content of an enactment, in doubtful cases, and giving it practical effect. The limit is in one sense an affirmation of parliamentary sovereignty, akin to the rule that prevents Parliament as presently constituted being bound by its predecessors.[55] It is a limit inherent in "sovereignty" when understood as a legal concept, which imports a principle of separation of powers. If either the legislature or the executive were the final interpreter of laws, it would be judge in its own cause, "with the ills of arbitrary government which that would entail".[56] If a public agency were made its own final interpreter, "the decision-makers would write their own laws".[57]

While refusing to recognise any "higher law" that might curtail legislative supremacy, Lord Sumption nevertheless concedes the logic of

[53] Ibid., at [144].
[54] *R. (Cart) v The Upper Tribunal (Public Law Project Intervening)* [2009] EWHC 3052 (Admin), [2010] 2 W.L.R. 1012.
[55] Ibid., at [38].
[56] Ibid., at [37].
[57] Ibid.

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Laws L.J.'s observations in *Cart*. Parliament can express its will only by written texts, which can be made effective only if there is a final interpretative authority, residing in courts of law. The inability to oust judicial review is, accordingly, "conceptual rather than normative".[58] Parliament's intention that there should be legal limits to a tribunal's jurisdiction is scarcely consistent with the courts having no capacity to enforce those limits. But the supposed distinction between conceptual and normative boundaries is illusory. Judicial interpretation does not merely clarify the law, when its content is doubtful, but also justifies it through an appropriate integration of statutory rule and common law principle. The limits of parliamentary sovereignty are equally conceptual and normative: they are inherent in the basic scheme of separation of powers. When Lord Sumption proposes that Parliament might escape the conceptual limitation by creating a tribunal of unlimited jurisdiction, or "one with unlimited discretionary power to determine its own jurisdiction", he clearly contradicts himself.[59] No institution or body can override the conceptual limits on its own authority. It will not help to say, as Lord Sumption suggests, that a "sufficiently clear and all-embracing ouster clause" might demonstrate that Parliament had intended to create a tribunal of unlimited jurisdiction. For both conceptual and normative reasons, the existence of limits to an agency's jurisdiction is a mark of its established legal authority, wielding a certain specified portion of the power of the state.

A similar issue arose in *Evans* because, in purporting to override a decision of the Upper Tribunal, under the Freedom of Information Act 2000, s. 53, the Attorney General was asserting a power to act contrary to law as the court had determined it.[60] The Upper Tribunal had ordered the disclosure of correspondence between government ministers and the heir to the throne, rejecting the arguments made in favour of preserving confidentiality.[61] In denying the validity of the Attorney's certificate in all the circumstances, the Supreme Court invoked the presumption that Parliament does not intend to legislate contrary the rule of Law. Its adoption of a narrow reading of the "veto" provision, confining the power within strictly defined boundaries, was the only means of preserving intact the separation of powers. While the Attorney might otherwise have been well-placed to determine the balance of public interests, his judgment that non-disclosure would be lawful – consistent with the statute – was hardly tenable if made in ignorance or disregard of the constitutional context, determined in part by the nature and role of

[58] *R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, at [208].
[59] Ibid., at [210].
[60] *R. (Evans) v Attorney General* [2015] UKSC 21, [2015] A.C. 1787.
[61] *Evans v Information Commissioner* [2012] UKUT 313 (AAC), [2012] 9 W.L.U.K. 280.

the relevant conventions. The "education" convention, concerning the preparation of the future monarch, was plainly inapplicable to Prince Charles's "advocacy" correspondence, in which he pursued specific interests in public policy. Questions of law, convention and public interest were closely bound up together in a manner that fully justified Lord Mance's conclusion that there were no "reasonable grounds", under section 53, for issuance of the certificate.[62]

IV. Law and Convention

The court's decision in *Evans* would only amount to a brazen "re-writing" of the Act, as Lord Wilson alleges, if a statute should be read as a self-contained code of instructions, insulated from the broader constitutional context that includes the requirements of the rule of Law.[63] Although he acknowledges that a power of executive override of judicial determinations of issues of law would be an "unlawful encroachment upon the principle of separation of powers", Lord Wilson nonetheless maintains that "issues relating to the *evaluation of public interests*" are different.[64] That sharp division could be sustained, however, only by downgrading the significance of the relevant constitutional conventions, which blur the lines between law, fact and policy. If an accurate view of the relevant conventions is pertinent to a sound assessment of the respective public interests, matters of legality cannot be so easily distinguished from those of public policy. The Upper Tribunal's authority could not simply be side-stepped by a disgruntled minister.

An initial appearance of ideological conflict or struggle for institutional power can usually be diffused, to a very substantial degree, by legal analysis closely attuned to the specific circumstances. On further inspection, what may initially seem to be a choice between acceptance of the democratic will, on one side, and adherence to the ideal of legality, on the other, turns out to be merely an occasion for measured judgment, duly responsive to all relevant considerations. Lord Wilson was right to highlight the "unique array of safeguards" that the statute provided to tame an admittedly exceptional executive power, including the requirement that the minister's certificate should be laid before each House of Parliament.[65] It is more doubtful, however, whether we should accept his contention that

[62] Lord Mance denied that the Attorney could issue a certificate "on the basis of opposite or radically differing conclusions about the factual position and the constitutional conventions without … explaining why the tribunal was wrong to make the findings and proceed on the basis it did": *R. (Evans) v Attorney General* [2015] UKSC 21, at [145].

[63] Lord Wilson complains that the Court of Appeal, in a judgment upheld by the Supreme Court majority, "re-wrote" section 53: ibid., at [168]. Cf. Lord Hughes's reliance on "the plain words of the statute": ibid., at [155].

[64] Ibid., at [171] (Lord Wilson's emphasis).

[65] Ibid., at [172].

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the scope of the education convention, to which the Upper Tribunal devoted so much attention, was of merely marginal significance. For any conscientious public official, anxious to determine the balance of public interests correctly in all the circumstances, the applicable conventions were surely of prime importance. If they were fully compatible with publication of the correspondence sought, on a proper understanding, the case for non-disclosure was severely weakened.

An insistence that matters of convention are no business of the courts, while intended to protect the separation of powers, overlooks the overlap between the different sets of norms – an overlap derived from the shared roots of both sets in general principle. An established convention, applicable inter alia to the exercise of the royal prerogative, contributes to the *corpus iuris* by affirming principles that clarify the law, enhancing its overall coherence as a legitimate scheme of governance. An assertion that judges are merely observers, being "neither the parents nor the guardians of political conventions", echoes the obsession with rival sources of authority that we so often encounter in legal analysis.[66] An observer stands aloof, unable to settle any dispute about the demands of convention in the circumstances arising, whereas the court must reach its own view, guided by defensible judgments of political morality. Although the requirements of convention are heavily dependent on the facts of political practice, their normative force – what they require in certain instances – depends on their correct interpretation. To "recognise" a convention is to ascribe a specific content, informed by political principle.[67] In the face of a conflict of evidence, the Upper Tribunal was obliged, in *Evans*, to determine the nature and scope of the education convention, laying out its reasons in considerable detail. The court's decision may not be binding on the political actors, as regards their future conduct, but it settled the scope of the convention, as a matter of law, for the purposes in hand.[68]

In its *Reference re Amendment* ruling, the Supreme Court of Canada held that the Federal Government was empowered, as a matter of public law, to procure major constitutional change without provincial consent even though, as a matter of convention, such a course would be

[66] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] A.C. 61, at [146].

[67] The Supreme Court concedes that the courts "can recognise the operation of a political convention in the context of deciding a legal question" even if "they cannot give legal rulings on its operation or scope" (ibid.). But a limited determination of operation and scope is implicit in any act of recognition, if only for the immediate purposes in hand. The Sewel Convention was not legally binding – despite its recognition in section 28(8) of the Scotland Act 1998 (as amended by the Scotland Act 2016) – because its enforcement would limit the power to legislate for Scotland preserved by section 28(7). In substance, the supremacy principle outweighed countervailing considerations, however otherwise beneficial.

[68] For full discussion, see T.R.S. Allan, "Law, Democracy, and Constitutionalism: Reflections on *Evans v Attorney General*" [2016] C.L.J. 38.

unconstitutional.[69] The fundamental principle of federalism, crucial to the structure of the Canadian constitution, was confined to its role in the interpretation of the British North America Act 1867: "What is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute."[70] The argument that the federal principle might operate also at common law, which would enlarge its significance as a constitutional constraint, was dismissed on the familiar ground that law and convention had different sources of origin: conventions were not "judge-made" rules. The court's preoccupation with formal sources is akin to Lord Sumption's approach in *Privacy International*: beyond the constitutional text there are only posited rules, detached from the principles that might justify them and thereby fix their content and scope.[71] If the principle of federalism were a legitimate source of guidance in interpreting the Act, it is hard to deny it the status of a basic norm, having wider legal significance. The court's decision must be appraised in the light of its acknowledgement that the main purpose of conventions is to ensure that "the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles", such as the principles of democracy and federalism.[72]

In *R. (Miller) v Prime Minister*, the assumption that the Queen was obliged by constitutional convention to accept the advice given to her to prorogue Parliament was evidently the basis of the "constitutional responsibility" attributed to the Prime Minister, as the only person with the necessary authority, "to have regard to all relevant interests, including the interests of Parliament".[73] In addition to finding that the advice to prorogue Parliament was unlawful, the court held that the Order in Council, authorising prorogation, being founded on unlawful advice, was itself unlawful, null and of no effect. The prorogation was itself, accordingly, unlawful and void: Parliament had not been prorogued.[74] Constitutional convention was thereby integrated into public law. If the Queen could properly reject the Prime Minister's advice, even if only in

[69] *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753. It was intended that a joint resolution of both Houses of the Canadian Parliament would, by way of an address to the Queen, request enactment of new legislation at Westminster, terminating residual British legal authority in Canada and enacting a charter of rights binding on both federal and provincial governments.

[70] Ibid., 784.

[71] Section I, above.

[72] *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753, 880. In the dissenting judgment, the intended procedure was condemned as an attempt to accomplish indirectly what could not lawfully be achieved directly "by perverting the recognized resolution method of obtaining constitutional amendments by the Imperial Parliament for an improper purpose": ibid., 846 (Martland and Ritchie JJ.). For further analysis, see T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford 1993), 246–53; Allan, *Sovereignty of Law*, 58–59, 69–72.

[73] *R. (Miller) v Prime Minister*; *Cherry v Advocate General for Scotland* [2019] UKSC 41, at [30].

[74] Ibid., at [69]–[70].

exceptional cases, a prorogation would arguably carry the monarch's imprimatur in every case and, hence, be legally unchallengeable in the Queen's courts.[75]

In giving explicit legal recognition to the convention of ministerial responsibility to Parliament, moreover, the Supreme Court affirms the fundamental unity of the legal and political constitutions, reflecting the interdependence of legal and political principle. An abuse of prerogative power poses a threat to democracy by frustrating Parliament's oversight of the executive Government. The ideal of responsible government may be subverted, undermining the legitimacy of British governance.[76] A distinction between law and convention that serves well enough for purely descriptive purposes loses its grip in the adjudicative context. A persuasive justification for the court's intervention invokes settled customs and understandings in aid of a suitable application of legal principle, adapted to the immediate political context.

The High Court's decision, in contrast, evaded matters of constitutional principle by reliance on a blanket denial of justiciability: prorogation was a matter of "high policy", to which there were no applicable legal standards.[77] The more nuanced view of the Supreme Court, which allows for judicial intervention in exceptional cases, is plainly superior as a response to grave threats to constitutional propriety. Public law does not expire in the way the High Court apparently supposed, giving way to unfettered political power-play: the common law constitution draws inspiration from a deep well, far below the surface visible in the everyday practice of courts and administrators. Public law forges a seamless continuity between basic ideals of legality and democracy and the standards necessary to sustain those ideals on specific occasions.

Admittedly, the standard of legality applied by the Supreme Court blurs the distinction, on which its judgment purports to rely, between the scope of the power and its manner of exercise. It involves a review of the exercise of discretion in all the circumstances.[78] The judges, however, can properly reply that the standard of legality duly tracks the implications, in all the circumstances, of the relevant legal principles. It is as intrusive as necessary to mark "the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty

[75] There is an analogy with *R. v Secretary of State for the Home Department, ex parte Bentley* [1994] Q.B. 349, where the Home Secretary's advice with respect to exercise of the prerogative of mercy was assumed to be justiciable. Cf. M.D. Walters, "Judicial Review of Ministerial Advice to the Crown" (2016) 25 Constitutional Forum 33, 39–40.

[76] A decision to prorogue Parliament, or advise the monarch to do so, would be unlawful if prorogation had "the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislator and as the body responsible for the supervision of the executive": *R. (Miller) v Prime Minister*; *Cherry v Advocate General for Scotland* [2019] UKSC 41, at [50].

[77] *R. (Miller) v The Prime Minister* [2019] EWHC 2381 (Q.B.), [2019] 9 W.L.U.K. 81, at [42].

[78] See Finnis, "Unconstitutionality", at [21]–[22].

of Parliament and responsible government on the other".[79] The context, then, eliminates any clear distinction between the scope of the power, in principle, and its manner of exercise, in practice.[80]

The Supreme Court's elaboration of legislative supremacy and ministerial accountability in *R. (Miller) v Prime Minister* properly assumes that all legal rules and principles can be refined and clarified by recourse to deeper values of legality and democracy. That approach is warranted by an appreciation of the interdependence of public law and political or constitutional morality. The court's reluctance to intrude into a politically sensitive sphere of governance is qualified by its recognition that such intrusion is sometimes unavoidable. If legal tradition is the means of transmitting constitutional values across the generations, it must be constantly renewed as altered circumstances require. The law must be adapted to meet challenges to any aspect of constitutional practice by reference to the values that inform and inspire other parts of that practice, promoting the integration of the whole. There must be a constant interaction between theory and practice, each illuminating and reinforcing the other.[81]

V. Constitutional Rights at Common Law

If parliamentary sovereignty is dependent on the existence of independent courts, responsible for interpreting legislation and giving it effect in specific instances, unobstructed access to the courts must be viewed as a foundational constitutional right. When deprived of the opportunity to vindicate their legal rights, people are no longer in any true sense governed by law – whether statute or common law. In *Unison*, Lord Reed traces the provenance of the right from Magna Carta through Coke's *Institutes* and Blackstone's *Commentaries* to the modern law: "Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question."[82] While granting that restrictions on access may be necessary for certain legitimate purposes, the principle seeks to confine their scope within limits consistent with the demands of legality. Echoing the traditional approach to natural justice, legal doctrine forges an appropriate reconciliation between legislative supremacy and the rule of Law. If that reconciliation demands a robust response to purported or

[79] *R. (Miller) v Prime Minister*; *Cherry v Advocate General for Scotland* [2019] UKSC 41, at [52].
[80] Elliott draws an analogy with the principle of legality as it applies in the context of statutory powers: M. Elliott, "Constitutional Adjudication and Constitutional Politics in the United Kingdom: The *Miller II* Case in Legal and Political Context" (2020) 16 EuConst 625, 635–41. See also P. Craig, "The Supreme Court, Prorogation and Constitutional Principle" [2020] P.L. 248.
[81] See generally Allan, *Sovereignty of Law*, ch. 2.
[82] *R. (Unison) v Lord Chancellor* [2017] UKSC 51, at [80].

potential infringements of this basic constitutional right, it is fully justified as an implication of democratic governance, respectful of the governed. As Lord Reed explains, the right of access to the courts is "inherent in the rule of law": it enables the law to be enforced, preventing Parliament's work being "rendered nugatory" and the election of Members of Parliament becoming a "meaningless charade".[83]

All constitutional rights at common law may be understood, by analogy, as inherent implications of the rule of Law – limits on legislative and administrative discretion required by adherence to legality itself. Rights to natural justice and due process preserve the integrity of the proceedings that the constitutional right of access secures, extending the relevant protections to all tribunals and public agencies insofar as they must apply the law fairly and impartially. The distinction between artificial and natural reason is here at its most elusive: the principles of public law correspond directly to the requirements of Law. While other rights curtail the use of force in pursuit of administrative goals and public policy, they usually accommodate a broader range of state action.[84] Rights of free speech, association, and assembly, for example, are properly qualified when necessary to protect other rights or important public interests. The greater the encroachment, the more compelling must be the countervailing considerations: there is otherwise an inequality in the enjoyment of rights between persons. There is an analogy with the principles of natural justice. The further removed from the paradigm of the determination of legal rights or the adjudication of a criminal charge, the greater the need for adaptation to the administrative context. Procedural fairness at a public inquiry cannot reasonably seek to replicate the requirements of a civil or criminal trial.[85]

All constitutional rights can be conceived as rights to due process in the sense that the actions of public agencies must be capable of appropriate justification, neither invoking nor presupposing improper grounds, inconsistent with legal principle. The familiar standards of rationality and reasonableness, applicable to the exercise of administrative discretion, operate in defence of fundamental equality by distinguishing between legitimate and illegitimate reasons for action. They exclude, in ordinary circumstances, such dubious grounds of distinction between persons as race, religion, sexual orientation, political or philosophical beliefs, and other

[83] Ibid., at [66]–[68].

[84] Elliott treats the right of access to the courts as one of an "élite subset of common law rights", which he supposes enjoy stronger protection than those rights that fall "within the penumbra rather than the core": M. Elliott, "The Fundamentality of Rights at Common Law" in M. Elliott and K. Hughes (eds.), *Common Law Constitutional Rights* (Oxford 2020), ch. 9, 218.

[85] See *Lloyd v McMahon* [1987] 1 A.C. 625, 702: what fairness demands, therefore, when any public body has to make a decision affecting the rights of individuals "depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates" (Lord Bridge of Harwich).

irrelevant traits or characteristics. They prohibit adverse treatment or punishment in response to lawful actions or speech that a public body may consider an interference with, or impediment to, the pursuit of its policy or programme. Conscientious dissent is protected from unwarranted suppression.[86]

While reliance on morally irrelevant matters vitiates an official decision, the adoption of blanket measures or policies, applied indiscriminately to readily distinguishable cases, improperly exclude morally relevant considerations. A practice of routinely removing prisoners from their cells during searches for forbidden materials, whether or not any individual prisoner would be likely to obstruct the search if he were present, provides a good example.[87] If it has the consequence that a prisoner's confidential legal correspondence is likely to receive unwarranted scrutiny in his absence, the practice undermines his access to justice, which crucially depends on the ability to obtain informed and impartial legal advice. The court's intervention translates a general requirement of justice, reflected in international charters of rights, into domestic law, adapted to the circumstances obtaining.[88] It would be wrong to characterise the decision as a mere balancing of interests, which might well imply the judicial usurpation of an executive function. Instead, the court prohibits an unjustified assault on the right of access to the courts and the companion right to legal advice. It is wrong to penalise a well-behaved prisoner, treating him as if he posed a threat to good order and discipline – or at least it is wrong in the absence of established necessity. The prison policy was disproportionate only in the sense that it was unfair, akin to an undeserved punishment.[89]

The objection, made by Varuhas, that the principle of legality is "effectively substantive review by another name", but lacking appropriate deference to administrative judgment, is therefore questionable.[90] It trades on a false picture of "substantive review" as a balancing of interests. Substantive review, so-called, is only a form of process review,

[86] *Wheeler v Leicester City Council* [1985] A.C. 1054. See especially Browne-Wilkinson L.J., dissenting, in the Court of Appeal at 1063–65, a dissent vindicated in the House of Lords. For further analysis see Allan, *Sovereignty of Law*, chs. 7, 8.

[87] *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, considered above.

[88] Lord Cooke observes that some rights are "inherent and fundamental to democratic civilised society", bills or charters of rights giving them formal recognition: ibid., at [30]. Cf. Lord Reed in *R. (Osborn) v The Parole Board* [2013] UKSC 61, [2014] A.C. 1115, at [55]–[63], explaining that the abstract guarantees of the European Convention on Human Rights are fulfilled at national level through the more detailed provisions of domestic law.

[89] Cf. G. Letsas, "Rescuing Proportionality" in R. Cruft, S.M. Liao and M. Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford 2015), ch. 17. Letsas rightly insists that the court must not trade off rights against the collective interest in any crude version of a balancing test. Proportionality plays a constitutive role in defining a person's moral rights by asking whether her status as an equal member of the political community has been contravened by a decision made on impermissible grounds.

[90] Varuhas, "Principle of Legality", 612–13.

where certain grounds of action are identified as illegitimate. There is no sharp line between excess and abuse of power, as Lord Carnwath's judgment in *Privacy International* indicates: the scope of administrative jurisdiction is invariably dependent on all the circumstances.[91] Any conduct that entails a breach of legal or constitutional standards is inherently unauthorised – ultra vires. Judicial deference is appropriate only when there is reasonable doubt about the urgency or necessity of the action under review, where there should be proper acknowledgement of administrative expertise and experience.

Although the concept of a constitutional right at common law affirms the link between state law and natural law, reflecting the ideals of freedom and equality that provide the grounds of legitimacy, the specific demands of a fundamental right are sensitive to the immediate context. Abstract rights obtain their concrete content from the circumstances in which public agencies discriminate between persons. Moreover, the risk of judicial encroachment on territory that belongs to Parliament or Government is substantially reduced by the requirement of intellectual and moral coherence. The quest for reflective equilibrium between principle and precedent, every judgment being open to challenge on the ground of its compatibility with others – or at least those decisions not recanted – significantly curtails the scope for arbitrariness. The concern expressed by Sir Philip Sales that there should be no substitution of judges' personal commitments for those values "immanent within our constitutional system" can be readily assuaged.[92] Fundamental rights must be identified, as he observes, by recourse to precedent and tradition in the ordinary style of the common law.[93] The fear that legal judgment might be displaced by judicial aggrandisement is, at least in part, a reflection of the image of public law as a competition for institutional power. Even if we grant the universal nature of rights, in principle, legal practice and tradition mediates between abstract ideal and specific application. For the purposes of adjudication, a judge's commitments are precisely the values immanent within the legal and constitutional order, even if their interpretation is often controversial. It is only a deep immersion in legal practice that allows a judge even to understand the judicial task as it arises, in specific instances, in its own unique complexity. To impose one's own values, detached from familiar legal principle, is to abjure the interpretative function altogether, abandoning the judicial role.[94]

[91] *R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, at [130]–[131].
[92] P. Sales, "Rights and Fundamental Rights in English Public Law" [2016] C.L.J. 86, 99.
[93] Ibid., 97–98.
[94] The issue is more fully explored in T.R.S. Allan, "Constitutional Rights, Moral Judgement, and the Rule of Law" in J. Goudkamp, M. Lunney and L. McDonald (eds.), *Taking Law Seriously: Essays in Honour of Peter Cane* (Oxford 2022), ch. 5, 100–105.

Adherence to practice and principle, in common law style, will ensure that legal development is incremental, working out the moral implications for novel circumstances. Such gradual evolution, however, can scarcely form a normative *condition*, curbing the application of general principles to the instances that fall within their proper compass. In *Elgizouli*, Lord Reed observes that the "more dramatic changes" were the prerogative of the legislature: judges must be mindful of the value of legal certainty.[95] What chiefly distinguishes judicial "lawmaking" from legislation, however, is its focus on the elaboration of principle, seeking coherence as far as possible across all parts (or associated parts) of settled practice. When there is a serious challenge to the law's coherence in a matter of grave concern for those affected, certainty is usually best served by eradicating doctrinal conflict or confusion. The question was whether the Home Secretary was prohibited from providing information to assist a foreign state in mounting a prosecution that might lead to the imposition of the death penalty. The Supreme Court refused to recognise any fetter on such action despite there being a settled practice of refusing to deport or extradite individuals for trial in a foreign state without assurances that the death penalty would not be imposed. In his elaborate dissenting judgment, Lord Kerr explores the inconsistency. A general principle, requiring assurances in all cases, could be inferred from the wider constitutional context, including inter alia the prohibition of cruel and unusual punishment by the Bill of Rights 1688, the Privy Council jurisprudence that condemns delay in carrying out the death penalty as cruel and inhuman, abolition of the death penalty by statute in the UK, and ratification of the Thirteenth Protocol to the European Convention on Human Rights, which prohibits the death penalty. The common law, in Lord Kerr's view, should reflect that tradition, responding to society's "contemporary needs, standards and values" by recognising a constitutional right of appropriate breadth.[96]

Lord Reed's distinction between the existence of a right to life "in the sense in which that term is used in the law of obligations", on the one hand, and what "might more aptly be described as a value to which the courts attach great significance", on the other, echoes the distinction between private and public law.[97] It is not a contrast that greatly illuminates the content of public law.[98] In recognising that the

[95] *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10, [2021] A.C. 937, at [170].
[96] Ibid., at [144].
[97] Ibid., at [175].
[98] Cf. Elliott, "Beyond the European Convention", 88–90, drawing a similar distinction between judicial values and constitutional rights. While it is true that these values are realised only insofar as they obtain judicial enforcement, the "normative reach" of common law rights cannot be "an ultimately empirical question", as Elliott contends: ibid., 95. It is a normative question that only legal and moral argument can clarify. Cf. T. Fairclough, "The Reach of Common Law Rights" in Elliott and Hughes (eds.), *Common Law Constitutional Rights*, ch. 13.

decision-making context may affect the application of the familiar grounds of review, Lord Reed in substance acknowledges the pertinent right to life. It is the right to a level of justification consonant with the threat to a central constitutional value. In *Bugdaycay*, for example, Lord Bridge had observed that a court should subject an administrative decision to the "more rigorous examination" according to the gravity of the issue arising. If an applicant's life were at risk, the basis of the decision would call for the "most anxious scrutiny".[99] In the absence of convincing reasons for the differential treatment of persons, however, legal equality is undermined. The apparent inconsistency to which Lord Kerr drew attention clearly required to be explained.[100]

VI. Conclusion

I have sought to challenge a conception of public law as a struggle for power between institutions, a conception in which legal doctrine serves to conceal rather than illuminate shifts in judicial allegiance. While that approach may have merits as a contribution to political science, it diverts legal scholarship away from the study of legal reasoning and close analysis of judicial decisions. My contention is that we should take a judgment at face value, treating it as a full-blooded defence of the court's conclusions – an effort to show that the decision is legally, and hence morally, justified, having regard to all relevant circumstances.[101] A decision is justified when it succeeds in interpreting legal practice as a reasonable adaptation of the relevant moral ideals to the conditions of contemporary UK governance. Legal and political tradition is thereby harnessed in aid of fundamental values of human dignity and democratic equality, giving determinate shape to these abstract commitments in positive law. The common law tradition, on correct analysis, embraces that appeal to an ideal of Law, implicit, if not fully embodied, in present doctrine and fostering the interdependence of artificial and natural reason. In common law adjudication, there is always the prospect of challenge to any rule or principle – or any interpretation of such a rule or principle – arguably inconsistent with settled practice when viewed as a whole. Artificial reason can be regarded as sound only insofar as it can be reconciled with natural reason: legal rights are necessarily an approximation of natural or human rights,

[99] *R. v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] A.C. 514, 531. Lord Templeman considered that "where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process": ibid., 537.

[100] As Lord Reed acknowledged, in his "postscript", there were in fact good reasons to doubt whether in all the circumstances the action impugned in *Elgizouli v Secretary of State for the Home Department* complied with the common law requirement of rationality: [2020] UKSC 10, at [181]–[187].

[101] Cf. G. Letsas, "How to Argue for Law's Full-blooded Normativity" in D. Plunkett, S.J. Shapiro and K. Toh (eds.), *Dimensions of Normativity* (Oxford 2019), ch. 8.

constituents of any legitimate legal order duly respectful of the governed.[102]

Although Varuhas's critique of the principle of legality is not persuasive, he is right to criticise *Elgizouli* as a decision that departs from ordinary standards of legal reasoning.[103] The court's reliance on the fact that the right claimed had no clear textual basis in international instruments is not consistent with the normal assumption that the common law is autonomous, developing under its own momentum. Similarly, Parliament's having addressed the subject matter in certain statutes is no bar to parallel common law reasoning. Nor is the distinction between rights and values helpful or persuasive, as I have argued. There is force in the complaint that when judges evade engagement with legal principles in this way, suspicions are aroused that there are undisclosed political considerations at work. Varuhas warns of "a perception that unstated normative concerns lie behind apparently incongruent lines of reasoning".[104] If the courts appear to be adjusting their sails to suit the prevailing political winds, their critics will understandably interpret their decisions as strategic moves in a power-game, extraneous to public law as it presents itself. Varuhas speculates, for example, that *Unison*'s allegedly "augmented" principle of legality indicates that the common law was "being readied to fill any gap" left by a loss of European rights following Brexit or the repeal of the Human Rights Act.[105]

We would do much better, in my view, to take public law at face value, relying on cogent argument about the interplay of policy and principle, as it arises in specific instances, to forestall any abuse or excess of judicial power. If courts stray from the track, tolerating doctrinal incoherence as a means of deflecting ill-informed criticism, they only engender scepticism: moral reasoning, disciplined by doctrine and precedent, is displaced by political manoeuvre and its associated forms of deception. We invite dubious claims about judicial "revolution", whether in response to measured common law development, such as that in *R. (Miller) v Prime Minister*, or as a threat across the bows of potentially tyrannical governments, as in *Jackson*.[106] A better recognition of the interdependence of public law principles, each drawing on aspects of a larger vision of legitimate governance, would be a great advance. Contrary to the standard assumption that the law is ultimately the

[102] Dworkin distinguishes between the right to equal concern and respect, correctly understood, and the more fundamental and abstract right to be treated by government with the appropriate attitude – a "right to be treated *as* a human being whose dignity fundamentally matters": R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA 2011), 335. A government may respect that more fundamental right even when it fails (we may think) to achieve a correct understanding of more concrete political rights.

[103] Varuhas, "Principle of Legality", 583–88, where the following points are clearly elaborated.

[104] Ibid., 585.

[105] Ibid., 608.

[106] Finnis, "Unconstitutionality", at [10]; *R. (Jackson) v Attorney General* [2005] UKHL 56, at [101]–[102] (Lord Steyn).

product of a "rule of recognition" – a matter of temporary agreement between officials about the appropriate distribution of power – it is better understood as a form of reasoned deliberation that embodies the ideal of due process. Legal rights, powers and duties are those that principled argument supports, statute and precedent being interpreted *in tandem* as a morally coherent *corpus iuris*.

In *R. (Miller) v Secretary of State for Exiting the European Union*, the Supreme Court, affirming that parliamentary approval was needed to initiate the process of withdrawal, also asserted that the "rule of recognition" remained unaffected because the special status of EU law was wholly dependent on the European Communities Act 1972, which Parliament remained free to amend or repeal.[107] In a somewhat contradictory manner, however, it was held that it was nonetheless more "realistic" to treat the European treaties and institutions as the relevant source of EU law applicable in the UK.[108] EU law supposedly constituted "an independent and overriding source of domestic law".[109] It was overriding, presumably, in the sense that the EU institutions effectively held all the power. Legal principle is displaced by something close to descriptive fact. Considerations of legality and democracy were largely submerged by preoccupation with rival sources of law and power.[110] A similar criticism can be made of the view that a judicial declaration of incompatibility with basic rights, or with an international convention, amounts to a restriction on Parliament's lawmaking power. The possibility that legislators might wish "to avoid the opprobrium" allegedly entailed is a matter of speculative fact, irrelevant to questions of legal principle.[111]

Sir Philip Sales is right to argue that parliamentary sovereignty cannot be a judicial creation: it is principle drawn from the practice of a wide range of actors, in one sense a product of historical struggle.[112] If, however, fundamental principles are ultimately *acknowledged* rather than created or invented, it is surely odd to insist that only in the event of a change in the "constitutional facts" would it be possible to affirm that Parliament's

[107] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [60].
[108] Ibid., at [61].
[109] Ibid., at [65].
[110] For trenchant criticism, see M. Elliott, "The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle" [2017] C.L.J. 257. Elliott further notes the weakness of the judgment's dependence on the notion of "scale", attempting to draw legal consequences from the mere fact of the unprecedented nature of both the incorporation of European law and its subsequent revocation.
[111] For this bizarre ruling, see *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 W.L.R. 5106, at [52]. The related notion at [50], that in enacting section 4 of the Human Rights Act Parliament qualified its own sovereignty, is also surely misconceived.
[112] Sales, "Legalism in Constitutional Law", 699.

"democratic mandate" is "predicated at some level on respect for a minimum content of individual rights, which therefore beyond a certain point could not be abrogated".[113] It makes little sense to divorce practice from principle in that way, suggesting that adjudication is wholly dependent on satisfactory evidence of consensus, as if the requirements of principle were merely an expression of the climate of official opinion – whether broadly favourable or irresolutely hostile to the protection of fundamental rights. Admittedly, the courts could not act without broad social and political consent; they must find a basis for their interpretation of the rule of Law within current practice, building on a legal tradition that enjoys wide respect. There is finally, however, no escape from independent moral judgment. Deference to the practice carries the implication that it *deserves* allegiance, representing a legitimate basis for governance. In defining the limits of legislative supremacy – or the extent of its demands in particular instances – a judge must exercise personal responsibility. It is a matter of deciding how best to make sense of a statute in the light of Parliament's responsibility to advance the public good within the constraints of justice.[114]

The uncomfortable juxtaposition of descriptive and normative analysis in Sales's discussion is reminiscent of Thomas Adams's proposal, mentioned above, that we should investigate the "structure" of judicial review as a prelude to considering its justification.[115] It is doubtful, however, whether such a separation can be intelligibly made. Description and evaluation cannot be neatly divided because the nature and application of the various grounds of review are so heavily dependent on context – not merely the immediate statutory context, in the case of a statutory power, but also the broader constitutional context that supplies the relevant legal principles. Contrary to Adams's view, the principle of legality – along with other principles – is indeed a standard of interpretation, regulating the construction of statutory provisions in the context of their application to specific instances. The citizen stands in her dealings with the state before the law in its entirety, viewed ideally as a morally coherent system of norms. Insofar as her circumstances are unusual, or expose conflicting lines of precedent, or otherwise give rise to reasonable doubt about the correctness or applicability of the standard rule, she may

[113] Ibid.
[114] As Sales recognises, it cannot be a matter of "free choice": judges must in all cases "guide themselves by reasoning from legal values" in the way they find most convincing and, accordingly, in a manner that they believe "would be persuasive to others": ibid.
[115] Adams, "Ultra Vires Revisited", 43.

properly appeal to more fundamental principles – even when that appeal provokes wide-ranging reflection on matters of constitutional propriety or legality. Her appeal demands an answer that sounds in political morality as much as law, supporting a decision that a court can defend as consistent with the basic requirements of due process and equal respect for persons, inherent in legal order.[116]

[116] Legal order, when correctly understood, affords its officials resources that enable them to give adequate answers to the legal subject, who asks "But how can that be law for me?" See D. Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge 2022), ix.